POLICY BRIEF

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WTO arbitration on China's standard patents policy threatens TRIPS balance and national autonomy

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ABSTRACT

This article critically examines the WTO arbitration award in *China – Enforcement of Intellectual Property Rights* (WT/DS611/ARB25), which marks a significant departure from established interpretations of Article 1.1 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). The arbitrators endorsed a broad "anti-frustration" reading of the provision, effectively imposing cross-border obligations on WTO Members and challenging the autonomy of national courts. Although Article 1.1 of TRIPS was relied upon by the European Union only in conjunction with Article 28, the arbitrators treated it as an autonomous normative foundation for imposing cross-border constraints on members' judicial measures. The article contends that this expansion of Article 1.1 goes beyond its text and structure, risks undermining legitimate public-interest measures, and opens the door to non-violation type complaints that are excluded from TRIPS. The analysis underscores the need to preserve the balance between intellectual property enforcement and national policy space, especially in disputes involving public policy considerations.

KEYWORDS: Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), World Trade Organization (WTO), WTO Arbitration Award, China, TRIPS Article 1.1, National Autonomy, Intellectual Property Enforcement, Anti-Suit Injunction (ASI) Policy, Standard-Essential Patents (SEPs)

KEY MESSAGES

- The WTO arbitration award expands the obligation under TRIPS Article 1.1 beyond its text, creating cross-border obligations that risk undermining national judicial autonomy and policy space.
- By introducing an 'anti-frustration' reading of Article 1.1, the award could allow challenges to legitimate public-interest measures that affect the exercise of IP rights abroad.
- If relied on in future decisions, this interpretation may open the door to de facto non-violation complaints in TRIPS, weakening the balance between IP enforcement and national policy flexibility.

Cet article examine de manière critique la décision arbitrale de l'OMC dans l'affaire Chine – Application des droits de propriété intellectuelle *(WT/DS611/ARB25), qui marque un écart significatif par rapport aux interprétations établies de l'article 1.1 de l'Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce (ADPIC). Les arbitres ont approuvé une interprétation large de la disposition, visant à « éviter toute frustration », imposant ainsi des obligations transfrontalières aux membres de l'OMC et remettant en cause l'autonomie des tribunaux nationaux. Bien que l'Union européenne se soit appuyée sur l'article 1.1 de l'accord ADPIC uniquement en conjonction avec l'article 28, les arbitres l'ont considéré comme un fondement normatif autonome pour imposer des contraintes transfrontalières aux mesures judiciaires des membres. L'article soutient que cette extension de l'article 1.1 va au-delà de son texte et de sa structure, risque de compromettre des mesures légitimes d'intérêt public et ouvre la voie à des plaintes pour non-violation qui sont exclues de l'accord ADPIC. L'analyse souligne la nécessité de préserver l'équilibre entre l'application des droits de propriété intellectuelle et la marge de manœuvre politique nationale, en particulier dans les litiges impliquant des considérations d'ordre public.*

MOTS-CLÉS: *Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce (ADPIC), Organisation mondiale du commerce (OMC), Décision arbitrale de l'OMC, Chine, Article 1.1 de l'Accord sur les ADPIC, Autonomie nationale, Application des droits de propriété intellectuelle, Politique d'injonctions anti-poursuites, Brevets essentiels à des normes*

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Este artículo examina críticamente el laudo arbitral de la OMC en China: Observancia de los derechos de propiedad intelectual *(WT/DS611/ARB25), que supone una desviación significativa de las interpretaciones establecidas del Artículo 1.1 del Acuerdo sobre los Aspectos de los Derechos de Propiedad Intelectual relacionados con el Comercio (ADPIC). Los árbitros respaldaron una interpretación amplia "antifrustración" de la disposición, imponiendo de hecho obligaciones con efectos transfronterizos a los Miembros de la OMC y cuestionando la autonomía de los tribunales nacionales. Aunque la Unión Europea se basó en el Artículo 1.1 del Acuerdo sobre los ADPIC únicamente en relación con el Artículo 28, los árbitros lo trataron como un fundamento normativo autónomo para imponer restricciones transfronterizas a las medidas judiciales de los Miembros. El artículo sostiene que esta ampliación del Artículo 1.1 va más allá de su texto y estructura, corre el riesgo de socavar medidas legítimas de interés público y abre la puerta a reclamaciones por incumplimiento que están excluidas del ADPIC. El análisis subraya la necesidad de preservar el equilibrio entre la observancia de la propiedad intelectual y el espacio de política publica de los Miembros, especialmente en controversias que involucran consideraciones de política pública.*

