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CHINA – ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE EUROPEAN UNION

The following communication, dated 7 December 2022, from the delegation of the European Union to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 18 February 2022 the European Union requested consultations with the Government of the People's Republic of China ("China") pursuant to Article 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article 64.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"), and Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT") with regard to certain measures adversely affecting the protection and enforcement of intellectual property rights and with regard to China's failure to carry out its obligations under Articles 63.1 and 63.3 of the TRIPS Agreement.

The European Union held consultations with China on 6, 7 and 12 April 2022 with a view to reaching a mutually satisfactory settlement of the matter. Unfortunately, the consultations failed to settle the dispute.

Therefore, the European Union respectfully requests, pursuant to Article 4 and 6 of the DSU, Article 64.1 of TRIPS Agreement, and Article XXII:1 of the GATT, that the Dispute Settlement Body establish a panel to examine this matter, based on the standard terms of reference as set out in Article 7.1 of the DSU.

1. Measure adversely affecting the protection and enforcement of intellectual property rights

1.1. Description of the measure

China has introduced, maintains, and implements a policy which, in the context of judicial procedures concerning the enforcement of intellectual property rights, empowers Chinese courts to prohibit patent holders from asserting their rights protected by the TRIPS Agreement in other jurisdictions. This prohibition materialises through the issuance by Chinese courts of provisional measures ("anti-suit injunctions")¹ that forbid patent holders to commence, continue or enforce the results of any legal proceedings before any non-Chinese court and which are enforced through daily penalties in case of infringement. Such penalties can be, and have been, set at the maximum level allowed for under Chinese Civil Procedure Law and they accumulate daily.

This policy was first introduced by means of a decision by China's Supreme People's Court ("SPC") dated 28 August 2020 in *Huawei v Conversant* ("SPC decision of 28 August 2020")². The SPC established that Article 100 of the Civil Procedure Law of the People's Republic of China ("Civil

¹ China's Civil Procedure Law calls the provisional measure an "act preservation measure".

² Supreme People's Court of the People's Republic of China, Civil Ruling of 28 August 2020, in cases between Huawei Technology Co. LTD and Conversant Wireless Licensing S. à r. 1. (2019) Zui Gao Fa Zhi Min Zhong No. 732, No. 733 and No. 734, Zhi yi. 中华人民共和国最高人民法院, 华为与康文森案 (2019) 最高法知民终732、733、734号之一裁定书.

Procedure Law")³ allows a Chinese court to adopt a provisional measure prohibiting a party from applying for enforcement of judgments of a non-Chinese court or from seeking judicial relief outwith the jurisdiction of China. Furthermore, it decided that in case of violation of that "anti-suit injunction", a Chinese court can impose the maximum fine possible under Article 115 (1) of the Civil Procedure Law⁴ of 1 million RMB per day. By decision of 11 September 2020, the SPC denied Conversant's request for reconsideration of the SPC decision of 28 August 2020 and maintained the anti-suit injunction and the daily penalties.⁵ The European Union understands that anti-suit injunctions generally remain valid until the final judgment in the case before the Chinese court becomes effective.⁶

The policy has been further elaborated by Chinese courts in at least four other cases where anti-suit injunctions were issued. In three of these cases, the anti-suit injunctions have been confirmed upon review and maintained. In addition, the Hubei Province High Court, Guangdong Province High Court and the Guangdong Province Communist Party Political and Legal Committee confirmed the correctness and exemplary character of those judicial decisions in their respective Provinces. The SPC has further elaborated and promoted the policy in a number of official and public documents issued in 2021 and 2022. The National People's Congress Standing Committee has endorsed the policy as applied in 2021 and 2022. According to official statements issued in 2021 and 2022, the policy will continue to be applied in the future.

1.1.1 Four anti-suit injunctions issued by Intermediate People's Courts

Patent holders are prohibited from asserting their rights before a non-Chinese court through the adoption of anti-suit injunctions, as described above. After the SPC decision of 28 August 2020, this has been done in a number of decisions adopted by Chinese courts, including:

1. *Xiaomi v InterDigital* – Wuhan Intermediate People's Court

On 9 June 2020, Wuhan Intermediate People's Court accepted a case filed by a number of companies of the Xiaomi group against InterDigital, Inc. in relation to the setting of a licence fee rate for standard essential patents ("SEPs").⁷ On 4 August 2020, Xiaomi filed an application for act preservation in the form of an anti-suit injunction. On 23 September 2020, the Wuhan Intermediate People's Court granted Xiaomi's request and issued an anti-suit injunction.⁸ That anti-suit injunction required InterDigital and its affiliates, under the sanction of daily penalties, to withdraw or suspend an injunction it had requested against Xiaomi and its affiliates before the Indian courts, and prohibited them from requesting any other court in the world for an injunction or a determination of a royalty fee for the 3G and 4G mobile standard essential patents involved in the case. The Wuhan Intermediate People's Court relied upon the provisions of the Civil Procedure Law, and the Supreme People's Court's Provisions on Several Issues Concerning the Application of Law in Examining Act Preservation Cases in Intellectual Property Disputes as interpreted in the SPC decision of 28 August

³ China's Civil Procedure Law, in its version of 2017 applicable at the time the SPC decision of 28 August 2020 was issued, was later amended on 24 December 2021. The revision entered into force in 1 January 2022 ("China's Civil Procedure Law 2022"). The text of, Article 100 remained unchanged, but was renumbered to Article 103. 中华人民共和国民事诉讼法 (根据2021年12月24日第十三届全国人民代表大会常务委员会第三十二次会议《关于修改〈中华人民共和国民事诉讼法〉的决定》第四次修正)。

⁴ In China's Civil Procedure Law 2022 the article was renumbered to Article 118.

