Non-Discrimination Prong of FRAND: Methodologically in Contrast to WTO Non-Discrimination Principle and with Special Reference to China's Related Judicial Practice

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Abstract

The kernel of the non-discrimination principle seems to be easily understandable, but actually a specific interpretation of it could be very knotty in the complicated FRAND context. A methodologically comparative illumination can be conducive to uncovering the inherent complexity of the non-discrimination principle. In addition, the non-discrimination prong of FRAND is unavoidably intertwined with non-disclosure agreements between SEP licensors and licensees. To achieve the goal of non-discrimination normally depends on sufficient disclosure of earlier comparable licensing terms regarding royalty rates, but confidentiality-related issues in this domain are still very intractable in reality. As an increasingly important jurisdiction over SEP-based legal disputes, China also encountered the problem of how to appropriately and satisfactorily interpret legal issues regarding the non-discrimination prong. Some potential challenges concerning non-discrimination issues in SEP-based cases in China may lie ahead. The theoretical and practical controversies over the non-discrimination prong of FRAND still exist globally, and thus more in-depth relevant research needs to be done, especially in the face of an upcoming era of unparalleled interconnectivity arising from 5G, IoT, AI, and so on.

A Brief Introduction to the Non-Discrimination Prong of FRAND

In recent years, along with the increasing importance of standard essential patent (SEP)[1] and the concomitant severity of worldwide SEP-based litigations in the sector of information and communications technology (ICT), some articles have explored the non-discrimination prong of the well-known licensing terms of fair, reasonable, and non-discriminatory (FRAND) in whole or in part.[2] Non-discrimination, in the FRAND-related scenario, usually refers to a benchmark by which similarly situated standard implementers should pay the same or at least similar royalty rates. Although there are a variety of seemingly distinctive definitions of the non-discriminatory principle in different specific scenarios, the kernel of this principle is perhaps easily understandable. Accordingly, to a certain degree, it can even be deemed common sense.

The essence of the non-discrimination prong of FRAND seems to be substantially unchanged, and some inherent elements have even been gradually clarified. For instance, as observed by a court, "the obligation of the patent owner to license its patents on non-discriminatory terms and conditions remained essentially unchanged between the 1993 and 1994 versions of the ETSI IPR policy, and continues in effect today."[3] (ETSI: European Telecommunications Standards Institute). The sitting judge of this case elucidated some crucial points concerning the specific interpretation and application of FRAND, especially the non-discrimination prong.

Nevertheless, just as perceived and asserted by Voltaire, *common sense is not so common*. This extensively quoted assertion is more so in the complicated context of FRAND-related issues, which have been profoundly influenced by the simultaneous rapid unfolding of technological development and economic globalization in the past few years. For example, the mere terminology of "similarly situated" could be very knotty for an adjudicator to appropriately and satisfactorily interpret in a specific case based on a specific set of facts.[4] It seems that there are no universally applicable hard and fast rules for specifying similarly situated firms, and therefore, to some extent, such identification depends on specific facts case by case. Another prime example is the sharp contrast between a hard-edged non-discrimination obligation without further consideration of the distortion of competition and non-discrimination obligation including consideration of the distortion of competition.[5] Furthermore, if other potentially relevant factors, like licensing of patent portfolios encompassing SEPs and non-SEPs, also have to be appropriately considered in some complicated patent-based transactions, issues regarding non-discrimination could be much knottier.

As revealed below from a methodologically comparative point of view, whether in the context of the World Trade Organization (WTO) or in the FRAND-

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based scenario, the legal adjudications regarding the specific application of the non-discriminatory principle in real cases were usually pivotal to the final outcome and, in the meantime, could be very complicated and contentious. This methodologically comparative illumination, especially in combination with various institutional elements in specific contexts, may be conducive to uncovering the inherent complexity of the principle of non-discrimination.

