

# China's Many Faces of FRAND

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## Abstract

*China has become a major destination for resolution of disputes over the licensing of patents incorporated into global technical standards. These patents are generally required to be licensed on “FRAND” terms. FRAND is an English language acronym that consists of four separate components: (A) “fair”, (B) “reasonable”, (C) “and” (D) “non-discriminatory.” Chinese courts have typically applied these four admittedly vague components in their Chinese translations, rather than their native English. These translations have not been standardised across cases and policy documents. There are often multiple translation variants in an individual judicial decision with at least 120 potential variant translations of the four FRAND components. In addition, there are three significant grammatical variants, plus various combinations of the four components, which brings a total of potential variants used by Chinese courts to over 500. Not all these variants impose new meanings of FRAND. In fact, the most significant of the variant translations is grammatical and not based on a semantic difference. It entails removing a Chinese term for “and” and utilising the Chinese enumerative comma or dunhao, which looks like a backwards comma, to replace the Western comma. According to relevant Chinese national standards and practice, the use of the dunhao means “pause.” It can mean “and” or “or.” It potentially fragments the integrated concept of “FRAND” into its separate components. In this dominant translation variant, FRAND means “fair and/or reasonable and/or non-discriminatory.” It might more appropriately be called “FRND”. The Chinese courts’ use of FRND*

*maximises judicial discretion by facilitating new combinations of individual FRAND components, thereby selectively ignoring certain FRAND components, and by introducing new terms into FRAND. These translations have also worked to the disadvantage of the foreign party by imposing preferential treatment for a Chinese licensee or a rate that is equal to the lowest rate charged by the licensee, regardless of the costs and challenges faced by the foreign licensor in negotiating and litigating with its Chinese counterpart. While foreign courts and companies have observed that it is difficult to obtain fair remuneration for standards-essential patents (“SEPS”) licensed to China, these varied translated “faces of FRAND” are not observable to readers who rely solely on English translations. The English translations that I have reviewed have uniformly declined to address inconsistent translations from English into Chinese and back into English. These Chinese translations are also inconsistent with the translations into Chinese of international organisations and the approaches to translating FRAND’s vague components that have been undertaken by many foreign countries and economies. The effect of these mistranslations is to not merely to uniquely translate FRAND in judicial decision making, but, in certain instances, to suggest or impose new meanings based on Chinese law upon FRAND. These new Chinese meanings also serve to facilitate transplanting FRAND into new areas of the law and diplomacy where the Chinese government typically has expressed an interest in managing private property rights to serve governmental interests.*

## Introduction

### The Role of FRAND Licensing in Technology Diffusion

Due to such factors as the growing sophistication of Chinese courts, China’s key role in high tech supply chains, the increasingly valuable portfolio of Chinese companies in Standards Essential Patents (SEPs), the importance of China’s large domestic market to scaling new inventions,<sup>1</sup> and Chinese desire to advocate for its position on international trade and technology issues,<sup>2</sup> Chinese courts have become a distinct and important venue for adjudication of FRAND royalty disputes for

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<sup>1</sup> Jeffrey Ding, “Technology and the Rise of Great Powers, How Diffusion Shapes Economic Competition” (Princeton University Press, 2024).

<sup>2</sup> Hugo Jones, “China’s Quest for Greater ‘Discourse Power’”, *The Diplomat*, (November 4, 2021), <https://thediplomat.com/2021/11/chinas-quest-for-greater-discourse-power/>; Kenton Thibaut, “Chinese Discourse Power: Capabilities and Impact”, *Atlantic Council* (August 2, 2023), <https://www.atlanticcouncil.org/in-depth-research-reports/report/chinese-discourse-power-capabilities-and-impact/>; Stanford University, *DigiChina*, “Lexicon: ‘Discourse Power’ or the ‘Right to Speak’” (March 17, 2022), <https://digichina.stanford.edu/work/lexicon-discourse-power-or-the-right-to-speak-huayu-quan/>; Kirti Gupta and Mark A. Cohen, “The New SEP Powerhouse: How China is Shaping Global Patent Disputes”, CSIS (May 7, 2025), <https://www.csis.org/blogs/perspectives-innovation/new-sep-powerhouse-how-china-shaping-global-patent-disputes>.

standardised technology. FRAND is an acronym which requires licensing by patent holders on “Fair, Reasonable and Non-Discriminatory” terms for technology that has been accepted into a standard managed by a standards development organisation (SDO) or standards setting organisation (SSO) (hereinafter, together “SDO”).

FRAND licensing has helped create a global, open, interoperable ecosystem for cell phones, telecommunications infrastructure, smart cars, the Internet, and numerous other technologies and devices. Under the typical terms of the SDO, anyone who wishes to manufacture a product in accordance with the standard (often called an “implementor”) must secure a license from the SEP holder. The patent owner (often called the “innovator” or “patentee”) has a parallel commitment in exchange for the SDO’s incorporation of the patent into the standard to “be prepared to grant” a license to the patent on FRAND terms.<sup>3</sup> If the patentee and implementor cannot amicably resolve their FRAND dispute through negotiations, they may enter litigation or arbitration.

When negotiations between an innovator and a SEP implementor fail to achieve their goal of a global license agreement, litigation and counter-litigation may take place in multiple countries at one time, including in significant markets such as China. The litigation may address validity and infringement of the patents, the royalty rate for the patents, and/or antitrust claims against the patentee for abuse of its dominant position by overcharging for the SEPs. Such litigation is necessary despite the global nature of the telecommunications industry and the standards, because patents remain territorial and are subject both to local laws regarding their validity, interpretation, infringement and licensing, as well as other obligations set forth in international treaties regarding IP, and practices established by SDOs. Chinese courts share this fundamental need to adjudicate the value of local patents in harmony with local standards and international obligations, although they have begun to set global royalty rates, and they generally decline to apply FRAND untranslated in its English original, and then decline to apply French law to the facts of the case.