PALABRAS CLAVES: *Acuerdo sobre los Aspectos de los Derechos de Propiedad Intelectual relacionados con el Comercio (ADPIC), Organización Mundial del Comercio (OMC), Laudo arbitral de la OMC, China, Artículo 1.1 del ADPIC, Autonomía nacional, Observancia de la propiedad intelectual, Política de amparo contra litigios, Patentes esenciales para cumplir con las normas técnicas*

本文批判性地审视了世贸组织在中国知识产权权利执行案（WT/DS611/ARB25）中的仲裁裁决，该裁决标志着对《与贸易有关的知识产权协定》（TRIPS）第1.1条既有解释的重大偏离。仲裁员采纳了对该条款的宽泛“反阻挠”解释，实质上向世贸组织成员施加了跨境义务，并对成员国国内法院的自主权构成挑战。尽管欧盟仅将《与贸易有关的知识产权协定》第1.1条与第28条结合使用，仲裁员却将其视为对成员司法措施施加跨境约束的独立规范基础。本文认为，此种对第1.1条的扩张性解释超越了条文本身及结构框架，不仅可能削弱合法的公共利益措施，更将为《与贸易有关的知识产权协定》排除在外的非侵权类申诉打开大门。分析强调，在涉及公共政策考量的事务中，必须维护知识产权执法与国家政策空间之间的平衡。

关键词：《与贸易有关的知识产权协定》（TRIPS）、世界贸易组织（WTO）、世界贸易组织仲裁裁决、中国、《与贸易有关的知识产权协定》第1.1条、国家自主权、知识产权执法、反诉禁令（ASI）政策、标准必要专利（SEPs）

1. Introduction

The recent World Trade Organization (WTO) arbitration award in *China – Enforcement of Intellectual Property Rights* (WT/DS611/ARB25) marks a worrying expansion of the obligations under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). The arbitrators endorsed a broad "anti-frustration" reading of Article 1.1—one that goes far beyond the requirement for WTO members to make enforcement mechanisms available within their own jurisdictions. This expansive interpretation, –even though Article 1.1 was relied upon only in a subsidiary and contextual manner, rather than as an autonomous basis of violation– raises serious due process concerns and the risk of undermining legitimate public policy measures in developing countries.

The dispute underscores the persistent tension between the treatment of standard-essential patents (SEPs) and patents on other subjects. At the heart of this tension is a structural mismatch: while patents are granted and enforced within national borders, technical standards — particularly in sectors like telecommunications and digital technology — are global by design, as they aim to ensure uniformity in the production and use of goods and services across markets using standardized technological platforms.

This tension has been amplified by inconsistent approaches to SEP licensing, especially around the interpretation of Fair, Reasonable, and Non-Discriminatory (FRAND) terms. Courts and policymakers in jurisdictions such as the European Union (EU) and the United States (US) have struggled to define and apply FRAND principles uniformly. As a result, legal uncertainty has increased, leading to more disputes and strategic litigation. In some cases, national courts have asserted the authority to set global royalty rates, despite the territorial limits of patent law. This expansive judicial assertiveness blurs the line between national patent enforcement and the global nature of standards, adding complexity to an already contentious area of intellectual property governance.