Non-Discrimination Principle in the WTO Scenario: From a Methodologically Comparative Perspective

Actually, the non-discrimination principle is pervasive in both domestic legal systems and international contexts. A prime example in international contexts is the non-discrimination principle in the WTO multilateral trading system. For example, there are essentially similar most favored nation (MFN) principles in both the WTO and the antitrust-related legal domain in the United States and the European Union.[6] Specifically, in a following part in which the case of *Huawei v. InterDigital* is addressed, Interdigital explicitly made an MFN-based objection to the first-instance court's judgment on the non-discrimination prong in its appeal.

In addition to MFN, the other specific embodiment of the overarching non-discrimination principle in the WTO scenario is the principle of national treatment, which is more pertinent as a methodological contrast with the non-discrimination prong of FRAND herein. With respect to the national treatment principle, it is enshrined in numerous agreements in the WTO institutional framework. The most contentious element, among other things, is the methodological counterpart of "similarly situated firm" in the FRAND scenario, that is, "like product" contained in the General Agreement on Tariffs and Trade (GATT) (e.g., the pertinent provision of Article III:4). Briefly speaking, from the methodological perspective, the general ways of defining "similarly situated firm" in the FRAND scenario and "like product" in the WTO scenario are inherently comparable and alike. As to the interpretation of "like product" in the WTO dispute settlement mechanism, there is a quasi-precedent interpretation in this regard. It is explicitly stated:

> *... '[T]he interpretation of the term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a "similar" product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is "similar": the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality.'* [7]

Obviously, some methodological similarities can easily be perceived, irrespective of substantive factors. For instance, the interpretations of "similarly situated firm" and "like product" both rely on a case-by-case analysis in combination with specific pertinent factual elements. Furthermore, by and large, the final achievement of the institutional objective of non-discriminatory treatment in both scenarios ultimately depends on providing "similarly situated firm" or "like product" with the same or substantially similar treatment. To a certain degree, the quintessential institutional kernel of the non-discrimination principle is basically manifested in this methodological similarity.

Interwoven Relationship between the Non-Discrimination Prong of FRAND and Other Institutional Factors: An Example of NDAs

The knotty issues in regard to the non-discrimination principle could be even more complicated in terms of the inherent correlation with other institutional elements of FRAND, such as the inseparable nexus between non-discrimination and reasonableness. In addition, the non-discrimination prong of FRAND is unavoidably intertwined with non-disclosure agreements between SEP licensors and licensees. Generally speaking, achieving the objective of non-discrimination relies on sufficient disclosure of earlier comparable royalty rates, mainly because "it is hard to know whether a royalty unfairly favors one party unless we also know what other parties had to pay."[8] Accordingly, non-disclosure of such earlier comparable licensing rates would result in predicaments when determining appropriate FRAND-consistent royalty rates in judicial cases.

Nevertheless, non-disclosure agreements (NDAs) are not unconditionally deemed impermissible in SEP-related scenarios. For example, it is explicitly stated in an IPR Guide in the ETST Directives that:

> *It is recognized that Non Disclosure Agreements (NDAs) may be used to protect the commercial interests of both potential licensor and potential licensee during an Essential IPR licensing negotiation, and this general practice is not challenged. Nevertheless, ETSI expects its members (as well as non-ETSI members) to engage in an impartial and honest Essential IPR licensing negotiation process for FRAND terms and conditions.*[9]

Put another way, perhaps the essence of the above-quoted paragraph could be felicitously interpreted as stating that the key justification for a specific NDA essentially lies in negotiators' lack of bias and honesty. However, in reality, honesty-based issues are usually difficult to deal with in judicial adjudication. Consequently, this reality has further intensified NDA-related non-discrimination issues.