An additional conflict that Chinese courts share with many other courts is the relationship between private patent rights asserted in a FRAND dispute with national goals. For China, many of these concerns may properly be considered political-legal as they implicate national political and industrial policy goals.<sup>4</sup> China’s own national interests include building “a reserve of intellectual property rights for key core technologies in key areas of manufacturing and building an industrialisation-oriented patent portfolio and strategic layout”.<sup>5</sup> China’s leadership

also wishes to control the terms upon which SEPs are licensed and to maintain “judicial sovereignty” when parallel litigation is arising elsewhere. Judicial sovereignty (*sifazhuquan*) “relates to the preservation of the territorial jurisdiction of the courts and the protection of the Chinese courts from foreign infringements on their autonomy”. The concept, according to Prof. Vivienne Bath, “does not appear to involve respect by Chinese courts for the judicial sovereignty of foreign courts or deference to their decisions”.<sup>6</sup> Other concerns include the Chinese Communist Party’s desire to politically influence international technology transfer policies based on its own sense of the need to address current and past discrimination, as well as its desire to help determine the policies and terms of international technology transfer.

Occasionally, some SDOs do not include the “fair” component of FRAND as a licensing requirement and require only terms that are “RAND”.<sup>7</sup> These terms have been considered interchangeable. Licensing on a FRAND or RAND basis is sometimes abbreviated as “F/RAND” licensing.

One challenge posed by the interchangeability of FRAND and RAND is that they are both vague terms. Their constituent parts also overlap in meaning. There are, for example, currently 38 non-obsolete definitions of “fair” alone in the Oxford English Dictionary (“OED”) as a noun or adjective.<sup>8</sup> These definitions are not only internally inconsistent with each other but also overlap with definitions of the other FRAND components, “reasonable” and “non-discriminatory”. Any translation into a foreign language will thus be faced with the near impossible task of finding a perfect translation that is also a readable term which captures the vagueness of “fair” or, alternatively, best supports the usage of fair in FRAND as it may be understood in the English language and aligns with the purposes of the SDO. For example, in translating “fair” many countries have chosen to define “fair” as a process-oriented requirement, i.e., as “just, proper, equitable; reasonable” (Definition group 3 of the OED). Another approach might be to translate it as a term that governs royalty determinations, i.e., “adequately reflects the work done, service rendered, or injury received” (OED, Sub-Definition III. 14.c), as in a “fair” price. Yet another consideration may be to avoid FRAND lending itself to different outcomes from “RAND” or to let it be rendered meaningless in comparison to RAND. Using definitions of “fair” in English or a foreign language that overlap with “reasonable” and “non-discriminatory” (RAND) would also be inconsistent with obligations

<sup>3</sup> European Technology Standards Institute, IPR Policy, Rule 6.1.

<sup>4</sup> “Legal-political” (*zhengfa*) describes the interaction between the political process and the application of law, including the supremacy of the Party. For example, the highest legal authority in China is the Central Political and Legal Affairs Commission under the Central Committee of the Communist Party (*zhengfawei*).

<sup>5</sup> Made in China 2025, Government of China (May 8, 2015) [https://www.govcn/zhengce/content/2015-05/19/content\\_9784.htm](https://www.govcn/zhengce/content/2015-05/19/content_9784.htm).

<sup>6</sup> Vivienne Bath, “Overlapping Jurisdictions and the Resolution of Disputes Before Chinese and Foreign Courts”, Y.B. of Priv Int’l L.: XVII 2015/2016 (Swiss Institute of Private International Law) 111.

<sup>7</sup> Jorge L. Contreras, “A Tale of Two Layers: Patents, Standardisation and the Internet”, (2016) 93 Denv L. Rev 855, 960; Gan Haibing (Tony Gan) “FRAND Study on the legality and effectiveness of FRAND clauses for standard essential patents” (June 6, 2023), (PhD Dissertation, East China University of Political Science and Law) (on file with author) (hereinafter “Tony Gan Dissertation”).

<sup>8</sup> Fair, Oxford English Dictionary, [https://www.oed.com/dictionary/fair\\_adj?tab=factsheet&hide-all-quotations=true#4657049](https://www.oed.com/dictionary/fair_adj?tab=factsheet&hide-all-quotations=true#4657049).

under international law to give effect to every meaning of a contract or treaty term, or as it is otherwise expressed in Latin: *pacta sunt servanda* (agreements must be kept).<sup>9</sup>

The problems posed by the Chinese translation of “fair” is but one example of the challenges that translators face when confronting the component terms that have dozens of vague meanings in FRAND’s source language, English. A translator must ultimately make choices that limit or expand the inherent ambiguity of the source term into the destination language. Occasionally, judges or translators may provide explanations for their translation choices based on the meaning of the term or the context in which it appears. No such explanations have been given in the published cases of the Chinese courts that have been consulted in preparation for this paper, nor do I know of any explanations in Chinese academic literature, or in the various reverse translations of FRAND from Chinese back into English that are made in non-Chinese language parallel court filings in foreign countries that refer to developments in related cases occurring in China.

Despite its interpretative challenges, vagueness has its advantages. According to Prof. Mark Lemley, the vague terminology of FRAND was deemed necessary “given the variety of licenses and industries” and that “virtually no SSO specifies the terms on which licenses must be granted beyond [these] vague requirement[s].”<sup>10</sup> Technology has also changed, new legal approaches have evolved or been abandoned, and new countries with different languages and legal systems have participated in standards setting. Vagueness has likely allowed FRAND to adapt to evolving technology and trade across various legal systems. Translations of FRAND in countries like China have also not been either static or final.

Rather than directly and authoritatively confronting the meanings of FRAND that have been developed by foreign courts, the challenge of translating the vagueness of FRAND in China has instead generally devolved to courts or government agencies who have often conducted policy experiments in advance of broad national policies and generally enjoy greater flexibility to clarify FRAND’s meaning than China’s legislature.

