

W T O · D S 6 1 1 & D S 6 3 2

China, the EU, and the Future of SEP Enforcement

Anti-Suit Injunctions, Worldwide FRAND Rates, and the MPIA Award

DS611 Panel report 21 Feb 2025 · Art. 25 (MPIA) Award 21 Jul 2025 **DS632** Consultations requested 20 Jan 2025 · Panel established 19 Mar 2026

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What DS611 was about

Standard essential patents (SEPs)

Patents that read on a technical standard (e.g. 4G/5G). Holders give a FRAND undertaking to the SSO.

Anti-suit injunctions (ASIs)

Chinese courts (first the SPC in *Huawei v. Conversant*, 2020, then intermediate courts) began issuing in personam orders forbidding SEP holders from commencing, continuing, or enforcing related proceedings *anywhere in the world*, backed by cumulative daily fines up to RMB 1,000,000.

EU's complaint

China's ASI practice in SEP/FRAND litigation breaches TRIPS — both as an unwritten “ASI policy” (*as such*) and through five named decisions (*as applied*).



THE BARGAINING PROBLEM ARGUED BY THE EU

A worldwide ASI weakens the SEP holder's principal leverage to get the implementer to sign a license: the threat of injunctive relief in any jurisdiction where the patent is granted.

It gives potential licensees leverage over SEP holders in negotiations.

Five named ASIs — and an unwritten policy

01

Huawei v. Conversant

SPC, 2020

First Chinese ASI in SEP litigation.

02

ZTE v. Conversant

Shenzhen Int. PC

Followed Huawei pattern.

03

OPPO v. Sharp

Shenzhen Int. PC

ASI tied to global FRAND-rate jurisdiction.

04

Xiaomi v. InterDigital

Wuhan Int. PC

First worldwide ASI.

05

Samsung v. Ericsson

Wuhan Int. PC

Cumulative daily fines for non-compliance.



THE “ASI POLICY” AS AN UNWRITTEN MEASURE

EU framed the practice as a rule or norm of general and prospective application — promoted by the SPC, endorsed by the NPC Standing Committee, with cumulative daily fines as enforcement. Both the Panel and the Arbitrators found that the policy exists as an unwritten measure of general and prospective application (Award paras 4.13–4.42). Neither ruled on the five individual ASIs “as applied” under the substantive TRIPS provisions: the Panel declined and the Arbitrators, noting the five ASIs had expired, did not complete the analysis (paras 4.198–4.203).

Panel → MPIA Article 25 arbitration



Why the MPIA?

With the Appellate Body paralysed since 2020, the MPIA participants (35, or 62 WTO Members once the EU's member states are counted; China and the EU among them) use the Multi-Party Interim Appeal Arbitration Arrangement under DSU Article 25 to obtain binding appellate review. China and the EU notified agreed Article 25 procedures for this dispute on 4 July 2023.

Arbitrators

Penelope Ridings (NZ) — Chair
 Claudia Orozco (Colombia)
 Mateo Diego-Fernández Andrade (Mexico)

Selected from the MPIA pool of standing arbitrators.

China prevailed on the TRIPS substance

✗	Art. 1.1 + 28.1 — Exclusive patent rights	no breach
✗	Art. 1.1 + 28.2 — Right to license	no breach
✗	Art. 1.1 + 44.1 — Authority to enjoin	no breach
✗	Art. 41.1, 2nd sentence — Enforcement procedures	not applicable
✗	Section 2(A)(2) Accession Protocol — Uniform/impartial/reasonable administration	no breach
✓	Art. 63.1 — Publish judicial decisions of general application	BREACH (Xiaomi v. InterDigital)
✓	Art. 63.3, 1st sentence — Be ready to supply information	BREACH (Question V); 2nd-sentence claim outside terms of reference

Bottom line: the Panel rejected every substantive TRIPS claim against the ASI policy; the only breaches found were the transparency breaches (Arts. 63.1 and 63.3).