In recent years, a specific sort of patent licensing involving patent assertion entities (PAEs) is particularly controversial. Countless published articles have addressed PAE-related issues from different angles. With regard to NDAs, especially aiming at classifying past licensing terms, "[s]ome PAEs require their business partners to sign very stringent non-disclosure agreements to keep this information private."[10] Besides with this sort of PAE-initiated NDA, non-PAE patent holders may also be motivated to require licensees to sign NDAs. However, to be neutral and fair, patent licensees may also have incentives to keep the licensing rates private, especially to secure and maintain competitive edges. No matter which

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Particularly in the past five years, China has gradually become a globally noteworthy forum in terms of SEP-based judicial activities involving foreign stakeholders in the ICT sector. Such activities may not only impact the SEP-related commercial eco-system in China, it might also may generate some spillover influences in other parts of the world.

side, licensors or licensees, dominates such non-disclosure, comparison between different licensing terms becomes impossible, and thus the carefully crafted non-discrimination prong of FRAND would become futile. This crux has been recognized more extensively than before. For example, it is pointed out in the judgement of a real case that:

...in the absence of a public standard licensing agreement, and where licensing agreements already concluded with other competitors are not made public, the proprietor of the SEP is better placed to check whether its offer complies with the condition of non-discrimination than is the alleged infringer.[11]

Even though the necessity of sufficient information disclosure in the context of patent licensing has been highlighted, confidentiality-related issues in this domain are still very intractable in reality. For example, some relevant cases were even appealed to the Supreme Court of the United States.[12] But some positive signs that might foreshadow potentially decreasing controversies over the non-discrimination prong of FRAND have emerged. An example is Ericsson's ex ante public disclosure of a fixed FRAND royalty rate for its fifth generation/New Radio (5G/NR) technology,[13] containing a spectrum of specific royalty rates from $5 to $2.5 per 5G/NR multimode-compliant handset practicing its portfolio of SEPs. It is well acknowledged that more transparency usually leads to less non-discrimination. Although this sort of measure might, to some extent, alleviate the escalating disputes arising from the non-discrimination prong, such long-lasting controversies in the FRAND context might not totally come to an end in the near future. For instance, to some extent, will the somewhat questionable potential situation that differently-situated licensees obtain the same or similar royalty rates emerge and trigger further theoretical controversies and judicial disputes? The subsequent real implementation effects still remain to be seen.

Similarly, in China, judges have also encountered this sort of judicial predicament concerning the analysis of specific application and interpretation of the non-discrimination principle, in combination with NDA issues, in the FRAND-related scenario.

The Non-Discrimination Prong of FRAND in China's Related Judicial Practice

A Brief Overview of Recent SEP-Based Cases in China

Particularly in the past five years, China has gradually become a globally noteworthy forum in terms of SEP-based judicial activities involving foreign stakeholders in the ICT sector. Such activities may not only impact the SEP-related commercial ecosystem in China; it might also may generate some spillover influence in other parts of the world. In parallel with this trend, some articles[14] related to this topic have been published.

These SEP-based judicial cases can be generally classified into two categories: adjudicated cases and settled cases. As to the first category, there are three adjudicated cases: *Huawei v. InterDigital* (2013), *Huawei v. Samsung* (2018) and *Iwncomm v. Sony* (2018). On the other hand, the settled cases are *Huawei v. ZTE* (2015) and *Qualcomm v. Meizu* (2016). With regard to the three adjudicated cases in China, only the judgment of the first case contains a relatively detailed analysis of the application of non-discrimination therein.

Non-Discrimination Prong in Huawei v. InterDigital

A Brief Backdrop: This is the first and perhaps the most influential adjudicated FRAND-based case in China. Huawei, a Chinese company and the complainant in this case, sued Interdigital (a U.S. company) in 2011 in the Shenzhen Intermediate People's Court (the Shenzhen Court) in China. The complaint mainly centered on InterDigital's alleged failure to negotiate on FRAND terms regarding certain SEPs. The Shenzhen Court subsequently issued the judgment in favor of Huawei, and then InterDigital appealed to the Guangdong High People's Court against this judgment. Finally, on October 16, 2013, the second-instance court affirmed the judgment issued by the Shenzhen Court.[15]

The Arguments and Decision: This subsection only focuses on briefly setting out the non-discrimination factors in this case instead of offering an all-inclusive elucidation.