Despite its inherent vagueness, the licensing of SEPS has in many respects been a remarkable success. It has generated significant revenue for those companies that contribute to this licensing ecosystem. One study estimated licensing revenues for cellular telephony alone at \$89.899 billion dollars for the period from 2015–2022 with revenue rates per cellular mobile device estimated at between \$9.29 and \$9.79.<sup>11</sup> FRAND/RAND terms are

also applied outside of the handset business, to mobile telephone operators, the Internet of Things, smart automobile manufacturers, and in other industries. This open, pay-to-play standardisation process has enabled China to participate as a successful contributor to the further development of these technologies, and, with the help of China’s emerging technological ecosystem, state financial and policy support of various kinds, China’s vast STEM-educated talent pool, and other factors, to emerge as an increasingly important licensor of SEPs.<sup>12</sup>

## ETSI’s Original FRAND Standard

International SDOs, such as the European Technology Standardisation Institute (ETSI) require FRAND commitments of innovators that wish to have their patents incorporated into a standard. The IPR Policy of ETSI, which has been cited and/or referenced several times by Chinese courts to govern FRAND licensing in China,<sup>13</sup> states in its English original:

### 6 Availability of Licences

6.1 When an ESSENTIAL IPR relating to a particular STANDARD or TECHNICAL SPECIFICATION is brought to the attention of ETSI, the Director-General of ETSI shall immediately request the owner to give within three months an undertaking in writing that it is prepared to grant irrevocable licences on fair, reasonable and nondiscriminatory terms and conditions....<sup>14</sup>

In most circumstances, this IP policy will mandate application of French law in interpreting the FRAND commitment:

12 Law and Regulation The POLICY shall be governed by the laws of France. However, no MEMBER shall be obliged by the POLICY to commit a breach of the laws or regulations of its country or to act against supranational laws or regulations applicable to its country insofar as derogation by agreement between parties is not permitted by such laws.<sup>15</sup>

<sup>9</sup> Vienna Convention on the Law of Treaties, art.26, May 23, 1969, 8 ILM 679, 1115 U.N.T.S. 331, “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”.

<sup>10</sup> Mark A. Lemley, “Intellectual Property Rights and Standard-Setting Organisations” (2002) 90 *California Law Review* 1889, UC Berkeley Public Law Research Paper No.84.

<sup>11</sup> Alexander Galetovic, Stephen Haber and Lew Zaretski, “Cellular SEP Royalties and 5G: What Should Competition Policy Be?”, in *5G and Beyond, Intellectual Property and Competition Policy in the Internet of Things* Jonathan M. Barnett and Sean M. O’Connor, eds. (Cambridge University Press, 2024) pp.53, 79.

<sup>12</sup> Dan Prud’homme, “Alternative Responses to Anti-Commons: State Financing of Latecomer Patenting”, in *Handbook of Innovation and Intellectual Property Rights* (Walter G. Park, ed. 2024) p.139, [https://ideas.repec.org/h/elg/eechap/20438\\_9.html](https://ideas.repec.org/h/elg/eechap/20438_9.html).

<sup>13</sup> *Huawei v Interdigital* (2013) (antitrust decision of Guangdong High Ct.) (case no.3), *Huawei v Conversant* (2018) (Nanjing Interim. Ct.) (case no.32), *Oppo v Nokia* (2022) (Chongqing Interim. Ct.) (case no.63). All case numbers refer to the number assigned in Appendix 2.

<sup>14</sup> ETSI, Rules of Proc., Annex 6: ETSI Intell. Prop. Pol’y (November 29–30, 2022), <https://www.etsi.org/images/files/IPR/etsi-ipr-policy.pdf>.

<sup>15</sup> ETSI, Rules of Proc., Annex 6: ETSI Intell. Prop. Pol’y (November 29–30, 2022), <https://www.etsi.org/images/files/IPR/etsi-ipr-policy.pdf>.

Chinese courts since at least 2013 have rejected French law or declined to apply it.<sup>16</sup> This approach of exclusively applying Chinese law despite significant foreign connections (including licensing of foreign patents), is distinct from other areas of Chinese law where the courts have been seeking to expand their international influence and understanding by “establish[ing] and improv[ing] a mechanism for ascertaining foreign laws”.<sup>17</sup>

## Data, Resources and Methodology

Appendix 2 contains a numbered list of SEP/FRAND related cases that I have consulted. The research in this paper on China's FRAND/SEP case law has principally relied upon the Supreme People's Court (“SPC”) official judicial database *Wenshuwang* (<https://wenshu.court.gov.cn/>). This database is officially translated on its opening page in English as “China Judgments Online” or “CJO” or “CJOL”. It is available to the global public free of charge.

In addition to *Wenshuwang*, I have also interviewed attorneys and consulted cases and databases from various sources including IPEconomy,<sup>18</sup> IPHouse,<sup>19</sup> Peking University Fabao or Chinalawinfo, as it is called in English,<sup>20</sup> Willowedge Technology,<sup>21</sup> the website of the National IP Court of the SPC,<sup>22</sup> various WeChat channels, websites, and trade magazines among many other sources.<sup>23</sup> One foreign-owned Chinese IP law database that I formerly consulted, <http://www.ciela.cn>, which was managed by the international IP consulting firm Rouse, terminated its operations while I was preparing this article. In certain instances, I have been able to collect supporting information from non-Chinese sources, including secondary literature, information and evidence from US and UK court cases, the United States federal courts' PACER database,<sup>24</sup> and the World Intellectual Property Organisation's global SEP Case Law Collection.<sup>25</sup> Sometimes cases have also been discussed at length in

the media, but the case has not otherwise been published through a reliable channel. Overall, as my work progressed, it has become increasingly difficult to judge the accuracy of a case publication. Other limitations on cases are that many have been settled or contain confidential information, in which case they may not be published at all.

One particular challenge during the preparation of this article, has been that cases have been withdrawn from a database and/or renamed, sometimes on more than one occasion.<sup>26</sup> Previously published court cases have also been anonymised. Additional changes may also have been made to the decision besides changes to the case name. It remains unclear to me what the impact of delays in publication may be. However, as the SPC has ramped up on curation of CJO, publication may also lag the date of the final decision by months or even years, with the possibility of further editing of the case itself besides anonymisation. This has also made the CJO less useful for researching the most recent developments.