The filing and litigation of SEPs are deeply strategic decisions, influenced by the fact that countries vary significantly in how they approach patent protection and enforcement. As SEPs are typically part of global patent portfolios tied to products sold across multiple markets, disputes over their use often result in transnational litigation. Companies may need to initiate legal action in several jurisdictions to protect their interests or defend against infringement claims. This legal complexity is further intensified by national standards strategies, as many governments seek to secure technological leadership—particularly in critical and emerging technologies (CET) that carry strategic weight for economic competitiveness and national security. As a result, some countries are increasingly wary of having their domestic firms' SEPs adjudicated abroad, viewing such outcomes as potential threats to national interests and technological sovereignty.

2. Addressing SEPS and the Patent "Hold-Up" Problem

The "hold-up" problem remains a central concern in the licensing of SEPs, and it was a key reason why Standard Development Organizations (SDOs) introduced licensing rules in the first place. A "Hold-up" arises when implementers invest heavily in developing products that conform to a patented technical standard. Once that investment is made, switching to a non-compliant technology is no longer economically viable. This gives SEP holders considerable leverage, allowing them to demand royalties that may far exceed the value of their original contribution to the standard. If unremedied, this imbalance can inflate costs, reduce market competition, and deter innovation.

To mitigate this risk, several policy tools have been introduced. Chief among them is the requirement that SEP holders license their patents on Fair, Reasonable, and Non-Discriminatory (FRAND) terms. Because licensing discussions typically begin only after the implementer has incorporated the standard into their product, FRAND commitments are critical to preventing exploitative royalty demands. Courts and regulators have also taken steps to limit the availability of injunctions for FRAND--encumbered SEPs, recognizing that such remedies can give patent holders excessive negotiating power. In many jurisdictions, accepting a FRAND commitment is now seen as incompatible with seeking injunctive relief. Additionally, some experts argue that SEP-related hold-up should be treated as a competition law issue[1], pointing to the potential abuse of market power within the SDO framework. These approaches aim to strike a balance—protecting the rights of innovators while ensuring fair access to essential standard technologies for implementers.

The FRAND framework developed in the US and European Union (EU) has influenced regulatory approaches in other jurisdictions, including in Asia, contributing to a growing international consensus against the use of injunctions by SEP holders who have committed to FRAND terms. China, in particular, has leveraged both patent and competition law to restrict SEP enforcement, with the goal of facilitating the use of SEP and limiting royalty payments by domestic manufacturers especially in situations involving foreign patent holders.

Yet despite the trends toward global convergence, significant divergence remains in how FRAND is defined and applied. Different jurisdictions interpret what constitutes "fair" and "reasonable" in different ways. For instance, the European Commission has acknowledged that appropriate FRAND terms may vary by industry and the UK courts have explicitly rejected the idea of a single global FRAND rate. The existing variations have fueled litigation, requiring courts to step in to define FRAND terms. This has also encouraged forum shopping, as parties seek out to litigate jurisdictions perceived as more favourable to their interests—whether those of patent holders or technology implementers.

1 Yo S. Choi, "Standard essential patents - a comparison of approaches between East and West", *Queen Mary Journal of Intellectual Property*, Vol. 8, No.4 (2018), pp. 313-32. Available from https://www.ius.uzh.ch/dam/jcr:aa3e00ce-36cf-4f1d-9bda-7447212be12a/Heinemann-Choi%20Standard-Essential%20Patents.pdf.

3. Determination of Global Royalty Rates By Courts

A major development in SEP disputes is that national courts are increasingly willing to act like global licensing authorities. By defining FRAND terms, some courts now set **global** FRAND licenses that cover a company's entire SEP portfolio worldwide. This trend was triggered by the UK court's decision in *Unwired Planet v. Huawei*. This gives SEP holders a powerful strategic tool: instead of filing separate, expensive cases in multiple countries, they can bring a single case in a jurisdiction that is most favourable to them. The result is not only significant savings in litigation costs but also the ability to use certain courts as platforms for extending the global reach of their patents. In effect, these courts become instruments for the worldwide expansion of SEP holders' rights, influencing licensing outcomes far beyond the courts' own national borders.