Non-Discrimination Factors in the Judgement Made by the First-Instance Court: With regard to FRAND, the court attached more importance to reasonableness and simultaneously stressed the inherent nexus between reasonableness and non-discrimination by stating that:

The core of the principle of FRAND lies in reasonableness and non-discrimination. The key lies in the reasonableness of the licensing rate, and the reasonableness of the licensing fee includes both the reasonableness of the licensing fee itself and the reasonableness in terms of comparison with other comparable licensing fees.

Obviously, the court stressed the importance of the non-discrimination prong especially by means of underlining its irreplaceable role and function of helping reach reasonable licensing fees. Finally, the court determined a specific ceiling licensing rate of 0.019 percent exactly through the comparison with the licensing rate granted by Interdigital to Apple in light of non-discrimination, in addition to considering all the specific relevant factors per se in this case.

Arguments of Interdigital in Its Appeal on the Non-Discrimination Prong: Interdigital raised some arguments to counter the ceiling licensing rate determined by the first-instance court. Some of them were squarely on the non-discrimination prong. Such arguments centered on two aspects.

First, with respect to the application of Chinese laws to appropriately address FRAND-based disputes, Interdigital made the argument especially from the perspective of non-discrimination to highlight its perceived drawback in this regard. It was stated that:

From the literal reading of "fairness, equal value exchange, honesty and credibility " enshrined in the General Rules of the Civil Law and the Contract Law in China, the meaning of "Fairness" and "Reasonableness" in the "FRAND" obligation can

be perceived, but the meaning of "Non-discrimination cannot be found.

Second, according to Interdigital, the first-instance court misinterpreted the "FRAND" obligation. It argued that:

The "FRAND" obligation is not the MFN treatment in international trade. It does not mean that all parties seeking patent license should obtain the same licensing terms from the patentee.

Judgment on the Non-Discrimination Prong Made by the Second-Instance Court: As to the methodology and criterion of evaluating whether or not Interdigital was treated discriminately, it was specifically stated that:

Regarding the issue of "non-discrimination" conditions.....in the case of basically the same transaction conditions, basically the same licensing fee or basically the same licensing royalty rate should be charged. When judging whether the non-discrimination principle is met, the method of comparison is generally necessary. Under substantially the same trading conditions, if the SEP holder charges a licensee a lower licensing fee and charges another licensee a higher licensing fee, by contrast, the latter has reason to believe that it is subject to discrimination. The SEP holder accordingly violates the commitment of non-discriminatory licensing.

The rationale of the methodology taken by the court seems to be substantially equivalent to the methodology embodied by the above-mentioned criterion of "similarly situated standard implementers should pay the same or at least a similar royalty rate." Thus, the court also chose to follow the most frequently adopted adjudicative approach in this regard.

The Intertwined NDA Issue: The second-instant court was confronted with a complicated task of determining a mutually satisfactory reasonable royalty rate for both Huawei and Interdigital.

In brief, based on the methodology explicitly stated above, there should be two main steps of determining a FRAND-consistent royalty rate. Step one is to appropriately select some similarly situated firms; step two is to determine an appropriate royalty rate by comparing such comparable royalty rates offered to such similarly situated firms, in combination with considering the specific set of relevant facts in this case. Step two is especially linked to the non-disclosure issue. Put another way, if no such comparable royalty rates can be directly learned, judges accordingly cannot be able to determine a FRAND-consistent royalty rate by comparison even if similarly situated firms can be found, or at least may be excessively arduous for judges to determine such a royalty rate indirectly.

In this case, finally, the court had to adopt the way of indirect comparison (i.e., making the comparison with a comparable estimated royalty rate based on a multifactor estimation made by the court) instead of directly comparing to a comparable royalty rate or some comparable royalty rates publicly disclosed before.