In recent years, the Chinese courts have categorised certain cases on national and sometimes local levels as “guiding”, “leading” or “important”. According to relevant guidance of the SPC, “guiding cases” should be consulted first when conducting similar case search.<sup>27</sup> However, guiding cases are rarely referred to in published SEP legal opinions. As I have sought to understand the meaning of FRAND in legal discourse, I have generally not distinguished specially designated cases from other cases. I have also included many cases that only briefly mention FRAND, in addition to those that actually apply it. Lacking clear and consistent judicial interpretations of the meaning of FRAND and due to the limited number of published SEP cases, I have also not focused on any precedential or influential effect of FRAND case law or other judicial guidance, but instead focused on the underlying and evolving meanings of FRAND in the full range of published Chinese judicial decisions as decided

<sup>16</sup> *Huawei v InterDigital* (FRAND rate setting decision of Guangdong High Ct.) (case no.2). This case was ordered by the SPC for a retrial in 2014. The legal basis for the retrial was not set forth in the SPC order, *Civil ruling on the retrial review and trial supervision of the patent contract dispute between Interactive Digital Communications Co., Ltd. and Interactive Digital Technology Co., Ltd.* (2014) (Minshenzi no.677).

<sup>17</sup> China Law Translate, “The 2020 Plan on Building the Rule of Law in China (2020–25)”, China Communist Party and State Council (January 10, 2021), available at <https://www.chinalawtranslate.com/en/%E6%B3%95%E6%B2%BB%E4%B8%AD%E5%9B%BD%E5%BB%BA%E8%AE%BE%E8%A7%84%E5%88%92%E5%BC%882020-2025%E5%B9%B4%E5%BC%89/>; Susan Finder, “How China's Supreme Court Supports the Development of Foreign-Related Rule of Law” (2023) 8 *China Law & Soc'y Rev* 62, 118.

<sup>18</sup> IP Economy (Zhichan Caijing) is a specialized Chinese media economy focused on the economics of intellectual property and innovation. <https://www.ipeconomy.cn/>.

<sup>19</sup> IP House (Zhichanbao) is a Chinese intellectual property database provider. Their services are described in my blog, “IP House and IP Litigation Strategies”, (www.chinaipr.com, Dec. 22, 2016), <https://chinaipr.com/2016/12/22/iphouse-and-ip-litigation-strategies/>.

<sup>20</sup> PKULaw (Beida Fabao) is a legal and regulatory database jointly launched by Peking University and Chinalawinfo Co., Ltd to provide legal information and other services, <https://pkulaw.com/>.

<sup>21</sup> Willowedge Technology offers intellectual property and intelligence solutions, including through its English language platform [www.willowtech.cn](http://www.willowtech.cn). The company has been tracking IP litigation verdicts, patents, industrial designs, trademark filings and other legal events for over 20 years, <http://www.willowtech.cn>.

<sup>22</sup> This is the website of the Intellectual Property Tribunal of the Supreme People's Court of China. <https://ipc.court.gov.cn/zh-cn/index.html>.

<sup>23</sup> Many libraries also have guides to Chinese legal research. See, e.g., Law Library Of Congress, U.S. Global Legal Research Directorate, *Legal Research Guide: China*, (2007), <https://www.loc.gov/item/2019670423/> and UC Law Legal Research Database, *Chinese Law Research Guide* (2019), <https://libguides.uclawsf.edu/china-law/lexis>.

<sup>24</sup> Mark A. Cohen, “China's Diverse FRAND Translations Severely Impacting Court Decisions At Home and Abroad”, *Intell. Asset Mgmt.* (January 31, 2024), <https://www.iam-media.com/article/chinas-diverse-frand-translations-severely-impacting-court-decisions-home-and-abroad>.

<sup>25</sup> WIPO, Global SEP Law Collection, [https://www.wipo.int/wipolex/en/collections/profile/sep\\_caselaw](https://www.wipo.int/wipolex/en/collections/profile/sep_caselaw).

<sup>26</sup> Mark A. Cohen, “China's Judiciary: The Case of the Missing Cases”, *Hinrich Found.* (July 18, 2023), <https://www.hinrichfoundation.com/research/wp/tech/the-case-of-the-missing-cases/>; Laurie Chen, “China Vows Judicial Disclosure After Outcry Over Plan to Curb Access to Rulings”, *Reuters* (January 22, 2024), <https://www.reuters.com/world/china/china-vows-judicial-disclosure-after-outcry-over-plan-to-curb-access-rulings-2024-01-22/>; Note, “Making Chinese Court Filings Public? Some Not-So-Foreign American Insights”, 133 *Harv L. Rev* (March 2020) (“Making Chinese Court Filings Public”), <https://harvardlawreview.org/print/vol-133/making-chinese-court-filings-public-some-not-so-foreign-american-insights/>.

<sup>27</sup> “Notice by the SPC on the Guiding Opinions on Unifying the Application of Laws to Strengthen the Retrieval of Similar Cases (for Trial Implementation)” (July 15, 2020) (art.4.1, on use of “guiding cases”). For further background, see also Riccardo Vecellio Segate, “Precedential Value of Judicial Decisions in Increasingly Hybridised Civil Law Systems: Chinese Choreographies at the WTO” (2024) 19 *Asian J. of Compar. L.* 104; Marketa Trimble, “Unjustly Vilified TRIPS-Plus?: Intellectual Property Law in Free Trade Agreements” (2022) 71 *Am. U. L. Rev* 1449; Mark A. Cohen, “China's Evolving Case Law on ASIs”, *Chinaipr.com Blog* (March 4, 2021), <https://chinaipr.com/2021/03/04/chinas-evolving-case-law-on-as-is/>.

by courts throughout China at all levels.<sup>28</sup> Lacking clear judicial interpretations of the meaning of FRAND and due to the limited number of published SEP cases, I have also not focused on any precedential or influential effect of FRAND case law or other judicial guidance, but instead focused on the underlying and evolving meanings of FRAND in the full range of published Chinese judicial decisions as decided by courts throughout China at all levels.

Civil cases published by *Wenshuwang* total over ninety-three million (December 26, 2024). These include first instance decisions, appeals, and other decisions. In Appendix 2 I have thus far referred to 65 publicly available cases from *Wenshuwang* and the sources noted above during the period from 2013 to 2024. In other words, published SEP cases which interpret FRAND, despite their importance to businesses and the legal community, are one in a million in the CJO. Their relatively low numbers, and their high value in terms of damages and international influence, also make them a likely target for government curation prior to publication.