EU prevailed on the core Article 28 claims

Art. 1.1 — “give effect to” <i>Reinterpreted to include a non-frustration corollary.</i>	REVERSED
Art. 1.1 + 28.1 — Exclusive rights <i>China’s ASI policy frustrated other Members’ Art. 28.1 rights.</i>	REVERSED · INCOMPATIBILITY FOUND
Art. 1.1 + 28.2 — Right to license <i>China’s ASI policy frustrated SEP holders’ meaningful exercise of the right to conclude licensing contracts on FRAND terms.</i>	REVERSED · INCOMPATIBILITY FOUND
Art. 1.1 + 44.1 — Court authority to enjoin <i>The policy regulates litigant conduct and incentives; it does not remove foreign courts’ legal authority to grant injunctions.</i>	UPHELD (different reasoning)
Art. 41.1, 2nd sentence — Enforcement procedures <i>The second-sentence obligation does not apply: the ASI policy is not an enforcement procedure within Part III.</i>	UPHELD
Art. 63.1 / 63.3 — Transparency <i>Art. 63.1: Xiaomi v. InterDigital is a judicial decision of general application (upheld on China’s other appeal). Art. 63.3, 1st sentence: breach not appealed; deemed an integral part of the Award (para 5.2).</i>	UPHELD · 63.3 UNAPPEALED

Two disputes, two different questions



The DISTINCTION in a NUTSHELL

DS611 does not outlaw anti-suit injunctions. **DS632 is harder.** The first condemned a state-attributable, generally applicable policy of coercive worldwide ASIs that frustrated the practical exercise of territorial SEP rights. The second asks whether a court's unilateral determination of worldwide FRAND terms likewise frustrates foreign patent rights, or is instead a permissible adjudication of a global licensing relationship.

DS611 · HOLDING

China's ASI policy, as found, was inconsistent with Articles 28.1 and 28.2 read with Article 1.1: a generally applicable, coercive policy of worldwide ASIs frustrated the practical exercise of territorial SEP rights (Award paras 4.73–4.75, 4.108–4.109, 4.165–4.166).

→ *Not a ruling that ASIs as such breach TRIPS. China has since told the DSB that it withdrew the policy.*

DS632 · OPEN QUESTION

Global rate-setting ≠ **an anti-suit injunction.**

A Chinese judgment fixing worldwide FRAND terms operates on the licensing relationship rather than on litigation elsewhere, and DS611 itself says court intervention to settle FRAND terms is “not inherently or necessarily incompatible” with Art. 28.2 (para 4.162). Whether unilateral global rate-setting nonetheless “frustrates” Article 28 rights, and whether Article 4bis Paris reaches it, is what the DS632 panel must decide.

Article 1.1 — the meaning of “give effect to”

“Members shall give effect to the provisions of this Agreement.”

TRIPS Article 1.1, first sentence

The Article 25 Arbitrators (under the parties' MPIA-based procedures) read “give effect to” as broader than “implement” — an active, continuing duty whose corollary is that a Member must not frustrate the functioning of other Members' systems of protection and enforcement of IP rights (WT/DS611/ARB25, paras 4.68–4.75).

PANEL READING

Article 1.1 requires that Members **implement** the TRIPS provisions *within their own domestic legal systems*.

No transversal obligation about other Members' IP systems.

ARBITRATORS' READING

“Give effect to” > “implement.” It is an **active and continuing** duty.

Corollary: *a Member must give effect to TRIPS “without frustrating the functioning of the systems of protection and enforcement of IP rights implemented by other Members in their respective territories.” (paras 4.74–4.75; not an “additional obligation”, para 4.71)*

Read in the context of Article 7 (balance of rights and obligations), which informs the interpretation rather than creating a separate obligation (paras 4.68–4.71). TRIPS “does not establish a supranational system”, yet Members must not frustrate protection elsewhere (para 4.72).