Potential Challenges to Judicial Judgments Regarding the Non-Discrimination Principle in Future SEP-Based Cases in China: First, to date, the number of adjudicated cases involving a detailed analysis of non-discrimination issues is limited, and also there is still no nation-wide body of SEP-based legal judgments in China. Thus, the jurisprudence for analyzing issues regarding the non-discrimination prong perhaps remains to be further enriched by future cases. This might be even more complicated by further harmonizing the nonindigenous FRAND-based analysis with some inseparable indigenous legal elements, such as the principle of honesty and credibility enshrined in the General Provisions of the Civil Law of the People's Republic of China (effective date: 01 October 2017) and Contract Law of the People's Republic of China (effective date: 01 October 1999), etc.

Second, in addition to the NDA-related judicial difficulties, courts in China may also encounter other knottier and tougher issues, such as issues related to further distinction between hard-edge non-discrimination and soft-edged discrimination, which have appeared elsewhere and are more complicated in terms of the additionally combined analysis of distortion of competition.

Third, overseas doubts about China's SEP-based judgments might have to be appeased. Judicial judgements in SEP-related cases in China have incurred some overseas doubts from different perspectives, such as doubts about discrimination against foreign litigants. For example, as explicitly stated by a U.S. scholar, "[i]n *Huawei v. InterDigital*, the Shenzhen Court held that an injunction could be an abuse of dominant position. In *Iwncomm v. Sony*, the Beijing IP court disagreed and granted Iwncomm an injunction based on a balance of fault test. These divergences could be interpreted as using a form of protectionism: the SEP holder was a foreigner in *Huawei v. InterDigital* and was not granted an injunction whereas the SEP holder was a Chinese company in *Iwncomm v. Sony* and was granted an injunction."[16] Although such doubts perhaps need to be further substantiated, it seems that how to appease such overseas doubts or even criticism might pose a challenge for China, especially in the specific context of Sino-U.S. IP-based trade conflicts.[17]

Conclusion

In sum, interpretation and application of the non-discrimination principle in adjudicated cases were usually critical to the final outcomes and could be very contentious. The knotty issues in regard to the non-discrimination principle could be even more complicated by intertwining with NDAs.

On the whole, the court in *Huawei v. InterDigital* chose to follow the most frequently adopted adjudicative approach in dealing with the interpretation and application of the non-discrimination principle. Accordingly, to some extent, this case may constitute a quasi-precedent in terms of the adjudicative approach in dealing with this sort of issue for future SEP-based cases in China, especially in the context of analyzing non-discrimination issues interwoven with NDAs. However, in this regard, subsequent cases in China may be more complicated because of the potential involvement of other factors, such as further distinction between hard-edge non-discrimination and soft-edged discrimination, etc.

Generally, the theoretical and practical controversies over the non-discrimination prong of FRAND still exist globally, and thus more in-depth relevant research is needed to be done, especially in the face of an upcoming era of unparalleled interconnectedness arising from 5G, IoT and AI, etc.

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Notes

[1] There is no such universally accepted definition of this terminology across the globe; thus, in fact, there are various definitions or interpretations of this terminology made by different organizations, courts, and so on. See, for example, the IEEE-SA Standards Board Bylaws, at 15 (2017); http://standards.ieee.org/develop/policies/bylaws/sb bylaws.pdf. ("'Essential Patent Claim' shall mean any Patent Claim the practice of which was necessary to implement either a mandatory or optional portion of a normative clause of the IEEE Standard when, at the time of the IEEE Standard's approval, there was no commercially and technically feasible non-infringing alternative implementation method for such mandatory or optional portion of the normative clause.").