It is also impossible to determine the total number of unpublished SEP cases that have been filed or decided by the court without having access to the confidential internal judicial databases and files. One group of lawyers collected data from a range of sources such as court data and news reports, and determined that the total number of SEP cases accepted by Chinese courts from 2011–2019 was 160, which is over twice the number of published cases that I collected over a longer period of time.<sup>29</sup> This calculation of total number of cases filed is nonetheless the most specific to date. Considering the declining transparency by the courts, it is unlikely that their study will be updated.

More general data suggests that there is a significant problem of *Wenshuwang* involving incomplete data disclosure and case publication. By comparing official SPC statistics with the number of cases published on *Wenshuwang*, I had previously estimated that about 50% of all patent final decisions are published.<sup>30</sup> This percentage has likely further declined in recent years.

One group of academics has calculated that overall civil cases published have declined by nearly from 14.4 million in 2019 to five million in 2022, a 65% decrease, which it viewed as “less dramatic” compared to other areas such as criminal or administrative law.<sup>31</sup>

As the number and type of actual SEP cases filed or published is unknown, it is also impossible to determine the extent that published SEP cases are representative of all SEP cases, or whether the cases disproportionately focus or ignore certain issues (such as litigation involving foreign parties). The small number of SEP cases and any delays in publication may also have been influenced by China’s desire to limit access to cases that may be implicated in a WTO case filed by the European Union involving Chinese adjudication publication of SEP cases,<sup>32</sup> as well as a desire by the courts to better manage the role of these significant cases.<sup>33</sup>

Like many other countries, China lacks a PACER-type system (Public Access to Court Electronic Records), such as is used by the US federal courts. The PACER system allows public access to non-confidential federal court filings.<sup>34</sup> PACER adds value to this research when US cases are being heard parallel to Chinese cases or are likely to be influenced by Chinese decisions. On occasion, the parties may submit translations of key documents in the Chinese proceeding to the US courts. The few reverse translations of FRAND from Chinese court proceedings into English that are available on PACER reveal that the inconsistencies in China’s FRAND translations may rarely be disclosed to a court. As one example, the translations used in the Eastern District of Texas in *Ericsson v Samsung*, following common practice in China, translate Chinese FRND into English “FRAND” and do not explicitly bring differences in the Chinese original to a US court’s attention, nor do they point to the Chinese court’s application of a “fair and reasonable” approach that may be linked to this “FRND” approach.<sup>35</sup> These types of issues are mixed questions of law and language which would require directed, close cooperation among translators and counsel, including engagement with opposing counsel and its translators.

<sup>28</sup> Among judicial policy documents, there is a binding 2020 Judicial Interpretation and earlier 2016 Judicial Interpretation on “Several Issues in the Application of Law in Patent Litigation”, that discuss application of FRAND in the context of recommended national standards, industry and local standards. It translates FRAND as FRND, without further explanation (Art.24) See <http://gongbao.court.gov.cn/Details/409a66a5e85613e92594a31b410220.html> (2016), <https://www.unitalen.com.cn/xhtml/report/16124417-1.htm> (2020). The impact of this judicial interpretation on subsequent translations of FRAND, especially in cross-border disputes, is unclear.

<sup>29</sup> Zhao Qishan and Lu Zhe, “Statistics of Chinese SEP Cases in 2011–2019 (2020)”, (<https://chinaipr.com/wp-content/uploads/2020/07/statistics-of-chinese-sep-cases-in-2011-2019-lexfield9892.pdf>). See also Mark A. Cohen, “An Update on Data-Driven Reports on China’s Enforcement”, *Chinaipr.com Blog* (July 13, 2020), <https://chinaipr.com/2020/07/13/an-update-on-data-driven-reports-on-chinas-ip-enforcement-environment/>.

<sup>30</sup> Chris Bailey, Douglas Clark, Mark Cohen and Aria Tian, “Chinese Publication Data: What It Tells Us and What It Doesn’t”, *Intell. Asset Mgmt.* (November 17, 2021), <https://www.iam-media.com/article/chinese-patent-litigation-data-what-it-tells-us-and-what-it-doesnt>.

<sup>31</sup> Benjamin Liebman, Rachel Stern, Xiaohan Wu, and Margaret Roberts, “Rolling Back Transparency in China’s Courts”, (2023) 123 Col. L. Rev 2407, <https://columbialawreview.org/wp-content/uploads/2023/12/Liebman-Stern-Wu-and-Roberts-Rolling-back-transparency-in-chinas-courts.pdf>.

<sup>32</sup> Request for Consultations by the European Union, “China-Enforcement of Intellectual Property Rights”, Sec.2 (“China’s Failure to Publish Final Decisions Pertaining to the Subject Matter of the TRIPS Agreement”), WTO Doc. WT/DS611/1 IP/D/43 G/L/1427 (February 22, 2022), available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds611\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds611_e.htm).

<sup>33</sup> Mark A. Cohen, “Australia, US, and EU Submissions at the WTO on China and Anti-Suit Injunctions”, *Chinaipr.Com Blog* (Jan. 4, 2024), <https://chinaipr.com/2024/01/04/australia-us-and-eu-submissions-at-the-wto-on-china-and-anti-suit-injunctions/>.

<sup>34</sup> PACER, “Public Access to Court Electronic Records”, provides electronic public access to United States federal court records, with instantaneous access to over 1 billion documents, nearly all the documents filed by a judge or the parties in any case. It is a service of the federal judiciary. <https://pacer.uscourts.gov/>.

