

Patent Infringement Litigation over SEP's boosted by recent WTO Decision

The Award of the WTO appeal Arbitrator was circulated to WTO Members on 21 July 2025.¹ The European Union (=Complainant) brought the case against China (=Respondent) three years ago regarding measures that allegedly adversely affect the protection and enforcement of intellectual property rights. The measures at issue revolve around Chinese courts' ability to prohibit patent holders from enforcing or using their patent rights (by way of patent infringement litigation or licensing contracts) outside of China by issuing anti-suit injunctions in China.

Anti-suit injunctions² are established litigation tools in common law jurisdictions. The basic idea is that a court in one jurisdiction prohibits a plaintiff from litigation in another jurisdiction. Typically, the patent implementer brings an anti-suit injunction motion in one country to prohibit the holder of a Standard Essential Patent (SEP)³ from obtaining or enforcing the injunction for patent infringement against the patent implementer in another country until FRAND⁴ licensing terms have been decided by the court issuing the anti-suit injunction.

I. My Summary of the Main Issues of the Award of the Arbitrators

1. Regarding Patent Infringement Litigation:

WTO rules⁵ require that Members not frustrate a patent owner's ability to exercise the exclusive rights conferred on it by another WTO Member under that provision, i.e. to prevent third parties not having the patent owner's consent from making, using, offering for sale, selling, or importing patented product.

¹ Documents of this WTO Dispute Settlement case no. DS611 are available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds611_e.htm

² See for details Christoph Jaeckel, Anti-Suit Injunctions in Patent Litigation, published 11 November 2022 on <https://jaeckel-ip.de/veroeffentlichungen>

³ SEPs are necessary for a product or technology to meet specific industry standards.

⁴ Fair, Reasonable, and Non-Discriminatory licensing terms for patents.

⁵ Article 28.1, read in conjunction with Article 1.1., first sentence of the TRIPS Agreement.

2. Regarding Patent Licensing:

WTO rules⁶ require that Members not frustrate a patent owner's ability to exercise its right to conclude licensing contracts as conferred in the territory of another WTO Member under that provision.

3. The Arbitrators found that China's ASI policy is inconsistent with the above cited provisions.⁷
4. The Arbitrators upheld the Panel's finding that the EU had provided sufficient evidence and argumentation to demonstrate the existence of the ASI policy and that its specific nature is that of a rule or norm of general and prospective application.

II. Relevance of the Award of the Arbitrators

1. Relevance for Holders of Standard Essential Patents

- Holders of Standard Essential Patents are more likely to enforce their patents outside of China without the risk of being blocked by anti-suit injunctions issued by Chinese courts.
- Their ability to conclude favorable licensing contracts with implementors of Standard Essential Patents is upheld.

2. Relevance for the Respondent and for Implementers of Standard Essential Patents

- Anti-suit injunctions issued by Chinese courts preventing foreign holders of SEP's from patent enforcement outside of China may no longer be available for SEP implementers.
- China has 90 days to revise its anti-suit injunction policy. Otherwise, its ability to issue global anti-suit injunctions will be inconsistent with its WTO obligations.
- Courts in China may still issue domestically limited anti-suit injunctions without extraterritorial effect.

3. Relevance for other Jurisdictions

- Limits extraterritorial judicial interference by courts in litigation of intellectual property rights.
- Courts in jurisdictions where anti-suit injunctions are established tools in patent litigation (i.e. common law jurisdictions) may be less inclined to issuing anti-suit injunctions in the future.

Christoph Jaeckel

⁶ Article 28.2, read in conjunction with Article 1.1., first sentence of the TRIPS Agreement.

⁷ Article 28.1 and Article 28.2 respectively, each read in conjunction with Article 1.1., first sentence of the TRIPS Agreement.