[2] See, for example, J. L. Contreras, "A Brief History of FRAND: Analyzing Current Debates in Standard Setting and Antitrust through a Historical Lens," 80 *Antitrust Law J.* 39 (2015). (The author scrutinized and illuminated the evolutionary path of FRAND, including non-discrimination elements, such as a bifurcated analysis containing the "all applicants" part and "uniform terms" part.); R. J. Gilbert, "Deal or No Deal — Licensing Negotiations in Standard-Setting Organizations," 77 *Antitrust Law J.* 855 (2011). (The author elucidated the comparative advantage of the non-discrimination prong and called for "a shift of emphasis from the 'fair and reasonable' prong of FRAND, which is often inherently ambiguous, to the 'non-discrimination' prong..."); G. A. Gabison, "A Two-Dimensional Approach to Non-Discriminatory Terms in FRAND Licensing Agreements," 24 *B.U. J. Sci. & Tech. Law* 100 (2018), and so on. In addition, there are also some Chinese articles on FRAND-related topics. Because these Chinese articles are normally inaccessible to non-Chinese audiences, examples of this part are omitted.

[3] See TCL Commun. Tech. Holdings, Ltd. v. Telefonaktiebolaget LM Ericsson, 2017 U.S. Dist. LEXIS 214003, No. SACV 14-341 JVS(DFMx), at *26 (C.D. Cal. Dec. 21, 2017).

[4] For instance, an appropriate and satisfactory legal interpretation of "similarly situated" usually depends on a set of specific relevant facts on a case-by-case basis, including the firms' particular use of the licensed IP, firm size and expected revenues, competitive position in the relevant marketplace, the time span for which the patented technology is expected to remain valuable to licensees, and so on. See J. L. Contreras, and A. Layne-Farrar, "Non-Discrimination and FRAND Commitments," *The Cambridge Handbook of Technical Standardization Law, Volume 1: Antitrust and Patents*, J. L. Contreras, Ed., Cambridge Univ. Press, 2017, p. 194.

[5] See *Unwired Planet v. Huawei* [2017] EWHC 711 (Pat), para. 501; https://www.judiciary.uk/wp-content/uploads/2017/04/unwired-planet-v-huawei-20170405.pdf. For more detailed discussion on the judicial decision of this case concerning the non-discrimination prong, see J. L. Contreras, "Global Markets, Competition, and FRAND Royalties: The Many Implications of Unwired Planet v. Huawei," 16 Antitrust Source 17(1) (Aug. 2017).

[6] For example,"'MOST FAVORED NATION' (MFN, also termed 'most favored customer') contractual provisions have come under scrutiny in recent years by antitrust authorities in both the US and the EU." See J. B. Baker and J. A. Chevalier, "The Competitive Consequences of Most-Favored-Nation Provisions," 27 Antitrust 20 (2013), at 20. In a recently released decision (ASUS Computer Int'l v. InterDigital, Inc.), ASUS' "Most Favorable Licensee" argumentation was rejected by Judge Freeman. See "District Court Denies FRAND Breach of Contract and Sherman Act Summary Judgment Motions by ASUS and InterDigital," Feb. 28, 2019; http://www.ipwatchdog.com/2019/02/28/district-court-denies-asus-interdigital-summary-judgment-motions/id=106844/.

[7] See "Analytical Index: General Agreement on Tariffs and Trade (GATT)," 1994, Article III, Jurisprudence (WTO), p. 17; https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art3_jur.pdf.

8 See M. A Lemley and C. Shapiro, "A Simple Approach to Setting Reasonable Royalties for Standard-Essential Patents," 28 *Berkeley Tech Law J.* 1135 (2013), at 1145.

[9] See "ETSI Guide on Intellectual Property Rights (IPRs)" para. 4.4, 19 Sept. 2013; https://www.etsi.org/intellectual-property-rights.

[10] See F. M. Scott Morton and C. Shapiro, "Strategic Patent Acquisitions," 79 *Antitrust Law J.* 470, 2014, at 470.