<sup>35</sup> *Ericsson Inc v Samsung Electronics Co., Ltd.*, Memorandum Opinion and Preliminary Injunction, Civ Action No.2:20-CF-00380-JRG) (E.D. TX, Jan. 8, 2021) (Gilstrap, J). Samsung’s Chinese complaint for a “FRAND” license had literally been for a “FRND” license. The inconsistencies in the Chinese complaint were removed in the English translation by replacing all references to FRND with FRAND. This “FRND” approach may have led the court to misapprehend the effort of Samsung to seek a “Fair Reasonable” (FAR [gongpinghe]) license in China. (“For standard essential patents, this court recognises and respects the rights enjoyed by standard essential patent holders, and supports them in obtaining fair reasonable licensing fees from the implementation of relevant technologies.”) (ASI Decision, Civil Complaint, *Samsung v Ericsson* (Samsung Complaint to Wuhan Intermediate Court, December 7, 2020), Pacer: Case 2:20-cv-00380-JRG Document 26-2 Filed 01/01/21 Page 1 of 18 PageID #:

The lack of a PACER-type system in China to publicly access court records furthermore makes it difficult to understand any arguments in favor or against translations that may have been advocated by practicing lawyers and their translators or to otherwise determine the source of translations used by a Chinese court in the preparation of a published written case decision. My guess is that translations of FRAND may have appeared in evidence and arguments presented in the case,<sup>36</sup> or otherwise have been derived from rules and policies involving SEPs and from other related areas such as antitrust, and from articles by scholars, lawyers and judges.<sup>37</sup> Multiple inconsistent translations in Chinese court decisions could also suggest that a court was simply being inattentive. On several occasions, Chinese courts appear to have used definitions of FRAND that may have been advanced by a party by their citing to that party's arguments. However, later in the court's opinion, it has applied a different translation of FRAND without additional explanation.<sup>38</sup> Similar inconsistencies in translation are also evident in academic literature concerning SEPs.

FRAND is a standardised term that is governed by one language (English) and one law (French) across the globe. Countries other than France, however, have often applied local law, with which they are more familiar. Moreover, local standards organisations, such as the China Communications Standards Association (CCSA) may adopt local standards that reflect ETSI standards but are governed by local law. Nonetheless, Chinese courts have also "retranslated" these Chinese translations, such as the CCSA FRAND standard, with a different wording and without further explanation.<sup>39</sup>

The wide variety of inconsistent translations used by the Chinese courts are troubling as FRAND is an internationally standardised term. Its international standardisation leads to reasonable expectations that the term will be applied consistently by national courts and agencies. However, FRAND has been translated and applied in so many different ways that China is likely the most diverse country for judicial translations of FRAND and the most inconsistent.

Chinese courts have construed FRAND in four unique ways. First, the courts have used varying translations of the four FRAND components. Second, they have used

different punctuation and grammar in translating FRAND to Chinese. The predominant translation used by the Chinese courts has had the effect of disaggregating FRAND from a unitary concept joined by the English "and", into one which consists of four disaggregated terms without any conjunction, further expanding the number of translation variants. Third, the translations have also departed from international standards by making FRAND governed by Chinese civil law. The application of China's Civil Code (2020) has created additional interpretative ambiguities by introducing new legal meanings. Fourth, judicial translations of FRAND are often dissimilar with China's antitrust agency, the State Administration for Market Regulation ("SAMR"),<sup>40</sup> international standards<sup>41</sup> and IP organisations,<sup>42</sup> and the practices of other jurisdictions (including those that have non Western-legal systems, or that speak Chinese or use Chinese characters).<sup>43</sup> These practices may contribute to confusion or misunderstandings in the absence of further explanations.

## Chinese Courts' Multiple Semantic Variants

### Fragmenting FRAND's Four Components

As an acronym, FRAND consists of four individual substantive components: "Fair" ("F"), "Reasonable" ("R"), "And" ("A"), "Non-Discriminatory" ("ND"). A second component is grammatical: FRAND includes an "and" and a comma. The "A" constitutes FRAND as an integrated concept that is combined from its other three components. In addition to FRAND being an English term according to ETSI rules, the inherent difficulties of translating the four substantive elements of this acronym can make even a translation for the convenience of the reader a challenge and may also further contribute to some foreign courts relying upon the English original of FRAND in their court decisions. The European Court of Justice ("ECJ") has perhaps the most experience of translating FRAND simultaneously into multiple languages (at least until the creation of the Unified Patent Court in Europe in June 2023). The ECJ translated its *Huawei v ZTE* decision regarding obligations to negotiate

431. Samsung's expert witness in the US proceeding was former SPC IPR Chief Judge Kong Xiangjun. Judge Kong referred to FRAND three times in his Chinese expert opinion using the English acronym "FRAND" (paras 8, 9 and 10), but referred to the term once in Chinese using the dominant FRND translation (para.12). Pacer: Case 2:20-cv-00380-JRG Document 26-2 Filed 01/01/21 Page 1 of 18 PageID #: 431.

<sup>36</sup> Making Chinese Court Filings Public?.

<sup>37</sup> An example discussed later in this article is the 2010 book by Prof. Tao Xinliang, which translated "non-discrimination" by reference to a classical Chinese expression that originally meant "equal benevolence" (*yishitongren*) (Tao Xinliang ed., Tian Lipu editor in chief, *Zhuanlijishuyidong* [Transfer of Patented Technology] (2010), at pp.463, 464 (hereinafter "Transfer of Patented Technology"). This translation subsequently appeared in several court decisions.

<sup>38</sup> See, for example, translations of ETSI's FRAND in *Opvo v Nokia* (Chongqing Interim Ct. 2022) (case no.63).

<sup>39</sup> See *Huawei v Interdigital* (Guangdong High Ct. 2013) (case no.2).

<sup>40</sup> Mark A. Cohen, *Opvo v Nokia in Context* (Dec. 18, 2023), *ChinaIPR.Com Blog*, <https://chinaipr.com/2023/12/18/opvo-v-nokia-in-context/>.

<sup>41</sup> The International Telecommunications Union GSR10 (Global Symposium for Regulators) on Enabling Open Access in its Chinese language best practices statement (December 12, 2013) translates FRAND three times as a compound or lexical noun: (*gongpinghelifeiqishi*). As a lexical compound it might be translated as: *Fairreasonableandnondiscriminatory*. This compound grammatical structure is not commonly used in English. It is accurate to the extent that it creates a unitary FRAND compound. ITU, SCOM 12/HO, [Intl Telecomm. Union, Com12/HO Correspondence No.75] (2013) [https://www.itu.int/dms\\_pub/itu-t/md/13/tsb/cir/T13-TSB-CIR-0075!!MSW-C.docx](https://www.itu.int/dms_pub/itu-t/md/13/tsb/cir/T13-TSB-CIR-0075!!MSW-C.docx).

