

*How the updated IEEE patent policy facilitates trade under the WTO regime*  
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REVIEW OF GLOBAL TRADE AND ECONOMIC GOVERNANCE<sup>2</sup>  
(Law Press China ed., 2016), pp. 3-16

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This article aims to illustrate the mechanism through which the updated IEEE (Institute of Electrical and Electronics Engineers) patent policy, to some extent, can facilitate trade in the WTO system.

Previously, almost all the standard setting organizations maintained ill-defined patent policies. This very fact was queried or even criticized by many IP scholars, even including some leading researchers in this domain. For example, according to Professor Lemley, “over 25% of SSOs have no patent policy at all; or if they do it is often a ‘hodgepodge’ of unclear judicial instruments.”<sup>3</sup> Under this undesirable status, IEEE, an international private standard setting organization, finally updated its patent policy in March 2015, in terms of refining the governance structure for its license standards.

Such facilitation illuminated in this article derives from the essential nature of the updated patent policy which aims at significantly reducing transaction costs. It is easily understandable that without further clarifications, “negotiating in good faith” is extremely ambiguous, and it yields very little certainty to both patent holders and implementers. This often results in lengthy and costly disputes and litigation. In the ICT sphere, as far as I am concerned, such uncertainty has actually brought about a lot of domestic and international litigations. For example, a well-known series of litigations - *HuaWei v. InterDigital* - in

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both China and the US were arising from conflicting views on FRAND (fair reasonable and non-discriminatory licensing).

On one hand, this article attaches much importance on depicting how the updated IEEE patent policy can significantly reduce transaction costs particularly by means of providing better definitions of the ‘reasonable’ and ‘non-discriminatory’ ingredients of the FRAND commitment and clarifying the role of injunctions and reciprocal licensing. On the other hand, it especially puts the role and function of such patent policy update into the broad context of the international trade of ICT products promoted by the recently concluded, implemented, and expanded ITA (Information Technology Agreement) in the WTO.

With regard to the importance of international trade of ICT products, the incumbent Director-General of WTO, Mr. Roberto Azevêdo argues:

The original WTO Information Technology Agreement...was agreed in 1996 ... Since 1996 exports in products covered by that agreement have more than tripled in value ... since then new products and technologies have continued to emerge... This is why ... this group of WTO members agreed to expand the original ITA...Trade in the products covered by the agreement is valued at approximately 1.3 trillion dollars each year. This is larger than global trade in automotive products ... it is larger than global trade in textiles, clothing, iron and steel combined.<sup>4</sup>

In addition to the IEEE updated patent policy, such clarity enhancement initiatives was recently echoed by the European Commission which promulgated “measures to ensure that intellectual property rights are well protected, thereby encouraging European companies, in particular SMEs and start-ups, to invest in innovation and creativity.”<sup>5</sup> There is one measure, *inter alia*, specifically focusing on SEP (Standard Essential Patents) titled, “Creating a Fair and Balanced System for Standard Essential Patents.” Literally, it is less complicated to identify “transparent and predictable licensing rules” as one of the key aspects.

Accordingly, the on-going international trend of enhancing transparency and predictability in standard essential patent licensing rules will continue to gradually achieve the intended beneficial goals not only in the IP domain but also in the field of international trade. This article can contribute to this socially

beneficial trend in terms of anatomizing the inherent mechanism of how the updated IEEE patent policy would facilitate trade under the WTO regime.

### **Abstract of the article**

*The rise in global trade, especially in the ICT sector, has come at the cost of increased numbers of cross border disputes in intellectual property. Characterized by lengthy and often expensive transnational litigation, patent lawsuits can be particularly unaffordable for right holders in developing countries. Against this background, the updated IEEE patent policy fills an important gap in international IP disputes particularly in the ICT sector. By providing greater clarity and defining core elements of the FRAND regime, it significantly helps reduce litigation costs and, in doing so, provides greater clarity in court cases involving patents that read on a standard. As such, the updated IEEE patent policy can be characterized as an instrument facilitating international trade under the WTO regime and hence considered an instrument promoting one of the few common goals that the international community was able to achieve under the Doha round of negotiations. This article discusses core features of the IEEE patent policy and explains why these are particularly helpful tools to promote international trade and contribute to the goals of the WTO in order to help exporters and importers conduct their business.*

### **REFERENCES**

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2. Currently, it is annually published, focusing on issues which are closely related to global trade and economic governance from a variety of perspectives. It contains original English and Chinese articles.
3. M. Lemley, *Intellectual property rights and standard-setting organizations*, CALIF. L. REV. 1889-980 (2002).
4. See Information Technology Agreement press conference: Remarks by Director-General

Roberto Azevêdo, *available at* [https://www.wto.org/english/news\\_e/spra\\_e/spra104\\_e.htm](https://www.wto.org/english/news_e/spra_e/spra104_e.htm) (last visited on Feb. 12, 2018).

5. *See* Intellectual property: Protecting Europe's know-how and innovation leadership, European Commission Press Release, Nov. 29, 2017, *available at* [http://europa.eu/rapid/press-release\\_IP-17-4942\\_en.htm](http://europa.eu/rapid/press-release_IP-17-4942_en.htm) (last visit on Feb. 12, 2018).