⁵ Supreme People's Court of the People's Republic of China, Civil Ruling of 11 September 2020, in cases between Huawei and Conversant (2019) Zui Gao Fa Zhi Min Zhong No. 732, 733, 734 Zhi er. 中华人民共和国最高人民法院, 华为与康文森案(2019)最高法知民终 732、733、734 号之二裁定书。

⁶ During China's 2021 Trade Policy Review, in reply to Question No. 78 by the European Union on the duration of anti-suit injunctions, China referred to Article 13 of the Provisions of the Supreme People's Court on Issues Regarding the Application of Law in Examining Cases of Act Preservation in Intellectual Property Disputes, which notes that these types of rulings shall generally be valid until the judgment in the case becomes effective.

⁷ See Wuhan Intermediate People's Court of Hubei Province, Civil ruling of 23 September 2020, in case between Xiaomi and InterDigital (2020) E 01 Zhi Min Chu No.169 Zhi yi. 湖北省武汉市中级人民法院, 小米与交互数字案 (2020) 鄂01知民初169号之一裁定书。

⁸ Wuhan Intermediate People's Court of Hubei Province, Civil ruling of 23 September 2020, in case between Xiaomi and InterDigital (2020) E 01 Zhi Min Chu No.169 Zhi yi. 湖北省武汉市中级人民法院, 小米与交互数字案 (2020) 鄂01知民初169号之一裁定书。

2020. By decision of 4 December 2020, the Wuhan Intermediate People's Court denied InterDigital's request for reconsideration of the decision of 23 September 2020, and maintained the anti-suit injunction and the daily penalties.⁹

2. *ZTE v Conversant* – Shenzhen Intermediate People's Court

On 17 January 2018, the Shenzhen Intermediate People's court accepted a case ZTE filed against Conversant Wireless Licensing Co., Ltd. ("Conversant") requesting a decision on the licensing conditions for the patents Conversant claimed to be essential for Chinese standards.¹⁰ The day of the SPC Decision of 28 August 2020, ZTE applied to the Shenzhen Intermediate People's Court for an act preservation measure prohibiting enforcement of an injunction by a foreign court.

On 28 September 2020, the Shenzhen Intermediate People's Court issued an anti-suit injunction.¹¹ The anti-suit injunction prohibited Conversant, under the sanction of daily penalties, from enforcing an injunction issued by the Düsseldorf Court. The Shenzhen Intermediate People's Court referred to a decision by the Nanjing Intermediate People's Court in a case between Huawei and Conversant¹² that concerned the royalty rate for the same patents concerned in the dispute before the Shenzhen Intermediate People's Court. Taking into account that decision, the Shenzhen Intermediate People's Court concluded that Conversant was asking a too high rate from ZTE. Therefore it granted an anti-suit injunction because otherwise ZTE would either be forced to withdraw from the German market or be forced to accept the offer of Conversant and reach a settlement with it. The decision by the Nanjing Intermediate People's Court was appealed and was the subject of the SPC decision of 28 August 2020. The Shenzhen Intermediate People's Court also referred to that SPC trial, noting it was in progress. The Shenzhen Intermediate People's Court granted the anti-suit injunction based on the provisions of the Civil Procedure Law.

3. *OPPO v Sharp* – Shenzhen Intermediate People's Court

On 25 March 2020, the Shenzhen Intermediate People's Court accepted a SEP licensing dispute case filed by OPPO and OPPO Shenzhen ("OPPO") against Sharp Corporation and Scienbizip Japan Corporation.¹³ OPPO requested the Court, amongst other things, to determine the global licensing conditions, including but not limited to, the licensing royalty rate, for OPPO's intelligent terminal products, regarding Wi-Fi related SEPs, 3G related SEPs, and 4G related SEPs. In or around October 2020, OPPO applied for an act preservation measure requesting the Court, first, to prohibit Sharp and its affiliates from applying for judicial injunctions (including a permanent injunction and a temporary injunction) or other similar relief measures in other countries or regions. Secondly, OPPO sought to prohibit Sharp and its affiliates from initiating patent infringement lawsuits or applying for judicial injunctions (including permanent injunction and temporary injunction) or other similar relief measures against OPPO in other countries or regions.

⁹ Wuhan Intermediate People's Court, Civil ruling of 04 December 2020, in case between Xiaomi and InterDigital, (2020) E 01 Zhi Min Chu No.169 Zhi er. 湖北省武汉市中级人民法院, 小米与交互数字案 (2020) 鄂01知民初字第169号之二裁定书.

¹⁰ See Shenzhen Intermediate People's Court of Guangdong Province, Civil ruling of 28 September 2020, in case , in case between ZTE and Conversant (2018) Yue 03 min Chu No. 335 Zhi yi. 广东省深圳市中级人民法院, 中兴与康文森案 (2018) 粤03民初335号之一裁定书.

¹¹ Shenzhen Intermediate People's Court of Guangdong Province, Civil ruling of 28 September 2020, in case between ZTE and Conversant (2018) Yue 03 Min Chu No. 335 Zhi yi. 广东省深圳市中级人民法院 · 中兴与康文森案 (2018) 粤03民初335号之一民事裁定书.