Article 1.1 — the meaning of “give effect to”

ARBITRATORS’ READING

We acknowledge the arguments made by China that the TRIPS Agreement does not address issues of private international law. 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. 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.” *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.* (4.72)

Exclusive rights to prevent making, using, selling, importing

“A patent shall confer on its owner the following exclusive rights ... to prevent third parties not having the owner's consent from ... making, using, offering for sale, selling, or importing ...” — TRIPS Article 28.1(a)

1

Territorial rights

The Arbitrators agreed that Article 28.1 rights exist only within the granting Member's territory (Paris Convention Art. 4*bis*). The Award did not treat foreign patents as Chinese rights or hold that China adjudicated foreign infringement (paras 4.83–4.86).

2

But Article 1.1 corollary still applies

A Member must not frustrate the effective exercise of Article 28.1 rights that another Member has conferred within its own territory. The vector is the coercive effect of the policy on the right holder; the Chinese courts' grounds include no inquiry into the holder's Art. 28.1 rights (para 4.100).

3

ASI policy → frustration

Worldwide ASIs + cumulative daily fines impede SEP holders from preventing infringing acts in territories where the patent is granted.

VERDICT · China's ASI policy was inconsistent with Article 28.1 read in conjunction with Article 1.1, first sentence

The right to license — and FRAND



FRAND AND THE ARTICLE 28.2 LICENSING RIGHT

By giving an irrevocable FRAND undertaking to an SSO, a SEP holder **conditionally waives** its right not to license — on condition that both parties, the implementer above all, engage in **good-faith negotiation on FRAND terms**. (*SEP holders “conditionally waive their right under Article 28.2 to not conclude a licensing agreement”, paras 4.137–4.138, 4.154.*)

PANEL

All five disputes settled with a license.

→ *The right to conclude a licensing contract was, in fact, exercised. No breach.*

ARBITRATORS

Conclusion of a contract ≠ **meaningful exercise of the right**.

Holding (paras 4.154–4.166): the ASI option “alters the process of negotiation in a fundamental way” (4.156) and “removes a key incentive for negotiating licences” (4.161), so the policy frustrates the condition on which the SEP holder waived its right. Court intervention to settle FRAND terms is “not inherently or necessarily incompatible” with Art. 28.2 (4.162); an ASI without any FRAND-conduct inquiry may be.

VERDICT · China’s ASI policy was inconsistent with Article 28.2 read in conjunction with Article 1.1, first sentence

When, exactly, is an ASI TRIPS-incompatible?

The Award did NOT hold that ASIs are categorically TRIPS-incompatible. *It held that this particular ASI policy, with these features, frustrates Article 28 rights.*

Not a closed five-part test: the finding rested on the policy as found, and these features of it did the work:

1

Worldwide scope

Prohibits commencing/continuing/enforcing proceedings anywhere outside China — not just in China-connected forums.

2

Sought by implementers, not patentees

Issued at the request of implementers bringing Chinese FRAND-rate proceedings, against SEP holders as defendants.

3

No FRAND-conduct inquiry

Issuance does not depend on any finding that the SEP holder is acting unreasonably or that parallel litigation is vexatious.

4

Cumulative daily fines (RMB 600k–1m)

Use of penalty mechanisms in IP litigation; intended to coerce compliance.

5

Embedded in a general policy

Promoted by SPC, endorsed by NPC Standing Committee, designated typical/model cases — i.e., not a one-off.

The Award leaves room a finding that an ASI against a SEP holder that itself failed the good-faith condition would not infringe Art. 28.2 (para 4.160).

What TRIPS leaves largely to national law

PRIVATE INTERNATIONAL LAW

Conflict of laws

Choice-of-law rules, contractual choice-of-forum clauses, and the recognition and enforcement of foreign judgments are matters of national private international law. TRIPS contains no general rules of conflicts.

