CHINA – ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

(DS611)

THIRD PARTY SUBMISSION
OF THE UNITED STATES OF AMERICA

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US – Continued Zeroing (AB)	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009
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I. INTRODUCTION

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

II. MEASURES AT ISSUE

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

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

4. If either set of challenged measures is outside the terms of reference – either because the measure has not been identified in the complaining party's panel request and did not form part of the matter the DSB has established the Panel to examine,[4] or because the alleged measure is not an issue that may be challenged under the DSU[5] – then that challenged measure and aspect of the matter is not properly before this Panel and may not be subject to findings by the Panel. Therefore, it would be appropriate to consider first whether the EU has identified a specific measure that can be challenged under the DSU in this dispute. In light of these threshold issues, the United States addresses each of the types of challenged measures below.

A. A "Policy" of a Member as an Unwritten Measure

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

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[1] *See* China's First Written Submission ("China FWS"), para. 73.
[2] European Union's First Written Submission ("EU FWS"), para. 218.
[3] EU FWS, para. 219.
[4] DSU Art. 6.2 (panel request "shall identify the specific measures at issue"); Art. 7.1 (panel's terms of references established by DSB are "[t]o examine … the matter referred to the DSB by [the complaining party] in document [requesting panel establishment]").
[5] DSU Art. 3.3 (DSU directed to "prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member"); Art. 4.2 (consultations concern "representations made by any Member concerning measures affecting the operation of any covered agreement taken within the territory of [that Member]").
[6] EU FWS, para. 216 (citing to *US – Continued Zeroing (AB)*, para. 198, where the Appellate Body stated that, "Particular rigour is required on the part of a panel to support a conclusion as to the existence of a 'rule or norm' that is not expressed in the form of a written document.").

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

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

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

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

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[7] *See* EU FWS, para. 217.
[8] *See* EU FWS, para. 218.
[9] *See* EU FWS, para. 224.
[10] *See* EU FWS, paras. 224–242.
[11] EU FWS, para. 249.
[12] *See* EU FWS, para. 251.
[13] *See* EU FWS, paras. 254–255, 258.
[14] EU FWS, para. 263.
[15] *See* EU FWS, para. 265.
[16] EU FWS, para. 287.

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

11. As the complainant, the EU bears the burden of identifying and demonstrating the existence of a "specific measure".[23] Therefore, the Panel must determine whether the EU has identified a specific measure. The Panel must also determine whether the EU has shown that this measure is a "measure taken" by the responding party[24] and of the nature the EU argues, *i.e.*, that it has "general and prospective application." That is, what the EU characterizes as a "policy" must be an act or decision with some legal effect for the responding party.[25] If, as China argues, the cases identified by the EU are simply instances of legal application of Chinese law, and do not reflect a specific "measure" that operates as if a legal act or decision "with general and prospective application" or having "a functional life of its own," then the Panel cannot find that such a measure exists within the meaning of the DSU.

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

13. Here, the Panel may wish to examine in particular, whether the EU has sufficiently explained why the existence of the unwritten measure is not undermined by the fact that all the instances identified by the EU took place over a relatively short period of time and have not been

[17] *See* China FWS, para. 70.
[18] China FWS, para. 73.
[19] China FWS, para. 74 (emphasis in original).
[20] China FWS, para. 75.
[21] China FWS, para. 156.
[22] *See* China FWS, paras. 129, 133.
[23] *See* DSU Arts. 6.2, 7.1.
[24] *See* DSU Arts. 3.3, 4.2.
[25] As the panel in *US – Export Restraints* found, an alleged unwritten measure must "constitute an instrument with a functional life of its own" and "*do* something concrete, independently of any other instruments." *US – Export Restraints*, para 8.85 (emphasis in original).
[26] EU FWS, para. 221 (citing *Argentina – Import Measures (AB)*, para. 5.108).

repeated since that time, or by the fact that a court in China declined to issue an anti-suit injunction, in *Lenovo v. Nokia*.[27]

B. Individual Instances of Injunctions Issued in Patent Disputes Where Such Disputes Have Been Settled Before the Time of the Panel's Establishment