¹² Nanjing Intermediate People's Court of Jiangsu Province Decision of 16 September 2019, in case between Huawei and Conversant (2018) Su 01 Min Chu No. 232, 233, 234. 江苏省南京市中级人民法院 · 华为与康文森案 (2018) 苏 01 民初232、233、234 号, 2019 年 9 月 16 日判决书.

¹³ See Shenzhen Intermediate People's Court of Guangdong Province, Civil ruling of 16 October 2020, in case between OPPO and Sharp (2020) Yue 03 Min Chu No. 689 Zhi yi. 广东省深圳市中级人民法院, OPPO与夏普案 (2020) 粤03民初689号之一民事裁定书.

On 16 October 2020, the Shenzhen Intermediate People's Court granted OPPO's request and issued an anti-suit injunction.¹⁴ It prohibited Sharp, under the sanction of daily penalties, from initiating a patent infringement case or requesting an injunction against OPPO and its affiliates based on its WiFi, 3G and 4G SEPs involved in that case anywhere in the world. The Shenzhen Intermediate People's Court granted the anti-suit injunction based on the provisions of the Civil Procedure Law. On 19 August 2021, the SPC rejected the appeal by Sharp against the Shenzhen Intermediate People's Court decision on jurisdiction. The SPC also ruled Shenzhen Intermediate People's Court has jurisdiction to set global rates for the SEPs concerned.

4. *Samsung v Ericsson* – Wuhan Intermediate People's Court

On 7 December 2020, the Wuhan Intermediate People's Court accepted a case filed by several Samsung entities against Ericsson in relation to the global licensing terms of 4G and 5G SEPs held or controlled by Ericsson and its subsidiaries for Samsung's communications products, including royalty rates, in accordance with fair, reasonable, and non-discriminatory ("FRAND") principles.¹⁵

On 14 December 2020, Samsung filed an application for an act preservation measure in the form of an anti-suit injunction with the Wuhan Intermediate People's Court. The Court issued an anti-suit injunction on 25 December 2020.¹⁶ It prohibited Ericsson, under the sanction of daily penalties, from requesting before any other courts, either in or outwith China, an injunction against Samsung based on its 4G and 5G patents. It also prohibited Ericsson from enforcing existing injunctions or from requesting decisions on licence questions anywhere in the world. The anti-suit injunction includes an anti-anti-suit injunction prohibiting Ericsson from requesting any other courts either in or outwith China to order Samsung to withdraw its application for an anti-suit injunction in this case. The Wuhan Intermediate People's Court granted the injunction based on the provisions of the Civil Procedure Law and the Supreme People's Court's Provisions on Several Issues Concerning the Application of Law in Examining Act Preservation Cases in Intellectual Property Disputes as interpreted in the SPC decision of 28 August 2020. Ericsson requested the Wuhan Intermediate People's Court to review the decision. By Decision of 10 March 2021, the Wuhan Intermediate People's Court denied Ericsson's request for reconsideration of the decision of 25 December 2020, and maintained the anti-suit injunction.¹⁷

Worldwide anti-suit injunctions approved of by the SPC

The SPC has confirmed that Chinese courts can put in place worldwide, prospective anti-suit injunctions, including a prohibition from initiating any patent infringement case before any non-Chinese jurisdiction, and a prohibition to request an injunction or similar relief measure, under the sanction of 1 million RMB daily penalties, not limited to specific scope, conditions or circumstances related to the concrete cases submitted to the court in question.

Every year, the SPC selects ten IP cases in cooperation with the Provincial High Courts, for them to serve as an example and guidance for courts ("top ten typical IP cases").¹⁸ In 2020, the SPC selected the Shenzhen Intermediate People's Court Decision dated 16 October 2020 in *OPPO v Sharp*, which

¹⁴ Shenzhen Intermediate People's Court of Guangdong Province, Civil ruling of 16 October 2020, in case between OPPO and Sharp (2020) Yue 03 Minchu No. 689 Zhi yi. 广东省深圳市中级人民法院, *OPPO与夏普案* (2020) 粤03民初689号之一民事裁定书.

¹⁵ See Wuhan Intermediate People's Court of Hubei Province, Civil ruling of 25 December 2020, in case between Samsung and Ericsson (2020) E 01 Zhi Min Chu No. 743. 湖北省武汉市中级人民法院, *三星与爱立信案* (2020) 鄂01 知民初743 号裁定书.

¹⁶ Wuhan Intermediate People's Court of Hubei Province, Civil ruling of 25 December 2020, in case between Samsung and Ericsson (2020) E 01 Zhi Min Chu No. 743. 湖北省武汉市中级人民法院, *三星与爱立信案* (2020) 鄂01 知民初743 号裁定书.

¹⁷ Wuhan Intermediate People's Court of Hubei Province, Civil ruling of 10 March 2021, in case between Samsung and Ericsson, (2020) E 01 Zhi Min Chu No. 743, Zhi er. 湖北省武汉市中级人民法院, *三星与爱立信案* (2020) 鄂01知民初743号之二裁定书.

¹⁸ Published on 22 April 2021. 最高人民法院, 2020年中国法院10大知识产权案件和50件典型知识产权案例. Page 1.

put in place such an anti-suit injunction, as one of the 2020 top ten typical IP cases.¹⁹ The SPC noted that this decision was in line with its interpretation of the Civil Procedure Law and policy.

