

ground that the fines to be imposed in the event of non-compliance constituted a very real risk to the interests of SEP holders.

8 CONCLUSIONS AND RECOMMENDATION

8.1. With respect to the existence of an ASI policy, the Panel finds that:

- a. The ASI policy is properly within the Panel's terms of reference.
- b. The European Union has substantiated the precise content of the ASI policy.
- c. The European Union has demonstrated that the ASI policy is a rule or norm of general and prospective application. It is not necessary, therefore, for the Panel to address the European Union's alternative argument that the ASI policy could be characterized as ongoing conduct.

8.2. With respect to the consistency of the ASI policy with the TRIPS Agreement, the Panel finds that:

- a. The European Union has not demonstrated that the ASI policy is inconsistent with Article 28.1, whether or not read in conjunction with Article 1.1, first sentence of the TRIPS Agreement.
- b. The European Union has not demonstrated that the ASI policy is inconsistent with Article 1.1, first sentence read in conjunction with Article 28.2 of the TRIPS Agreement.
- c. The European Union has not demonstrated that the ASI policy is inconsistent with Article 1.1, first sentence read in conjunction with Article 44.1 of the TRIPS Agreement.
- d. The obligation in the second sentence of Article 41.1 is not applicable to the ASI policy, as the ASI policy is not an enforcement procedure as specified in Part III.

8.3. With respect to the European Union's claims concerning the five individual ASIs, the Panel declines to make findings with respect to their consistency with Articles 1.1, 28.1, 28.2, 41.1, and 44.1 of the TRIPS Agreement as any findings on these measures would be duplicative and not aid in securing a positive solution to the dispute.

8.4. With respect to the transparency obligations under the TRIPS Agreement, the Panel finds that:

- a. The decision issuing an ASI in *Xiaomi v. InterDigital*, read together with the reconsideration decision in the same case, is a final judicial decision of general application made effective by China pertaining to the subject matter of the TRIPS Agreement. China's failure to publish that decision, read together with the reconsideration decision in the same case, or to make it publicly available in such a manner as to enable governments and right holders to become acquainted with it, is inconsistent with Article 63.1 of the TRIPS Agreement.
- b. The decisions issuing ASIs in *ZTE v. Conversant* and *OPPO v. Sharp* are not of general application and are, therefore, outside the scope of the publication obligation in Article 63.1 of the TRIPS Agreement.
- c. The information the European Union requested in Question V of its written request for information is information of the sort referred to in Article 63.1 of the TRIPS Agreement. China's failure to be prepared to supply that information is, therefore, inconsistent with Article 63.3, first sentence of the TRIPS Agreement.
- d. The European Union's claim under Article 63.3, second sentence of the TRIPS Agreement is outside the Panel's terms of reference.

8.5. With respect to the European Union's claims under Section 2(A)(2) of China's Accession Protocol, the Panel considers that findings on the five ASIs with respect to the European Union's claims under Section 2(A)(2) would aid in securing a positive solution to the dispute, and finds that:

- a. The European Union has not demonstrated that, by applying the relevant legal regime in an unpredictable manner, Chinese courts applied China's laws, regulations or other measures in a non-uniform manner.
- b. The European Union has not demonstrated that, by issuing ASIs exclusively in SEP litigation, Chinese courts applied China's laws, regulations or other measures in a non-uniform manner.
- c. The European Union has not met its burden of demonstrating that, by imposing cumulative daily fines, Chinese courts applied China's laws, regulations or other measures in a manner that was non-uniform.
- d. The European Union has not demonstrated that in issuing the five ASIs at issue in this dispute Chinese courts applied China's laws, regulations or other measures in a manner that was not impartial.
- e. The European Union has not demonstrated that, by applying the relevant legal regime in an unpredictable manner, Chinese courts applied China's laws, regulations or other measures in a manner that was unreasonable.
- f. The European Union has not demonstrated that the Chinese courts' determination of the amounts of the fines to be imposed in the event of violation of the ASIs was unreasonable.
- g. The European Union has not demonstrated that Chinese courts applied China's laws, regulations or other measures in a manner that was unreasonable on the ground that the fines to be imposed in the event of non-compliance constituted a very real risk to the interests of SEP holders.

8.6. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment accruing under that Agreement. In view of the foregoing, the Panel concludes that, insofar as China has acted inconsistently with the provisions of the TRIPS Agreement, it has nullified or impaired benefits accruing to the European Union under that Agreement.

8.7. Pursuant to Article 19.1 of the DSU, the Panel recommends that China bring its measures into conformity with its obligations under the TRIPS Agreement.