[11] See Case C-170/13, Huawei Technologies Co. Ltd v ZTE Corp., ZTE Deutschland GmbH, Judgment, para. 64; http://curia.europa.eu/juris/document/document.jsf?text=&docid=165911&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1091073.

[12] See M. R. Patterson, "Confidentiality in Patent Dispute Resolution: Antitrust Implications," 93 *Wash. Law Rev.* 827, 2018.

[13] See "Ericsson's FRAND licensing terms for 5G/NR in 3GPP Release 15"; https://www.ericsson.com/assets/local/tech-innovation/patents/doc/frand-licensing-terms-for-5g-nr-in-3gpp-release-15.pdf.

[14] In addition to many relevant published Chinese articles in China, some English articles squarely on this topic can also be found at home and abroad. For example, D. Sokol and W. Zheng, "FRAND in China," 22 *Tex. Intell. Prop. L. J.* 71 (2013); Z. Guangliang, "Enforcement of F/RAND and Antitrust Intervention: Discussion from the Huawei Decisions in China,"2 *China Legal Sci.* 3 2014; J.-A. Lee, "Implementing the FRAND Standard in China," 19 *Vand. J. Ent. & Tech. Law* 37 2016.

[15] The judgement of this case aroused widespread attention both in China and abroad. For instance, according to the latest news in 2019 released on the website of the Shenzhen Intermediate People's Court, this case "was selected into the country's 'great change — a large-scale exhibition celebrating the 40th anniversary of reform and opening up', as one of the 40 most influential judicial cases in the 40 years of China's reform and opening up." See "市中级人民法院报告提出 今年为全市法院审判质量全面提升年,"

19 Jan. 2019; https://www.szcourt.gov.cn/article/30030974. More detailed English information regarding the background of this case can easily be found elsewhere. For example, see "Huawei v. InterDigital: China at the Crossroads of Antitrust and Intellectual Property, Competition and Innovation"; https://www.competitionpolicyinternational.com/huawei-v-interdigital-china-at-the-crossroads-of-antitrust-and-intellectual-property-competition-and-innovation/?utm_source=Nov+29%2C+2013&utm_campaign=April+30%2C+2013&utm_medium=email; Also, "InterDigital's 10-K for the Year of 2012"; https://www.sec.gov/Archives/edgar/data/1405495/000140549513000010/idcc-20121231x10k.htm#sB8CBDEB8939B47C8E810BD0438747BFA. Due to the fact that there is no official English version of the judgment of *Huawei v. InterDigital*, the quoted sentences in the following subsection of "The Arguments and Decision" are translated by the author from the judgment made by the second-instance court.

[16] See G. A. Gabison, "A Two-Dimensional Approach to Non-Discriminatory Terms in FRAND Licensing Agreements," 24 *B.U. J. Sci. & Tech. Law* 100 (2018), at 133.

[17] In addition to the globally well-known ongoing Sino-U.S. IP-based trade conflicts starting from a U.S. Section 301 investigation in 2017, regular Sino-U.S. IP-based trade disputes are mainly embodied by issues listed in a series of annual Special 301 reports. China has been consecutively placed on the priority watch list for more than 10 years due to IP-based deficiencies alleged by the United States. Standard-related and SEP-related concerns and even criticism, among other things, have also been addressed in such reports. For instance, SEP-related concerns were explicitly expressed 10 years ago. As stated in 2009 Special 301 Report (p15), "the United States understands that the Standards Administration of China is expected to issue revised draft regulations regarding the treatment of patents and other IPR in national standards. Earlier draft regulations, issued in 2005, prohibited the incorporation of patents in mandatory national standards. U.S. stakeholders continue to have concerns about these issues, due in part to recent Chinese Government officials' public comments suggesting that patent holders might be required to share their patented technologies on a royalty-free basis..."; https://ustr.gov/sites/default/files/2009%20Special%20301%20Report%20FINAL.pdf.

Biography

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