The Shenzhen Intermediate People's Court had put in place a global anti-suit injunction in this case, as it concerned a global royalty rate dispute. This decision and the other courts' decisions putting in place anti-suit injunctions state that they aim to avoid that the applicant is forced to sign a licence for the patents it implements with a rate the Chinese court considers inappropriate. The SPC ruled in *OPPO v Sharp* that Chinese courts have jurisdiction to set global rates for SEPs.²⁰ In a decision of 7 September 2022, the SPC re-affirmed the right for Chinese courts to set global FRAND licensing rates for SEPs.²¹

China has not applied and administered its laws, regulations and other measures in a uniform, impartial and reasonable manner

The rules for act preservation measures in intellectual property disputes are set in the Civil Procedure Law of the People's Republic of China, in particular Article 103 and 104, the Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Review of Act Preservation in Intellectual Property Disputes (as last amended on 26 November 2018)²² and the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (as last amended on 22 March 2022).²³ By the abovementioned rulings on act preservation measures in the form of anti-suit injunctions of the SPC in *Huawei v Conversant*, and rulings on the four act preservation measures in the form of anti-suit injunctions issued by Intermediate People's Courts, which are based inter alia on Article 103 of the Civil Procedure Law of

¹⁹ Published on 22 April 2021. 最高人民法院, 2020年中国法院10大知识产权案件和50件典型知识产权案例.

²⁰ Supreme People's Court of the People's Republic of China, Civil Ruling of 19 August 2021, in case between OPPO and Sharp, (2020) Zui Gao Fa Zhi Min Xia Zhong No. 517. 最高法院, OPPO与夏普案(2020)最高法知民辖终517号裁定书.

²¹ Supreme People's Court of the People's Republic of China, Civil Ruling of 7 September 2022, in case between OPPO and Nokia (2022) Zui Gao Fa Zhi Min Xia Zhong No. 167. 最高法院, OPPO与诺基亚(2022)最高法知民辖终167号裁定书.

²² Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Review of Act Preservation in Intellectual Property Disputes, as last amended on 26 November 2018, entering into force on 01 January 2019. 最高人民法院关于审查知识产权纠纷行为保全案件适用法律若干问题的规定,已于2018年11月26日由最高人民法院审判委员会第1755次会议通过·现予公布·自2019年1月1日起施行,法释〔2018〕21号.

²³ Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2022), as last amended on 22 March 2022, , entering into force on 10 April 2022, Fashi 11 hao. 最高人民法院关于修改《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》的决定(2022)(法释〔2022〕11号),《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》2014年12月18日最高人民法院审判委员会第1636次会议通过;根据2020年12月23日最高人民法院审判委员会第1823次会议通过的《最高人民法院关于修改〈最高人民法院关于人民法院民事调解工作若干问题的规定〉等十九件民事诉讼类司法解释的决定》第一次修正;根据2022年3月22日最高人民法院审判委员会第1866次会议通过的《最高人民法院关于修改〈最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释〉的决定》第二次修正·该修正自2022年4月10日起施行.

the People's Republic of China, China has established an anti-suit injunction policy,²⁴ which it describes as an "anti-suit injunction system with Chinese characteristics".²⁵

The rules on fines for violation of act preservation measures are set in the Civil Procedure Law of the People's Republic of China, in particular Article 118, and Article 184 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (as last amended in 2022).²⁶ By the abovementioned rulings on act preservation measures in the form of anti-suit injunctions of the SPC in *Huawei v Conversant*, and the rulings on act preservation measures in the form of anti-suit injunctions issued by Intermediate People's Courts in *Xiaomi v Interdigital*, *ZTE v Conversant* and *OPPO v Sharp*, which included *inter alia* daily fines in case of violation of the ruling based on Article 115 of the Civil Procedure Law of the People's Republic of China.²⁷ China has established specific rules, allowing for the imposition of daily fines, up to the maximum level of Article 115 (1) of the Civil Procedure Law, in the event of violation of an anti-suit injunction.²⁸

Through the above China has not applied and administered its laws, regulations and other measures in a uniform, impartial and reasonable manner.

²⁴ See for example: 1) Intellectual Property Court of the Supreme People's court, Report on 10 typical cases of technical intellectual property in 2020, published on 26 February 2021. 最高人民法院知识产权法庭, 2020年10件技术类知识产权典型案例. 2) Intellectual Property Court of the Supreme People's Court publication, "The first anti-suit injunction issued by China in an intellectual property trial—The case collegial panel explained in detail the dispute over licensing of standard essential patents between Conversant and Huawei." 最高人民法院知识产权法庭, 中国知识产权审判发出的首例禁诉令——案件合议庭详解康文森公司与华为公司标准必要专利许可纠纷案. <https://ipc.court.gov.cn/zh-cn/news/view-1056.html> 3) Supreme People's Court, top ten "big, typical" intellectual property cases and 50 "typical" intellectual property cases in Chinese courts in 2020. 最高人民法院办公厅, 关于印发2020年中国法院10大知识产权案件和50件典型知识产权案例的通知, 法办〔2021〕146号. 4) Supreme People's Court Report on the implementation of the "Decision of the Standing Committee of the National People's Congress on Several Issues Concerning Litigation Procedures in Patent and Other Intellectual Property Cases" of 27 February 2022. 最高人民法院关于《全国人民代表大会常务委员会关于专利等知识产权案件诉讼程序若干问题的决定》实施情况的报告, 2022年2月27日在第十三届全国人民代表大会常务委员会第三十三次会议上.