JURISDICTION OF COURTS

Who can hear what

Whether a Chinese, U.S., U.K., German, or Indian court has personal or subject-matter jurisdiction over a SEP/FRAND dispute is governed by domestic law, applicable treaties and EU instruments such as the Brussels I Recast Regulation — not TRIPS.

INTERNATIONAL COMITY

Doctrine, not treaty

The discretionary deference courts give one another remains a matter of judicial doctrine. TRIPS does not codify it. The Arbitrators rejected the EU's Art. 44.1 claim because foreign courts' authority to enjoin was left intact, not on comity grounds (paras 4.173–4.176).

So how did the EU win? The Award did not regulate jurisdiction or comity, and did not decide which court may hear a SEP/FRAND dispute. It held that a measure attributable to one Member (China's ASI policy) can frustrate another Member's TRIPS-mandated IP regime. The main vector is ASIs available without any required inquiry into the parties' FRAND conduct (paras 4.100, 4.157). Note that the obligation is substantive (Art. 28), not jurisdictional.

Practical takeaways

ASIs as a litigation tool

U.S. courts can still issue ASIs (Microsoft v. Motorola) and anti-anti-suit injunctions (Ericsson v. Samsung, E.D. Tex. 2021). The Award constrains a state's no-FRAND-inquiry ASI policy that systematically frustrates foreign patent enforcement, not the existence of ASIs as such. A differently built measure would be judged on its own operation, scope and effects.

WTO compliance ≠ private remedy

DS611 binds China at the state-to-state level (DSU Arts. 21 and 22 apply to the Award mutatis mutandis, Art. 25.4). It creates no direct cause of action for patentees in U.S. courts.

Article 63.1 publication obligation

Practical implication for tracking: significant Chinese SEP/FRAND decisions of general application must be published. This eases due diligence on parallel-litigation risk.

Strategic forum selection in SEP disputes

Expect continued forum-shopping among Brazil, China, Colombia, Germany (Munich, Mannheim, Düsseldorf, UPC), India, U.K., and possibly U.S. The Award does not change which courts can claim global FRAND-rate jurisdiction.

China's response

China told the DSB that the SPC withdrew the ASI policy by notice of 23 Sept. 2025, “to the extent that it ever existed” (EU announcement, 1 Apr. 2026). After initial technical problems the notice became accessible online from outside China; the Commission continues to monitor compliance.

The Article 1.1 doctrinal “surprise”

If the “non-frustration corollary” takes hold, future TRIPS disputes may target many other extraterritorial-effect measures: compulsory licensing, parallel-import rules, government-use orders, IP-related export controls. Arts. 6 (exhaustion) and 31 (unauthorized use) would apply.

China — Worldwide Licensing Terms for SEPs

DS611 attacked an attempt at jurisdictional supremacy (ASIs blocking foreign litigation without any FRAND-conduct inquiry). **DS632** attacks, on the EU's account, the basis for the jurisdiction itself: Chinese courts asserting jurisdiction to set *binding, worldwide* FRAND royalty rates for SEP portfolios “without the consent of both parties”, typically at the request of an implementer.

THE MEASURE

The EU challenges Chinese measures that, it says, allow Chinese courts (notably the SPC and intermediate courts) to issue **binding and enforceable** decisions setting global licensing terms — royalty rates included — for SEP portfolios that include *patents granted by other WTO Members, without both parties' consent*.

THE TRIGGERING DECISION

Chongqing First Intermediate People's Court

OPPO v. Nokia, judgment dated 22 November 2023 (released December 2023)

The EU identifies this decision, which set worldwide royalty rates for Nokia's SEP portfolio, as its lead example. EU's Art. 63.3 information request to China about this judgment was, the EU contends, not adequately answered.

