

# A freehand for FRAND?

How Assess FRAND in the WTO Legal Regime

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# The Argument

- Treatment of FRAND has not been addressed in WTO legal texts
- But we are already experiencing the first dispute in this context
  - For now, the dispute concerns the jurisdictional ambit of measures
  - But this could change in the future
  - And probably, substantive issues could influence the outcome in the current case now before a WTO panel (DS611)

## The Key Issues

- In DS 611 (EU vs China) the panel will face the questions:
  - Can Chinese courts set the rules for FRAND worldwide?
  - If yes, on what basis?
- But think: what are the worldwide FRAND terms?
  - Is China-standard a world standard?
  - What if others act like China?

## It All Started with Conversant vs Huawei (and vice versa)

- It all starts in Wales
- Huawei had allegedly infringed patents by Conversant
  - Conversant holds portfolio SEPs developed by ETSI (EU Telecoms)
  - No agreement on compensation hence lawsuit before Welsh court
  - Conversant requests worldwide FRAND terms (% of price of standard-compliant goods)
  - Different rates for 2G, 3G etc.; major- other markets (China included)
  - Conversant wins but Huawei submits dispute in Nanjing, China
  - China court: some patents invalid, not infringed, FRAND for all rest
  - In the meantime SPC 2020 decision: cannot enforce Welsh judgment in China; anti-suit injunction: cannot initiate injunction / similar relief **anywhere** (1mio RMB); China courts set FRAND worldwide

## DS611

- EU complains vs China claims enforcement of IP rights in China
  - Prohibits patent holders from asserting rights in other jurisdictions
  - Anti-suit injunction (penalties) is unreasonable
  - Decision by SPC should be set aside
  - Violation of TRIPs (a few provisions, key is 1 and 28.1): restrict exercise by patent owners

# The WTO Legal Benchmark

- A patent shall confer on its owner the following exclusive rights:
  - where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of making, using, offering for sale, selling, or importing for these purposes that product;
  - where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.
- **Jurisdictional clause is missing in Art. 28 (as in 41/44, also invoked)**

## What Does the Panel Have to Address?

- How define permissible jurisdictional ambit of SPC decision?
  - Law is unclear: obvious place to start is PIL
  - Territoriality / nationality based jurisdictions
  - Here it is not the nationality of right-holder that confers jurisdiction

## One Step Beyond: the Incomplete Regime

- Assume Huawei wants to use a SEP in China and does not agree on price to pay to Conversant
- Assume further that the Welsh court had decided on FRAND for EU market: how decide on FRAND?
  - WTO law knows of (minimum) harmonized IP regime, but does not include harmonized antitrust regime
  - How define FRAND in harmonized, WTO-wide manner? Are not prices endogenous in markets? Should it be harmonized then?



## The Constraint: Lacking Institutional Infrastructure

- WTO adjudicators are selected (sometimes) from a roster at the initiative of the Secretariat
- Roster contains few TRIPs experts and almost no antitrust experts
- Roster also contains very few public international lawyers
- The questions in DS611 concern permissible jurisdiction and antitrust
- Two IP experts and a diplomat form the DS611 panel

## Damage Control

- What should the DS611 panel do then?
- Should it go ahead and adjudicate or pronounce a non liquet?
- Non liquet has happened only in GATT, never in WTO