²⁵ See Supreme People's Court Report on the implementation of the "Decision of the Standing Committee of the National People's Congress on Several Issues Concerning Litigation Procedures in Patent and Other Intellectual Property Cases" of 27 February 2022. 最高人民法院关于《全国人民代表大会常务委员会关于专利等知识产权案件诉讼程序若干问题的决定》实施情况的报告, 2022年2月27日在第十三届全国人民代表大会常务委员会第三十三次会议上.

²⁶ Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2022), as last amended on 22 March 2022, entering into force on 10 April 2022, Fashi 11 hao. 最高人民法院关于修改《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》的决定(2022)(法释〔2022〕11号), 《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》2014年12月18日最高人民法院审判委员会第1636次会议通过; 根据2020年12月23日最高人民法院审判委员会第1823次会议通过的《最高人民法院关于修改〈最高人民法院关于修改〈最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释〉的决定〉》等十九件民事司法解释的决定》第一次修正; 根据2022年3月22日最高人民法院审判委员会第1866次会议通过的《最高人民法院关于修改〈最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释〉的决定》第二次修正·该修正自2022年4月10日起施行.

²⁷ Article 115 of the Civil Procedure Law in its version of 2017 was later renumbered as Article 118 of the Civil Procedure Law in its version of 2022.

²⁸ See for example: 1) Intellectual Property Court of the Supreme People's court, Report on 10 typical cases of technical intellectual property in 2020, published on 26 February 2021. 最高人民法院知识产权法庭, 2020年10件技术类知识产权典型案例. 2) Adjudication guidelines as contained in the document summarizing the gist of the decisions of the intellectual property court of the SPC (2020). 最高人民法院知识产权法庭裁判要旨(2020). 3) Supreme People's Court Report on the implementation of the "Decision of the Standing Committee of the National People's Congress on Several Issues Concerning Litigation Procedures in Patent and Other Intellectual Property Cases" of 27 February 2022. 最高人民法院关于《全国人民代表大会常务委员会关于专利等知识产权案件诉讼程序若干问题的决定》实施情况的报告, 2022年2月27日在第十三届全国人民代表大会常务委员会第三十三次会议上.

Having regard to the above, the measures at issue under Part 1 in this panel request are the following:

First, the anti-suit injunction policy maintained by China as a measure of general and prospective application prohibiting a party in litigation concerning SEPs in China from applying for enforcement of judgments of any non-Chinese court in the territories of other Members or from seeking any judicial relief outwith the jurisdiction of Chinese courts.

Second, the continued issuance by Chinese courts of anti-suit injunctions in successive cases concerning SEPs prohibiting a party from applying for enforcement of judgments of a non-Chinese court in the territories of other Members or from seeking judicial relief outwith the jurisdiction of Chinese courts.

Third, the abovementioned specific instances of application by Chinese courts of anti-suit injunctions in cases concerning SEPs in China prohibiting a party from applying for enforcement of judgments of a non-Chinese court in the territories of other Members or from seeking judicial relief outwith the jurisdiction of Chinese courts.

The European Union challenges these measures as such and also the instances of application by various Chinese courts.

1.2. Legal instruments constituting these measures

The legal instruments through which China imposes and administers these measures include *inter alia* the following, operating separately or collectively:

- Civil Procedure Law of the People's Republic of China, in particular Articles 103, 104, and 118 of China's Civil Procedure Law 2022.²⁹
- Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Review of Act Preservation in Intellectual Property Disputes (approved by the 1755th conference of the judicial committee of the Supreme People's Court on 26 November 2018, to be enacted from 1 January 2019) Fa Shi [2018] No. 21.³⁰
- Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China, adopted on 18 December 2014, as first amended on 23 December 2020, and amended for the second time on 22 March 2022 by the Judicial Committee of the Supreme People's Court, with the last revision taking effect since 10 April 2022.³¹

²⁹ This comprises China's Civil Procedure Law in the version of 2022, as well as previous versions and later amendments. 中华人民共和国民事诉讼法（1991年4月9日第七届全国人民代表大会第四次会议通过 根据2007年10月28日第十届全国人民代表大会常务委员会第三十次会议《关于修改〈中华人民共和国民事诉讼法〉的决定》第一次修正 根据2012年8月31日第十一届全国人民代表大会常务委员会第二十八次会议《关于修改〈中华人民共和国民事诉讼法〉的决定》第二次修正 根据2017年6月27日第十二届全国人民代表大会常务委员会第二十八次会议《关于修改〈中华人民共和国民事诉讼法〉和〈中华人民共和国行政诉讼法〉的决定》第三次修正 根据2021年12月24日第十三届全国人民代表大会常务委员会第三十二次会议《关于修改〈中华人民共和国民事诉讼法〉的决定》第四次修正）

³⁰ 最高人民法院关于审查知识产权纠纷行为保全案件适用法律若干问题的规定》已于2018年11月26日由最高人民法院审判委员会第1755次会议通过，现予公布，自2019年1月1日起施行。

³¹ Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2022), as last amended by Decision of the Supreme People's Court of 22 March 2022, , entering into force on 10 April 2022, Fashi 11 hao. 最高人民法院关于修改《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》的决定(2022)（法释〔2022〕11号），《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》2014年12月18日最高人民法院审判委员会第1636次会议通过；根据2020年12月23日最高人民法院审判委员会第1823次会议通过的《最高人民法院关于修改〈最高人民法院关于人民法院民事调解工作若干问题的规定〉等十九件民事诉讼类司法解释的决定》第一次修正；根据2022年3月22日最高人民法院审判委员会第1866次会议通过的《最高人民法院关于修改〈最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释〉的决定》第二次修正，该修正自2022年4月10日起施行。