PROCEDURAL POSTURE

20 Dec 2023: EU Art. 63.3 information request to China · **20 Jan 2025:** EU consultations request (WT/DS632/1) · **12 Feb 2026:** panel requested (blocked by China at the DSB on 24 Feb) · **19 Mar 2026:** Panel established · **21 May 2026:** Art. 25 appeal procedures notified (WT/DS632/6) · **13 Jul 2026:** Panel composed by the DG (Art. 8.7)

What the EU appears to be asking the panel to find

Art. 4bis Paris Conv. <i>via TRIPS Art. 2.1</i>	Independence of patents for the same invention in different countries. EU ask: that independence constrains binding worldwide licensing determinations.	PARTLY NEW
Art. 1.1, first sentence <i>Give effect to TRIPS</i>	The non-frustration corollary adopted by the Article 25 Arbitrators in DS611 (an award between consenting parties, not an adopted AB report).	CARRIED OVER
Art. 28.1 <i>Exclusive rights</i>	Right to prevent unauthorized making, using, selling, importing.	CARRIED OVER
Art. 28.2 <i>Right to license</i>	Right to conclude licensing contracts. EU ask: that non-consensual global rate-setting frustrates that right, as the ASI policy did in DS611.	PARTLY NEW
Art. 44 <i>Injunctions</i>	Judicial authority to order desisting from infringement (whole article, not just 44.1).	BROADENED?
Art. 63.3, 2nd sentence <i>Information on request</i>	Duty to give access to, or inform about, a specific judicial decision on a Member's reasoned written request where it believes its rights are affected. DS611 adjudicated only the 1st sentence (the 2nd-sentence claim was outside the Panel's terms of reference); not adjudicated in DS611.	NEW GROUND

Note: DS632 **drops** the Art. 41.1, Art. 63.1, and Section 2(A)(2) Accession Protocol claims that featured in DS611. It **adds** Art. 4bis Paris (via Art. 2.1) — directly invoking the territoriality of patents.

Different angles of attack by EU on behalf of SEP holders

DS611 · ANTI-SUIT INJUNCTIONS	DS632 · GLOBAL RATE-SETTING
<p>MEASURE ATTACKED</p> <p>Court orders forbidding SEP holders from pursuing foreign litigation (worldwide ASIs).</p>	<p>MEASURE ATTACKED</p> <p>Chinese courts setting binding worldwide FRAND royalty rates for SEP portfolios without both parties' consent.</p>
<p>HOW THE HARM OPERATES</p> <p>Coercion: in personam order + cumulative daily fines deter foreign enforcement.</p>	<p>EU THEORY OF ADVERSE EFFECT</p> <p>Allegedly direct: a Chinese judgment fixes global licensing terms with practical consequences for patents granted in other territories.</p>
<p>TRIGGER / LEAD CASE</p> <p>Five SEP cases — Huawei, ZTE, OPPO/Sharp, Xiaomi/InterDigital, Samsung/Ericsson.</p>	<p>TRIGGER / LEAD CASE</p> <p>OPPO v. Nokia (Chongqing First Intermediate People's Court, judgment dated 22 November 2023).</p>
<p>ARTICLE 4BIS PARIS (VIA 2.1)</p> <p>The Arbitrators cited it as confirming the territoriality of patent rights.</p>	<p>ARTICLE 4BIS PARIS (VIA 2.1)</p> <p>Centrally invoked. Whether patent independence reaches a licensing remedy is the open question.</p>
<p>STATUS (AS OF OCT 2026)</p> <p>Panel report 21 Feb 2025; Award 21 July 2025; China announced withdrawal of the ASI policy (SPC notice 23 Sept 2025).</p>	<p>STATUS (AS OF OCT 2026)</p> <p>Consultations requested Jan 2025; panel established 19 Mar 2026; Art. 25 appeal procedures agreed May 2026; panel composed by the DG 13 Jul 2026 (Molokomme, chair; Astudillo Gómez; Nottage); 16 third parties, incl. US, UK, Japan, India.</p>

Strategic and doctrinal stakes

01 DS632 will test the DS611 Art. 1.1 reading

If the DS632 panel fully adopts the DS611 Article 1.1 approach, the EU gains a stronger doctrinal footing against unilateral global rate-setting. Whether the measure “frustrates” Article 28 rights will still turn on the characterization and legal effects of the Chinese remedy. An EU win could constrain non-consensual judicial determination of worldwide terms; what it would mean for global portfolio licensing as such depends on the panel’s reasoning.