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

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

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

[27] *Compare* EU FWS, para. 243 ("Even if in the *Lenovo v Nokia* case the Shenzhen Court rejected Lenovo's ASI request (although only because the proceedings outwith China were not completed) several elements following this decision show the continuing existence of the overarching measure: the SPC and the NPC' Standing Committee continued to promote the anti-suit injunction policy in November 2021 and February 2022; the Wuhan Court's reconsideration ruling of 10 March 2021 in *Samsung v Ericsson* maintained the global anti-suit injunction against Ericsson; in 2022, the Hubei High Court promoted the global anti-suit injunction in *Xiaomi v Interdigital* as a typical case." (internal citation to original Exhibit EU-9, *Ericsson v Samsung*, Wuhan Intermediate People's Court, Reconsideration Decision, 10-03-21)).
[28] EU FWS, para. 219.
[29] EU FWS, para. 294.
[30] *See* EU FWS, para. 297.
[31] *See* EU FWS, paras. 19, 46, 53, 66, 80, 299; China FWS, paras. 54, 178, 181, 184, 188.
[32] EU FWS, para. 298.
[33] EU FWS, para. 299.
[34] *See* EU FWS, para. 299.

measures may have had adverse effects at the time they were in effect, and may still have lasting adverse effects."[35]

17. Articles 6.2 and 7.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) set out a panel's terms of reference. Under DSU Article 6.2, the "matter" to be examined by the DSB consists of "the specific measures at issue" and "brief summary of the legal basis of the complaint." Under Article 7.1, when the Dispute Settlement Body (DSB) establishes a panel, the panel's terms of reference, unless otherwise decided, are "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request. It is thus the challenged measures, as they existed at the time of the panel's establishment, when the "matter" was referred to the panel, that are properly within the panel's terms of reference and on which the panel must make findings.

18. At the time of the Panel's establishment, it is uncontested that all five individual instances of anti-suit injunctions cited by the EU were no longer in effect. That is, each court involved had lifted its injunction pursuant to resolution of a specific case. Under Article 11 of the DSU, a panel's task is to make an objective assessment of the "matter before it, including an objective assessment of . . . the applicability of and conformity with the relevant agreements," and the "matter" comprises the complaining party's measures and claims. A panel's task does not extend to making findings of conformity outside the "matter before it." Furthermore, DSU Article 19.1 provides that "[w]here a panel or the Appellate Body concludes that a measure *is inconsistent* with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement."[36] Panels are not authorized to make recommendations about a measure that, because it no longer exists, is no longer inconsistent with the WTO Agreement (regardless of whether it in fact ever was). Therefore, the EU's claims regarding the five instances of anti-suit injunctions will fall outside the panel's terms of reference.

19. Even aside from the measures, and not just their alleged effects, needing to be in existence when the panel is established for the panel to examine those measures as part of the "matter," the EU also would have had to identify "adverse effects" as specific measures at issue in its panel request. As noted above, Article 6.2 requires the identification of the "specific measure at issue." Here, the EU has identified the five specific anti-suit injunction cases as the measures at issue. Any separate "adverse effects" of those cases would themselves need to be specifically identified and defined in the EU's panel request as measures, and then be shown to exist at the time of the Panel's establishment.

20. We also note that, even if the "adverse effects" of the cases are properly before the Panel as measures, the EU still would need to explain how the "lingering adverse effect" or "lasting adverse effects" of settlement agreements in patent disputes are inconsistent with specific provisions of the TRIPS Agreement. The TRIPS Agreement does not contain any obligation relating to "lingering adverse effects;" nor does the term "lingering adverse effects" appear anywhere in the TRIPS Agreement.

[35] *See* EU FWS, para. 299 (citing to *US – Upland Cotton*, para. 7.1201).
[36] Footnotes omitted and emphasis added.

21. The United States notes that, assuming for the purposes of argument that the EU has identified an unwritten measure properly before the Panel for its review, the unwritten measure identified by the EU does not include reference to the transparency concerns raised by the EU in its claims of breach of Articles 63.1 and 63.3 of the TRIPS Agreement by China. Accordingly, the United States assumes that claims under Article 63 only pertain to certain individual measures identified by the EU, and therefore the EU's claims under Article 63 of the TRIPS Agreement only apply to the three individual instances of anti-suit injunctions identified in the EU panel request and its submission: (1) *OPPO v. Sharp*; (2) *ZTE v. Conversant*; and (3) *Xiaomi v. InterDigital*.[37] In that case, if the Panel were to determine that the individual measures concerning the injunctions issued in these three cases were no longer in effect and not within the Panel's terms of reference, then the claims regarding Article 63 would similarly not be before the Panel, regardless of the existence of an overall, unwritten measure.

III. CONCLUSION

22. The United States thanks the Panel for the opportunity to submit its views on these threshold issues raised in this dispute.

[37] *See* EU FWS, paras. 622–646, 686–703.