- Supreme People's Court of the People's Republic of China Civil Ruling of 28 August 2020, in Cases between Huawei Technology Co. LTD and Conversant Wireless Licensing (2019) Zui Gao Fa Zhi Min Zhong No. 732, No. 733 and No. 734, Zhi yi, putting in place an anti-suit injunction.³²
- Supreme People's Court of the People's Republic of China Civil Ruling of 11 September 2020, in Cases between Huawei Technology Co. LTD and Conversant Wireless Licensing (2019) No. 732, No. 733 and No. 734, Zhi er - reviewing and maintaining the Decision of 28 August 2020 to put in place an anti-suit injunction.³³
- Supreme People's Court of the People's Republic of China Civil Ruling of 19 August 2021, in case between OPPO and Sharp, (2020) Zui Gao Fa Zhi Min Xia Zhong No. 517.³⁴
- Supreme People's Court of the People's Republic of China Civil Ruling of 7 September 2022, in the case between OPPO and Nokia (2022) Zui Gao Fa Zhi Min Xia Zhong No. 167.³⁵
- Summary of the Annual Report of the Supreme People's Court on Intellectual Property Cases (2020).³⁶
- Intellectual Property Court of the Supreme People's Court Report 10 typical cases of technical intellectual property in 2020.³⁷
- Supreme People's Court, top ten "big, typical" intellectual property cases and 50 "typical" intellectual property cases in Chinese courts in 2020.³⁸
- Adjudication guidelines as contained in the document summarizing the gist of the decisions of the intellectual property court of the SPC (2020).³⁹
- SPC "Report on People's Courts' IP trial work" of 21 October 2021 at the 31st meeting of the Standing Committee of the Thirteenth National People's Congress.⁴⁰
- Standing Committee of the National People's Congress Opinions and Suggestions on the SPC "Report on People's Courts' IP trial work" of 21 October 2021, published on 18 November 2021.⁴¹
- SPC Report on the implementation of the "Decision of the Standing Committee of the National People's Congress on Several Issues Concerning Litigation Procedures in Patent and Other Intellectual Property Cases" of 27 February 2022 at the 33rd session of the Standing

³² 中华人民共和国最高人民法院, 华为与康文森案(2019)最高法知民终732、733、734号之一裁定书。

³³ 中华人民共和国最高人民法院, 华为与康文森案(2019)最高法知民终732、733、734号之二裁定书。

³⁴ 中华人民共和国最高人民法院, OPPO与夏普案(2020)最高法知民辖终517号裁定书。

³⁵ 中华人民共和国最高人民法院, OPPO与诺基亚(2022)最高法知民辖终167号裁定书。

³⁶ Published on 26 February 2021. 最高人民法院知识产权案件年度报告(2020)。

³⁷ Published on 26 February 2021. 最高人民法院知识产权法庭2020年技术类知识产权典型案例的通报。

³⁸ Published on 22 April 2021. 最高人民法院办公厅, 关于印发2020年中国法院10大知识产权案件和50件典型知识产权案例的通知, 法办〔2021〕146号。

³⁹ Published on 26 February 2021. 最高人民法院知识产权法庭裁判要旨(2020). English version published 26 April 2021.

⁴⁰ 最高人民法院, 关于最高人民法院知识产权审判工作情况的报告, 2021年10月21日在第十三届全国人民代表大会常务委员会第三十一次会议上。

⁴¹ Opinions and suggestions on the report on intellectual property trial work of the People's Court, November 18, 2021. 十三届全国人大常委会第三十一次会议, 对人民法院知识产权审判工作情况报告的意见和建议, 2021年11月18日。

Committee of the Thirteenth National People's Congress.⁴²

- Standing Committee of the National People's Congress Opinions and Suggestions on the SPC Report Implementation Report of the Decision of the Standing Committee of the National People's Congress on Several Issues Concerning Litigation Procedures in Patent and Other Intellectual Property Cases of 27 February 2022.⁴³
- Standing Committee 2022 Work Report to National People's Congress.⁴⁴
- Wuhan Intermediate People's Court of Hubei Province Civil ruling of 23 September 2020, in case between Xiaomi and InterDigital (2020) E 01 Zhi Min Chu No.169 Zhi yi - putting in place an anti-suit injunction.⁴⁵
- Wuhan Intermediate People's Court Civil ruling of 04 December 2020, in case between Xiaomi and InterDigital (2020) E 01 Zhi Min Chu No.169 Zhi er - reviewing and maintaining the Decision of 23 September 2020 to put in place an anti-suit injunction.⁴⁶
- Shenzhen Intermediate People's Court of Guangdong Province Civil ruling of 28 September 2020, in case between ZTE and Conversant (2018) Yue 03 Min Chu No. 335 Zhi yi - putting in place an anti-suit injunction.⁴⁷
- Shenzhen Intermediate People's Court of Guangdong Province Civil ruling of 16 October 2020, in case between OPPO and Sharp (2020) Yue 03 Minchu No. 689 Zhi yi - putting in place an anti-suit injunction.⁴⁸
- Wuhan Intermediate People's Court of Hubei Province Civil ruling of 25 December 2020, in case between Samsung and Ericsson (2020) E 01 Zhi Min Chu No. 743 - putting in place an anti-suit injunction.⁴⁹
- Wuhan Intermediate People's Court of Hubei Province Civil ruling of 10 March 2021, in case between Samsung and Ericsson, (2020) E 01 Zhi Min Chu No. 743, Zhi yi - reviewing and maintaining the Decision of 25 December 2020 to put in place an anti-suit injunction.⁵⁰
- Guangdong Province High People's Court, Top ten Intellectual Property Trial Cases in Guangdong Province in 2020.⁵¹
- Guangdong Province China Communist Party Political and Legal Committee notice of 22 April 2021, on Guangdong Province High People's Court publication of Top ten intellectual property cases in Guangdong Province in 2020.⁵²