02 Article 4bis Paris: a territoriality-based challenge to global rate-setting?

EU argument: unilateral worldwide rate-setting constrains the territorial exercise of patents granted by other Members. Likely Chinese answer: a global rate concerns a licensing relationship, uses foreign patents only as inputs, and DS611 itself says court settlement of FRAND terms is not inherently incompatible with Art. 28.2 (para 4.162). Whether Article 4bis reaches the licensing-remedy context is the central unresolved question; it was not centrally pleaded in DS611.

03 The remedy gap question

DS611 addressed how SEP holders were pushed to settle in China. DS632 addresses what they are pushed to settle on. This pushes **past IP** into other areas of law understood to be within the Member’s sovereign rights (TRIPS does not harmonize contract law or allocate jurisdiction over cross-border licensing disputes, and has only a few competition rules, Arts. 8.2 and 40). As I see it, this will be a steep hill for the EU.

04 DS632 could have significant impacts on IP licensing

DS611 recognized that the FRAND commitment constitutes an obligation by the SEP holder. If the EU prevails in DS632, it is unclear at this stage what limiting principle could be applied to limit the holding to SEP licensing, meaning it could apply to the enforcement of other licensing agreements covering multiple territories.

Read together, DS611 and DS632 describe what the EU sees as a single Chinese strategy, contested on two fronts: first the restrictions on foreign litigation, now the binding worldwide licensing determinations themselves.

What is the precedential value of an MPIA award?



How much weight will future panels — and Members not party to the MPIA — give to the DS611 Award?

01

WTO dispute settlement is not a common-law system

Article 3.2 DSU calls for security and predictability, but neither stare decisis nor binding precedent applies. Each dispute is decided on its own merits.

02

Even Appellate Body reports are not, strictly, precedential

The AB consistently asked panels to follow its findings as a matter of consistency and predictability (absent cogent reasons not to do so), and panels overwhelmingly did so. Still, even adopted AB reports bind only the parties to the dispute (*US – Stainless Steel*).

03

But the MPIA is not the Appellate Body

MPIA awards are arbitral decisions under DSU Article 25 between consenting Members. They are notified (DSU 25.3) to the DSB, not adopted, although DSU Arts. 21 and 22 apply mutatis mutandis (Art. 25.4), so compliance and retaliation remain available. The Award binds China and the EU in this dispute; for later panels and non-participants it is persuasive, not binding. The awards also “cannot add to or diminish the rights and obligations provided in the covered agreements”.

04

DS632 will be “a” test case

China is an MPIA participant, and DS632 already has agreed Art. 25 procedures (WT/DS632/6). Will the DS632 panel cite the DS611 Award? Probably. Will China contest its weight on the merits? How that panel handles the Article 1.1 “non-frustration” approach will tell us a great deal.

OPEN QUESTIONS

After DS611 — and now DS632?



Will the DS632 panel (and possibly future Article 25 arbitrators) adopt the DS611 Article 1.1 “non-frustration” reading?



Does Article 4*bis* Paris Convention bar one Member's courts from setting effective rates for another Member's patents?



How will Chinese courts adapt now that the SPC has withdrawn the ASI policy “to the extent that it ever existed”?



Could a U.S. Section 337 exclusion order or German/UPC injunction face a symmetric TRIPS challenge under the DS611 reading of Article 1.1?



How do U.K. global-licence injunctions (*Unwired Planet*), German anti-anti-suit injunctions, and the German/UPC “corridor” practice fare under the same logic?

Thank you