<sup>42</sup> The WIPO Chinese language guide to alternative dispute resolution (ADR) involving FRAND (2021) translates FRAND once as "Fair [dunhao or enumerative comma] Reasonable and Non-Discriminatory. This a less common but more precise grammatical translation of FRAND as it preserves the original "and" in its grammatical structure. WIPO, "WIPO Guidelines on FRAND Alternative Dispute Resolution (ADR)" (2021), at p.2. <https://www.wipo.int/export/sites/www/amc/zh/docs/wipofrandadrguidance.pdf>.

<sup>43</sup> See Appendix 1.

FRAND licenses in good faith into 23 of the ECJ languages, in addition to the original German.<sup>44</sup> The ECJ also acknowledged that FRAND is an English acronym by also referring to FRAND and its four components in English in its various translations. Although there have been few cases heard in Türkiye, it has thus far followed a similar approach.<sup>45</sup> There are also several Chinese cases that reference the English acronym exclusively and without translation or explanation. However, cases that apply FRAND typically use multiple translations.<sup>46</sup> The preference of the Chinese courts is to repeat FRAND in English and/or translate FRAND into Chinese (typically as “FRND”) and thereafter apply the individual components in Chinese in the decisions without reference to any ambiguity created by the Chinese translation.<sup>47</sup>

## Fair

The first limb of FRAND, “Fair” (or “F”) is usually translated by the Chinese courts as *gongping*, which can be understood to mean “fair” as in “fairly priced” among other meanings. An alternative, less common Chinese translation of “fair” is *gongzheng*, meaning “just” process. Defining fairness in terms of legal process and not in terms of a rate outcome also helps ensure that FRAND and RAND do not impose different substantive licensing obligations.

*Gongping* also differs slightly in its connotations from “fairly priced” as that term is understood in English for commercial translations. According to various Chinese-English dictionaries, it can also imply an obligation to treat others equitably or equally. The Cambridge Chinese-English dictionary defines *gongping* as “the quality of treating people equally or in a way that is right or reasonable”. The Baidu dictionary (Baikē or Baidu Encyclopedia) defines the “ping” in “gongping” as referring to equality or *pingdeng*, as does the Chinese Language Dictionary (*Hanyucidian*).<sup>48</sup> It also overlaps with *tongdeng* which has also been used in the SEP case law to require equal treatment or parity.<sup>49</sup>

*Gongzheng* is an alternative translation of the English language “fair” which can be an appropriate translation of the OED definition of “fair” as “just”. It is not widely used by mainland Chinese courts on SEP matters. Other countries’ courts, however, use a term with a meaning that is similar to *gongzheng* in their translation of “fair”. For example, a common translation in Romance languages or legal cultures influenced by continental legal systems is to translate “fair” as, “just” or “equitably” such as “équitable” in French, which also shares roots with “equal”. Maltese, which is a semitic language, uses “ekwi” a concept which is similar to equitable.<sup>50</sup> Certain countries influenced by Islamic law, such as Indonesia and Türkiye, also define “fair” using the Arabic *adil* which means “fair”, “balanced” or “just”.<sup>51</sup> Japanese and Korean use Chinese characters but often preserve older meanings of these characters. Nonetheless, in Japan and Korea, the Chinese characters of *gongzheng* are similarly used to translate “fair” in FRAND, being translated as *asKōsei*, *gōri-teki*, *katsu*, *hi sabetsu-teki* in Japan and *gong-jeong-ha-gohap-ri-jeok-i-myeo bi-cha-byeol-jeog-in jo-geon*, in Korean.<sup>52</sup>

Based on the case law and commentary in Chinese SEP disputes, the judicial concept of *gongping* with implications as “equal” may have been a poor choice by Chinese translators, as it has been held to subsume the other limbs of “FRAND” and potentially undercuts arguments that “FRAND” and “RAND” have the same meaning.<sup>53</sup> For example, Chinese courts have decided cases with reference to whether a license was at an “unfair” high price and as such it was “discriminatory”.<sup>54</sup> A few courts have also applied a Chinese concept of FAND (fair and non-discriminatory).<sup>55</sup> Some Chinese cases have also focused on whether a proposed price or a negotiation was “fair and reasonable”, based on a high price, without discussing its discriminatory impact.<sup>56</sup> Courts have also relied upon art.6 of the Civil Code, to apply both the “F” and “R” aspects of FRAND, as art.6 requires that commercial actors comply “with the principle of fairness (*gongping*), [and] shall reasonably

<sup>44</sup> *Huawei v ZTE* (Eur. Ct. of Just. 2015), Document 62013CJ0170, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62013CJ0170>.

<sup>45</sup> ACTECON, Spotlight: Standards-Essential Patents in Türkiye (July 12, 2023) “FRAND terms were only mentioned when defining what each letter of the acronym stands for”. <https://www.lexology.com/library/detail.aspx?g=4bb91152-c1ab-49eb-adj3-4f71e2b920a>; see also Turkish Competition Board Decision, *Vestel Elektronik Sanayi ve Ticaret A.Ş. v Koninklijke Philips N.V.- Türk Philips Ticaret A.Ş.* (December 16, 2019), <https://www.rekabet.gov.tr/Karar?kararId=b9319155-4333-4d5a-a891-a20e98191af9>.

<sup>46</sup> See, e.g., *Apple v Qualcomm* (Guangdong High Ct. 2018) (case no.31) (FRAND appears once in English, without a Chinese translation); *Gangshui Yongxin Braking Materials Co., Ltd. v Knorr-Bremse Commercial Vehicle Braking System Co., Ltd.* (Beijing Intell. Prop. Ct. 2018) (case nos.36 and 37) (FRAND appears once in English).