⁴² 最高人民法院关于《全国人民代表大会常务委员会关于专利等知识产权案件诉讼程序若干问题的决定》实施情况的报告, 2022年2月27日在第十三届全国人民代表大会常务委员会第三十三次会议上。

⁴³ 十三届全国人大常委会第三十三次会议,对《全国人民代表大会常务委员会关于专利等知识产权案件诉讼程序若干问题的决定》实施情况报告的意见和建议, 2022年02月27日。

⁴⁴ Published in English on the State Council Website
http://english.www.gov.cn/news/topnews/202203/14/content_WS622ee462c6d09c94e48a69f7.html

⁴⁵ 湖北省武汉市中级人民法院,小米与交互数字案(2020)鄂01知民初169号之一裁定书。

⁴⁶ 湖北省武汉市中级人民法院,小米与交互数字案(2020)鄂01知民初169号之二裁定书。

⁴⁷ 广东省深圳市中级人民法院·中兴与康文森案(2018)粤03民初335号之一民事裁定书。

⁴⁸ 广东省深圳市中级人民法院,OPPO与夏普案(2020)粤03民初689号之一民事裁定书。

⁴⁹ 湖北省武汉市中级人民法院·三星与爱立信案(2020)鄂01知民初743号裁定书。

⁵⁰ 湖北省武汉市中级人民法院,三星与爱立信案(2020)鄂01知民初743号之一裁定书。

⁵¹ 湖北省高级人民法院·2020年度广东省知识产权审判十大案件。

⁵² 中共广东省委政法委员会,2020年度广东省知识产权审判十大案件。

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- Hubei Province High People's Court's annual report on 2020, published in April 2021.⁵³
 - Hubei Province High People's Court Work Report on 2021: Interpretation of Typical Cases II, published 22 January 2022.⁵⁴

This request also covers other court decisions with a similar content based on these documents or any other related measures, and includes any annexes or schedules to these measures and amendments, supplements, replacements, renewals, extensions or implementing measures.

1.3. Legal basis for the complaint in respect of China's measures

The measures described are inconsistent with China's obligations under the covered agreements, in particular:

- Article 1.1, first sentence, of the TRIPS Agreement, in conjunction with Article 28.1 of the TRIPS Agreement, because China's measures restrict, or seek to restrict, the exercise by patent owners of their exclusive rights to prevent third parties not having the owner's consent from making, using, offering for sale, selling, or importing the product that is the subject matter of a patent or that is obtained directly by a patented process.
- Article 1.1, first sentence, of the TRIPS Agreement, in conjunction with Article 28.2 of the TRIPS Agreement, because China's measures, by prohibiting access to non-Chinese courts for the owners of the type of patents at issue, restrict, or seek to restrict, the exercise by patent owners of their right to conclude licensing contracts.
- Article 41.1, second sentence, of the TRIPS Agreement, because China's measures create barriers to legitimate trade and fail to provide for safeguards against the abuse of enforcement procedures. China's measures create barriers to legitimate trade because they prevent, or seek to prevent, patent owners in other Members from availing themselves of enforcement procedures that permit effective action against any act of infringement of intellectual property rights covered by the TRIPS Agreement, including expeditious remedies to prevent infringements and remedies, which constitute a deterrent to further infringements. Moreover, by granting worldwide anti-suit injunctions with little consideration of their impact on the enforcement procedures in other Members, China fails to provide for safeguards against the abuse of litigation procedures. The Chinese courts should have satisfied themselves with a sufficient degree of certainty that the applicant's right was being infringed or that such infringement was imminent. Furthermore, the security or equivalent assurance that was required from the applicant by the Chinese courts was not sufficient to protect the defendant and to prevent abuse.
- Article 1.1, first sentence, of the TRIPS Agreement, in conjunction with Article 44.1 of the TRIPS Agreement, because China's measures prevent, or seek to prevent, the judicial authorities of the other Members from ordering a party to desist from an infringement at the request of patent owners involved in patent litigation in China.
- Section 2(A)(2) of the Protocol on the Accession of the People's Republic of China, as China, through the issuance by Chinese courts of anti-suit injunctions in the abovementioned patent litigation cases, by favouring the applicant in assessing and setting the conditions for the anti-suit injunctions in those cases, and by imposing penalties on a daily basis, has not applied and administered its laws, regulations and other measures in a uniform, impartial and reasonable manner, in particular Article 103 and 188 of the Civil Procedure Law of the People's Republic of China and the Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Review of Act Preservation in Intellectual Property Disputes, and Article 184 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law.

⁵³ 湖北省高级人民法院·二〇二一年四月, 湖北法院知识产权司法保护状况及十大典型案例(2020年).

⁵⁴ 湖北省高级人民法院工作报告 典型案例事例释读二.