Building on the approach first taken by the UK courts, several other national courts have also claimed the authority to set FRAND terms for global SEP portfolios. The Judicial Court of Paris exercised this power in *TCL v. Philips* and *Xiaomi v. Philips*, while the District Court of The Hague did so in *Vestel v. Philips*, and the US District Court for the Central District of California in *TCL v. Ericsson*. Chinese courts have gone further, with the Supreme People's Court repeatedly affirming jurisdiction over global royalty rates for SEPs. In *Sharp v. Oppo*, the Supreme Court even portrayed China as a leader, rather than a follower, in shaping global FRAND terms. Recently, the European Commission has also suggested that future FRAND determinations could be based on global rates.[2]

4. Anti-Suit Injunctions

The growing practice of national courts setting global FRAND rates has intensified competition between jurisdictions, creating both a "race to the courthouse" among litigants and a "race to the bottom" among courts. This dynamic has encouraged, as noted, widespread forum shopping, as parties strategically file cases in jurisdictions most likely to favor their interests. Courts, in turn, have positioned themselves as attractive venues by asserting authority over global licensing terms. For SEP holders, jurisdictions that tend to set higher royalty rates present clear advantages, while implementers gravitate toward courts that are more hostile to patent holders and inclined to impose lower rates. China has emerged as a particularly important forum for implementers, with courts consistently setting FRAND royalty rates lower than those typically determined in Europe or the United States. This approach, seen for example in *Huawei v. Conversant* and *Oppo v. Sharp*, has not only made China a preferred venue for companies seeking to reduce licensing costs but has also reinforced China's domestic industry competitiveness and its position as a global rule-setter in standards governance.

The competitive judicial environment has also amplified the role of anti-suit injunctions (ASIs) in SEP disputes. ASIs are court orders that restrain a party from initiating or continuing litigation in another jurisdiction. Though they date back to fifteenth-century England, their

2 European Commission, Proposal for a Regulation of the European Parliament and of the Council on Standard Essential Patents and Amending Regulation (EU) 2017/1001 (Brussels, 2023. Available from https://single-market-economy.ec.europa.eu/publications/com2023232-proposal-regulation-standard-essential-patents_en.

modern use in global SEP disputes has taken on new significance. In theory, ASIs reduce litigation costs, streamline disputes, and prevent conflicting judgments across multiple jurisdictions. In practice, however, they have sparked a cycle of escalating legal battles. In *Microsoft v. Motorola* (US), one of the earliest major SEP cases to involve ASIs, the US courts blocked Motorola from enforcing a German injunction while FRAND issues were being determined domestically. More recently, Chinese courts have aggressively used ASIs in SEP disputes, most notably in the referred to cases *Huawei v. Conversant* and *Xiaomi v. InterDigital*, where the Supreme People's Court granted ASIs to prevent foreign litigation from undermining its jurisdiction over global FRAND determinations. These moves triggered responses abroad: courts in Germany and India, for example, issued anti-anti-suit injunctions (AASIs) to protect their own proceedings, while some cases escalated further into anti-anti-anti-suit injunctions (AAASIs).

This escalating use of ASIs and their countermeasures reflects the intersection of legal jurisdictional choices and geopolitics in SEP disputes. In effect, SEP litigation has become a battleground not only between patent holders and implementers but also between competing national jurisdictions. The WTO emerged as a theatre of this battle in the dispute *China-Enforcement of Intellectual Property Rights*.

5. The WTO Dispute

The dispute concerned the consistency of China's measures with TRIPS Agreement. The EU challenged both China's unwritten ASI policy—developed by the Supreme People's Court and endorsed by the National People's Congress Standing Committee—as well as five individual ASI decisions: *Huawei v. Conversant*, *ZTE v. Conversant*, *OPPO v. Sharp*, *Xiaomi v. InterDigital*, and *Samsung v. Ericsson*. In addition, the EU raised transparency concerns under the Agreement, arguing that China failed to publish the ASI decisions in *ZTE v. Conversant*, *OPPO v. Sharp*, and *Xiaomi v. InterDigital*. The ASI policy as implemented by Chinese courts blocked patent holders from pursuing or enforcing their rights in foreign jurisdictions, backed by daily fines for non-compliance. The EU argued that these decisions violated several provisions of the TRIPS Agreement, including Articles 1.1, 28.1, 28.2, 41.1, 44.1, 63.1, and 63.3, as well as Section 2(A)(2) of China's WTO Accession Protocol.

