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# The WTO dispute between China and EU over Chinese SEPs global rate-setting

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Back in January 2025, the EU initiated consultations at the World Trade Organization (WTO) to challenge the practice of Chinese courts to unilaterally set binding global royalty rates for non-Chinese standard essential patents (SEPs) without the consent of the parties to the litigation. According to the EU Commission press release, this unfairly pressures European high-tech companies to lower their royalty rates worldwide, granting Chinese manufacturers cheaper access to European technologies. Additionally, the EU claims this approach interferes with the jurisdiction of EU courts over patent matters and violates WTO rules, including transparency obligations under the TRIPS Agreement.

The initial 60 days term given to the parties to find a satisfactory solution in the WTO consultations stage has expired, and the EU could then request a panel to be appointed to hear the case.

***The background to the case***

Let's go back in time and see what specifically triggered this case. In December 2023, the Intermediate People's Court of Chongqing Municipality delivered the first global FRAND rate decision by a Chinese Court. It did so in *Oppo vs. Nokia*. A couple of months earlier, in September 2023, the Supreme People's Court in *InterDigital vs. Oppo* upheld the jurisdiction of Chinese courts in determining global licensing rates for SEPs. In doing so, it confirmed its precedents in *Oppo vs. Sharp* and another *Oppo vs. Nokia* 2022 dispute, which had also found that Chinese courts can maintain jurisdiction over such rates.

The *Oppo vs. Nokia* global rate determination worried the EU, though. Indeed, on 20 December 2023 the EU sent China an official request for information under Article 63.3 TRIPS Agreement, requesting to hand over the judgement. A partial English translation of the decision is available at the *thesedonaconference.org* website.

In the request for WTO consultations filed back in January, the EU has asked to "remove unfair and illegal trade practices by China in the sphere of intellectual property". This underscores the escalating tensions between the EU and China regarding technology standards and intellectual property rights in the strategically important Internet of Things (IoT) sector, where control over key technologies can dictate market dominance and economic advantage.

**The EU claims**

Specifically, the EU points out that Chinese courts have now the authority to determine, without the parties' consent, worldwide licensing conditions and royalty rates for SEPs portfolios which include non-Chinese SEPs; and that such conditions and rates are binding on both parties and enforceable in China. According to the EU, this curtails SEP owners' ability to enforce their rights in jurisdictions where their non-Chinese SEPs were granted, and the ability of non-Chinese courts to adjudicate these disputes.

The EU thus claims that China's global rate-setting approach is inconsistent with several obligations under the TRIPS Agreement. More specifically, such Chinese courts' practice would have the effect to restrict:

- the parties' ability to start or continue parallel legal proceedings in another country, and thus for the courts of that other state to decide questions on the registration or validity of a patent issued in that jurisdiction. This would be in contrast with the principle of independence (or territoriality) of patents under Article 4bis of the Paris Convention, as incorporated into Article 2.1 of the TRIPS Agreement;
- the parties' ability to start or continue parallel legal proceedings in another country to decide questions on: (a) patent rights granted outside China, or (b) licensing contracts based on such rights (in contrast with Article 28.1 and 28.2 of the TRIPS Agreement);
- the right of the owner of a non-Chinese SEP to freely negotiate and agree on FRAND contractual licence terms for the use of the SEP within the country that has granted that patent.

From a business perspective, as mentioned, the EU is concerned that Chinese courts may want to favour Chinese implementers by establishing cheap global FRAND rates, effectively pressuring "innovative European high-tech companies into lowering their rates worldwide, thus giving Chinese manufacturers cheaper access to those European technologies unfairly" (EC press release). In other words, the EU fears that Chinese courts' stance on global licensing could eventually lead to a transfer of technological and economic power, impacting European innovation and market share in the IoT landscape; and that China is leveraging its judicial system to favor domestic industries, potentially undermining the competitiveness of European companies.

***Global FRAND rates: the UK and Chinese approaches***

Yet, the EU's initiative at the WTO may appear somewhat unexpected, considering that courts in several jurisdictions had already unilaterally determined global licensing conditions and royalty rates, well before the Chinese Oppo vs. Nokia case.

This now regularly happens in the UK. The 2020 UK Supreme Court landmark decision in *Unwired Planet* has started this trend, followed by rulings in *Interdigital vs. Lenovo* and *Optis v. Apple*. Also, and more importantly, in *Unwired Planet* most sales of the patent infringing products had occurred outside the UK (predominantly in China). On the contrary, in the Chinese case which has pushed the EU to start the WTO consultations, the bulk of the production took place in China, which seems to make the dispute more connected to the country of the court which establishes the worldwide FRAND rate. Thus, while the principle of territoriality of patents seems to be contradicted in the scenario dealt with by UK courts, this may not be the case in the context of these Chinese disputes.

However, in the above UK cases licencing conditions were determined after a counterclaim to a

patent infringement action, with the caveat that in case the implementers decided not to accept the global licence established by the court, an injunction would be granted to exclude them from the UK market. The Chinese decision targeted by the EU complaint was instead issued as a result of an action brought directly by the implementer for the purpose of having a judicial FRAND determination. One may therefore note that the Chinese ruling setting global royalties appears less justified. Yet, a valid counterargument could be made that Chinese courts do so as they aim to address power imbalances by allowing implementers to seek fair terms pre-emptively, and avoid forum shopping by providing a venue for disputes with strong Chinese ties.

Moreover, UK courts in the mentioned decisions relied on the comparable licence approach eventually referring to the top-down as a cross check only to determine the royalty rate. On the other hand, in Oppo vs. Nokia the Chinese court extensively relied on the top-down approach when determining the 5G aggregate royalty rate, with the Court further determining the share of value contribution of 2G to 5G technologies to the smartphones at issue.

***Other countries' stance and what lies ahead***

Requests to join the WTO consultations have been filed by third countries, on different grounds. The UK explained that "UK courts have accepted jurisdiction to determine global licensing rates in appropriate cases. Therefore, any decision in these proceedings could impact on the United Kingdom's ability to adjudicate on such licensing disputes". Canada and Japan, on their part, stressed the lack of transparency and available information on the Chinese measures, also considering that China has not formally responded to the EU official request of 20th December 2023 for further information on the Chinese ruling in question. These countries also highlighted the negative effects on their own companies due to worldwide royalty rate-setting decisions made by China's courts.

The EU's request for consultations in this case follows the previous WTO dispute launched by the EU in February 2022. That controversy focuses on anti-suit injunctions granted by Chinese courts between 2020 and 2021, with the WTO panel expected to issue soon its final report.

The outcome of these WTO cases might not only shape the future of global FRAND rate-setting but also redefine the balance of power in international intellectual property governance, with significant implications for SEP holders, implementers, and cross-border trade relations.

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This entry was posted on Monday, March 31st, 2025 at 9:04 am and is filed under China, European Union, FRAND, SEP
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