2. China's failure to publish final judicial decisions of general application pertaining to the subject matter of the TRIPS Agreement

2.1. Description of the measures

China has failed to publish at least three decisions that were mentioned in official Chinese government publications and referenced as guiding materials.

In a report presenting the top ten, typical IP cases of 2020⁵⁵ the SPC included the Shenzhen Intermediate People's Court Decision putting in place an anti-suit injunction in the case of *OPPO v Sharp*. The Guangdong High Court in its report on the top ten cases in 2020 included the Shenzhen *ZTE v Conversant* decision as a "typical case".⁵⁶ The Guangdong China Communist Party Political and Legal Committee also published the above Guangdong Province High People's Court report on the top ten cases in 2020 remarking that this showed Guangdong's leading role in building intellectual property protection.⁵⁷ The Hubei Province High People's Court's annual report on 2020 activities included the Wuhan Intermediate People's Court decisions in *Xiaomi v InterDigital* as a "typical case".⁵⁸ This included the decision of 16 October 2020 putting in place an anti-suit injunction, as well as the re-consideration decision of 4 December 2020 that rejected the appeal and maintained the anti-suit injunction. In 2022 the Hubei Province High People's Court again listed the above decisions by Wuhan Intermediate People's Court in *Xiaomi v InterDigital* as a typical case representing "a useful practice for China to use anti-suit injunctions in cross-border civil lawsuits to maintain its own jurisdiction".⁵⁹ China's reply to the European Union TRIPS information request⁶⁰ also notes these cases "provide references for judicial practices". The decisions in these three cases appear not to have been published. For example, they cannot be found online on China's official website for judgements, which the European Union understands to be the official medium for publication.⁶¹

2.2. Legal basis for the claim

The elements described above are inconsistent with China's obligations under the TRIPS agreements, in particular Article 63.1 of the TRIPS Agreement, because China has not published, or made publicly available, in such a manner as to enable governments and right holders to become acquainted with them, final judicial decisions of general application, made effective by China pertaining to the subject matter of the TRIPS Agreement.

3. China's failure to supply information on final judicial decisions of general application pertaining to the subject matter of the TRIPS Agreement

3.1. Description of the measures

On 6 July 2021, the European Union sent an official request for information pursuant to Article 63.3 of the TRIPS Agreement requesting further information on a number of recent judicial decisions and regulations relating to patents.⁶² The request concerned in particular court cases where decisions were taken in court procedures related to patent licensing and royalty rates, and enforcement of injunctions. These decisions were mentioned in official Chinese government publications and referenced as guiding materials. The European Union explicitly requested China to provide the text of all decisions taken so far in the following cases:

⁵⁵ Published on 22 April 2021. 2020年中国法院10大知识产权案件和50件典型知识产权案例.

⁵⁶ 湖北省高级人民法院. 2020年度广东省知识产权审判十大案件.

⁵⁷ 中共广东省委政法委员会, 22 April 2022, 2020年度广东省知识产权审判十大案件.

⁵⁸ 湖北省高级人民法院. 二〇二一年四月 (April 2021) 湖北法院知识产权司法保护状况及十大典型案例 (2020年).

⁵⁹ The Work Report of the Hubei Province High People's Court: Interpretation of Typical Cases II, reported on 21-01-22. 湖北省高级人民法院. 二〇二一年四月 (April 2022) 湖北法院知识产权司法保护状况及十大典型案例 (2020年).

⁶⁰ Communication IP/C/W/683.

⁶¹ <https://wenshu.court.gov.cn/>

⁶² Communication IP/C/W/682.

1. Shenzhen Intermediate People's Court of Guangdong Province decisions in *OPPO v Sharp*;⁶³
2. Wuhan Intermediate People's Court of Hubei Province decisions in *Xiaomi v InterDigital*;⁶⁴
3. Wuhan Intermediate People's Court of Hubei Province decisions in *Samsung v Ericsson*.⁶⁵

On 7 September 2021, China answered that there is no obligation under the TRIPS Agreement to respond to that request and provided only two paragraphs with little detail.⁶⁶

3.2. Legal basis for the claim

The elements described above are inconsistent with China's obligations under the TRIPS agreements, in particular Article 63.3 of the TRIPS Agreement, because China, in response to the European Union's written request, failed to provide a complete description of the measures that it applies.

The measures maintained by China relating to the protection and enforcement of intellectual property rights, China's failure to publish final judicial decisions of general application pertaining to the subject matter of the TRIPS Agreement, and China's failure to supply information on final judicial decisions of general application pertaining to the subject matter of the TRIPS Agreement, appear to nullify or impair the benefits accruing to the European Union directly or indirectly under the covered agreements.

The European Union asks that this request for the establishment of a panel be placed on the agenda for the meeting of the Dispute Settlement Body to be held on 20 December 2022.

⁶³ Shenzhen Intermediate People's Court of Guangdong Province (2020) Guangdong 03 Min chu 689. 广东省深圳市中级人民法院 (2020)粤03民初689号.

⁶⁴ Wuhan Intermediate People's Court of Hubei Province (2020) E 01 Zhi Min Chu No.169. 湖北省武汉市中级人民法院,小米与交互数字案 (2020) 鄂01 知民初169号.

⁶⁵ Wuhan Intermediate People's Court of Hubei Province (2020) E 01 Zhi Min Chu No. 743. 湖北省武汉市中级人民法院·三星与爱立信案 (2020) 鄂01 知民初743号.

⁶⁶ Communication IP/C/W/683.