Established in January 2023, the WTO Dispute Settlement Panel examined China's use of ASIs in litigation over FRAND determinations for SEPs. The Panel made several key findings on the EU's challenges to China's ASI policy and related measures. First, the Panel confirmed that China's ASI policy existed as an unwritten rule or norm of general and prospective application, and that it fell within the scope of the dispute. However, the Panel largely rejected arguments that the policy violated substantive provisions of the TRIPS Agreement, finding no inconsistency with Articles 28.1, 28.2, 41.1, or 44.1. Similarly, it declined to rule substantively on the EU "as applied" claims against five individual ASI decisions, reasoning that separate findings would be duplicative and not contribute to resolving the dispute.

The Panel did, however, uphold parts of the EU claims concerning transparency. It found that China had breached its obligations under Article 63.1 of TRIPS by failing to publish the decision in *Xiaomi v. InterDigital*, which constituted a judicial decision of general application. It also determined that China acted inconsistently with Article 63.3 by not supplying certain requested information related to ASIs. By contrast, the Panel ruled that the ASI decisions in *ZTE v. Conversant* and *OPPO v. Sharp* were not of general application and thus did not fall within the publication obligation. Finally, the Panel rejected the EU claims under China's Accession Protocol, finding insufficient evidence that Chinese courts applied laws in a non-uniform, unreasonable, or partial manner, or that cumulative daily fines imposed for ASI violations were unpredictable or excessive.

EU and China mutually agreed, to enter into arbitration under Article 25 of the WTO Dispute Settlement Understanding (DSU) to decide any appeal from any final panel report as issued to the parties. The EU filed an appeal challenging the Panel's interpretation of the TRIPS obligations in relation to China's ASI policy. The EU argued that the Panel erred in finding no inconsistency with Articles 1.1, 28.1, 28.2, 41.1, and 44.1 of TRIPS, and requested that the Arbitrators also find five specific ASI decisions inconsistent with China's obligations.

China filed an "Other Appeal", contesting the Panel's finding that an unwritten ASI policy existed and its interpretation of TRIPS transparency obligations under Article 63.1, particularly regarding the *Xiaomi v. InterDigital* decision.

The arbitrators issued a mixed outcome that significantly reshaped the Panel's findings. They reversed the Panel's interpretation of TRIPS Article 1.1 and concluded that China's ASI policy was inconsistent with Articles 28.1 and 28.2, read together with Article 1.1, because it effectively prevented SEP holders from exercising their exclusive rights and undermined their ability to negotiate and conclude FRAND licenses in other WTO members' territories. The arbitrators observed that WTO members must not only implement TRIPS obligations domestically but also refrain from adopting measures that frustrate the functioning of intellectual property systems in other jurisdictions.

At the same time, the arbitrators upheld the Panel's findings that China's ASI policy exists as an unwritten but binding norm, and that China breached its transparency obligations by failing to publish the *Xiaomi v. InterDigital* ASI decision. However, they rejected the other claims by the EU, affirming that the ASI policy was not inconsistent with TRIPS Articles 44.1 or 41.1, and declining to make findings on the five individual ASI decisions. The arbitrators ultimately recommended that China bring its ASI policy into conformity with TRIPS obligations.

6. The Pivotal Role of Interpretation of Article 1.1 of TRIPS

The central issue in this dispute was whether China's ASIs inter-

fered with the TRIPS obligation to enforce intellectual property rights. Importantly, TRIPS only obliges Members to make enforcement mechanisms available; it does not guarantee their use, outcomes, or commercial effectiveness, nor does it require that such mechanisms remain unaffected by foreign judicial proceedings. The arbitrators' attempt to read Article 1.1 as imposing extraterritorial obligations on Members contradicts this foundational principle.

Article 1.1 states

> Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

Specifically, the outcome of this dispute hinged on the reading of the first sentence of article 1.1 of TRIPS, particularly the meaning of the obligation of members to **give effect** to the provisions of TRIPS. While agreeing that "give effect to" means to "make operative," the EU contended that this obligation is broader and requires Members not only to implement TRIPS provisions internally but also to refrain from adopting measures that undermine the protection and enforcement of intellectual property (IP) rights in other Members' territories.

The Panel rejected the EU argument and took an expansive view of Article 1.1. It held that the first sentence only requires Members to apply the TRIPS rules within their own domestic legal systems and found no evidence that it creates any broader obligation tied to the treaty's object, purpose, or to how other Members implement TRIPS. On this basis, the Panel concluded that the EU had not shown China's ASI policy to be inconsistent with Articles 28.1, 28.2, or 44.1, since those provisions, even when read with Article 1.1, do not extend to protecting patent rights or judicial authority in other Members' territories.

The Arbitration Award overturned the Panel's reading of Article 1.1 of TRIPS, which had limited the provision's interpretation to requiring only domestic implementation, and instead adopted an "anti-frustration" interpretation. The arbitrators held that the phrase "give effect" creates an active and ongoing duty for WTO Members, not just to apply TRIPS rules at home, but also to avoid measures that undermine the protection and enforcement of IP rights in other Members' territories. They reasoned that TRIPS would be rendered ineffective if one Member's actions could block the functioning of another's IP system and emphasized that the treaty's objective of balancing rights and obligations under Article 7 would be defeated if such frustration were allowed. This shift in interpretation provided the legal foundation for finding China's ASI policy inconsistent with Articles 28.1 and 28.2 of TRIPS.

Article 1.1 of TRIPS only mandates that Members "give effect" to the Agreement's provisions within their own legal systems. The Panel correctly interpreted this to mean domestic implementation—not a prohibition against adopting domestic measures that might impact rightsholders' positions in other jurisdictions. The ASI policy applied in China does not prevent any other WTO member to comply with its enforcement obligations under the Agreement, i.e., to make available measures for right--holders to enforce their rights at their discretion. Such a policy only concerns what right-holders, and not WTO members can do. Therefore, it does not affect in any way TRIPS obligations, which exclusively bind Member States, not right-holders.

The arbitrators' reinterpretation effectively transforms Article 1.1 into a plaform for cross-border enforcement, violating both its plain language and the rules of treaty interpretation under the Vienna Convention on the Law of Treaties. The Panel had rightly cautioned that interpreting treaty provisions in the light of object and purpose of the treaty (in this instance the TRIPS Agreement) does not override the need to apply customary rules of treaty interpretation. As noted in footnote 625 of the Panel Report: "Whether such an obligation exists can only be determined by applying the customary rules of interpretation to discern the precise scope and content of a given provision." This principle was overlooked by the arbitrators.

While Article 1.1 was not advanced as a stand-alone basis of claim, the EU did invoke it in conjunction with Articles 28.1 and 28.2 of TRIPS, treating it as a contextual provision informing the scope of the exclusive rights guaranteed under Article 28. The arbitrators, however, relied on Article 1.1 in a manner that went beyond its articulation in the EU appeal, treating it as an autonomous source of obligation rather than as a contextual provision linked to Article 28. This shift is particularly notable when contrasted with the Panel's approach, which had confined Article 1.1 to its traditional role as a provision concerned with domestic implementation and rejected the contention that it could extend the territorial reach of Articles 28.1 and 28.2 or shield foreign judicial proceedings from the effects of domestic measures such as anti-suit injunctions.

Seen in this light, the concern under Article 7 of the DSU is not that Article 1.1 was entirely absent from the EU claims, but that it was recast into something qualitatively different from what had been pleaded. Article 1.1 was not pleaded as an independent normative anchor capable of sustaining the findings ultimately derived from it. By elevating the provision into the decisive basis for an "anti-frustration" obligation with cross-border effects, the arbitrators effectively introduced a legal foundation that was neither clearly articulated as such by the complainant nor allowed by the text and structure of TRIPS. This raises due process concerns under the DSU and reinforces the broader objection to the award's expansion of TRIPS obligations, even if it does not, in itself, constitute the principal criticism of the decision.

Thus, the Arbitrators' interpretation of Article 1.1 in *China – Enforcement of Intellectual Property Rights* stretches the provision far beyond its textual boundaries and risks destabilizing

the TRIPS regime. By reading an "anti-frustration" obligation into the first sentence of Article 1.1, the Arbitrators effectively transformed what had long been understood as a domestic implementation requirement into a duty constraining members' policies whenever they may frustrate the exercise of IP rights in other jurisdictions. This expansion directly impacts the treatment of anti-suit injunctions in SEP disputes. National courts have increasingly issued ASIs to manage overlapping jurisdictional conflicts in global FRAND litigation, but under the arbitrators' reasoning, such domestic judicial measures could now be challenged at the WTO as violations of TRIPS if they are said to hinder patent holders' enforcement strategies abroad. This places WTO panels and arbitrators in the position of second-guessing the balancing acts undertaken by national courts in SEP disputes—where competition, innovation, and industrial policy are all at stake.

The broader implications of this interpretation are even more troubling. The arbitrators' logic risks importing non-violation complaints into TRIPS through the backdoor. By allowing claims based not on the breach of specific obligations, but on the perceived "frustration" of commercial expectations abroad, the ruling threatens to erode TRIPS flexibilities. Public-interest policies such as compulsory licensing, price regulation, and pooled procurement—long accepted as TRIPS-compliant—could now be vulnerable to challenge under this expanded interpretation.

This point can be illustrated by the following hypothetical scenario:

Price Regulation for Essential Medicines

Facing high treatment costs for certain diseases, a government caps the maximum retail price for relevant drugs to ensure universal access. The measure is TRIPS-consistent, as Members have freedom to regulate prices. Still, a patent holder could argue that such regulation frustrates their rights by preventing the full enjoyment of their right of charging a higher price in countries that rely on "reference pricing" to cap prices in their own jurisdiction. Recently, the United States considered such mechanisms through the "Most-Favored-Nation" (MFN) pricing model in Medicare, which requires companies to price their drugs based on the lowest price in comparable countries.[1] On this logic, price controls—intended to protect public health—become vulnerable to WTO challenge as frustrating the enforcement of foreign IP systems.

1 United States, *Delivering Most-Favored-Nation Prescription Drug Pricing to American Patients*, Executive Orders (Washington, The White House, 2025). Available from https://www.whitehouse.gov/presidential-actions/2025/05/delivering-most-favored-nation-prescription-drug-pricing-to-american-patients/.

7. Conclusion

The Arbitration Award in *China – Enforcement of Intellectual Property Rights* departs from both the text and purpose of the TRIPS Agreement. By constructively interpreting Article 1.1 in contradiction with the principles of the VCLT to impose on WTO Members an extraterritorial obligation not contained in the Agreement—despite no independent claim under that provision in the appeal — the arbitrators have set a dangerous precedent. It invites WTO oversight into judicial tools like ASIs, which courts across jurisdictions have developed to manage the complexities of global FRAND litigation. These risks undermining the autonomy of national courts and multiplying SEP disputes, which already straddle the boundaries of competition, innovation, and industrial policy. It undermines national autonomy in an area unconstrained by TRIPS thereby narrowing the policy space available to developing and other WTO member countries. By effectively importing non-violation type complaints into TRIPS by reading an anti-frustration obligation into TRIPS, the award opens the door for challenges to legitimate public policy measures. This, however, is beyond the powers of the WTO panels including arbitration tribunals under the DSU.

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