<sup>47</sup> See Appendix 2 for 65 cases which include translations of FRAND without a conjunction, or about 77% of the total cases.

<sup>48</sup> Cambridge Chinese-English Dictionary, definition of *gongping*, <https://dictionary.cambridge.org/zh/%E8%AF%8D%E5%85%B8%E6%B1%89%E8%AF%AD-%E7%AE%80%E4%BD%93-%E8%8B%B1%E8%AF%AD/%E5%85%AC%E5%B9%B3>; Hanyucidian, definition of *gongping*, <https://cidian.gushici.net/99/472965131058.html>.

<sup>49</sup> *Huawei v Samsung* (Shenzhen Interm. Ct 2016) (case no.16). See also Cambridge Chinese-English Dictionary, [https://dictionary.cambridge.org/dictionary/chinese-traditional-english/%E5%90%8C%E7%AD%89#google\\_vignette](https://dictionary.cambridge.org/dictionary/chinese-traditional-english/%E5%90%8C%E7%AD%89#google_vignette).

<sup>50</sup> See definition of *ekwi*, <https://www.linguee.com/maltese-english/search?query=ekwi>. Translation of *Huawei v ZTE* into Maltese: <https://eur-lex.europa.eu/legal-content/MT/TXT/HTML/?uri=CELEX:62013CJ0170>.

<sup>51</sup> Correspondence with Khoo Guan Huat (Sept. 3, 2024) (Malay) and Abi Abadi Tisnadisastra (Sept 12, 2024) (Indonesian) (available from the author); See also Wikipedia, definition of ADL, <https://en.wikipedia.org/wiki/Adl>.

<sup>52</sup> Correspondence with Saito Hirofumi, Japan Patent Office of November 28, 2023, and Prof. Jinyul Ju, Pusan National University Law School of September 4, 2023 (available from the author).

<sup>53</sup> See Tony Gan Dissertation, n.7, “FRAND” (“FRAND first originates from the principle of fairness [*gongping*] in civil law”).

<sup>54</sup> *Huawei v InterDigital* (Patent, Guangdong 2nd 2013) (case no.2) (“Fair and Reasonable” [*gongpingheli*] appear twice as a lexical compound, “not fair and also not reasonable appears once) See also *Huawei v Conversant* (Nanjing 1st 2018) (case no.32).

<sup>55</sup> *TCL v Ericsson* (SPC 2019) (case no.44), *Oppe v Sisvel* (Guangzhou IP Court, 2020) (case no.51) (AML case), *Xu Mo v Ningbo Mo Gongsi* (SPC 2020) (case no.54).

<sup>56</sup> *Koninklijke KPMI v Xiaomi* (Shanghai 2020) (case no.46), *IWNComm v Apple* (SPC 2022) (case no.62) (Apple is accused of violating the “fairness” principle). See also reporting on *Access Advance v TCL* (SPC, 2023 and 2024) (accused of unfair “high priced” licensing (bugongpinggaojiakuke). For background on that case see Randall Rader, David Kappos and Mark Cohen, “TCL v Access Advance and the Lingering Risk of Jurisdictional Disputes for Patent Pools” Int’l Asset Mgmt. (February 15, 2025).

(*heli*) clarify the rights and obligations of each party”.<sup>57</sup> This section was derived from general civil law principles in China, including China's Contract Law (1999), China's General Principles of the Civil Law (1986) (art.4),<sup>58</sup> and China's General Principles of the Civil Code (2017) which predated and ultimately were superseded by China's first comprehensive Civil Code (2020).

In practice, the Chinese concept of “*gongping*”, if defined as “equal” or as set forth in the Civil Code, can swallow up other elements in FRAND by the Civil Code's obligation to “reasonably establish the rights” of each party and/or by defining “fair” as a constraint on royalty pricing to what is “equal”. One Chinese court has candidly summarised this approach as applying concepts of “fair and/or [*dunhao*] reasonable and/or [*yi/huo*] non-discrimination” in reaching a FRAND determination.<sup>59</sup>

### Reasonable

The only FRAND component that does not vary in translations appearing in Chinese court decisions is “reasonable”, which is translated as *heli*. Thankfully, Chinese translators did not limit their translation of “R” to another pricing-related definition of “reasonable” as they may have intended in *gongping*. Such a translation would have been consistent with one definition of reasonable in English as something that is “not too expensive”.<sup>60</sup> China's approach is instead generally consistent with those of other countries surveyed, which define reasonable as meaning logical or complying with reason, although reasonable in Chinese enjoys a meaning related to “reasonable” pricing, much as does English.<sup>61</sup>

While translating “reasonable” has not posed significant challenges to China, the transplantation of the FRAND term “reasonable” into Chinese legal culture has been encumbered by its use in the Civil Code definition of “fair”, as a type of commercial behavior which sets forth a pricing obligation.

These Chinese law—rooted definitions of “fair” and “reasonable” are consistent with China's practices in other areas of intellectual property when legal concepts from the West have been translated and transplanted to China. As Prof. Peter Yu has noted, a legal transplant to China “involves not only selection and adoption, but also adaptation and rejection”.<sup>62</sup> A difference in FRAND cases with China's transplantation of other Western approaches to IP is that the ETSI use of FRAND is an internationally standardised term. Furthermore FRAND is governed by French law. In rejecting a definition of “F” that focuses on procedural fairness, China has chosen to translate FRAND as a term that (a) means “equal”, (b) allows “fairness” and “reasonableness” to set royalty rates, (c) is sometimes interpreted according to China's Civil Code, and (d) allows ND thereby to be subsumed by “F” and “R”. China's FRAND has become a transplant with its own unique characteristics and implications for China's legal system.

### And

Chinese courts have also translated “and” in a number of different ways, including through use of vernacular and classical variants which are all synonymous with each other, namely *he*, *ji* and *yu*, as well as use of conjunctions which may also serve to place additional emphases on the term that follows: *bing* and *qie*. These latter two terms are not only defined as “and” but can be used to create a kind of parataxis (side by side or parallel relationship) with potential meanings of “in addition”, “furthermore”, “and also”.<sup>63</sup> The conjunction *qie* may especially emphasise the term following it in a list,<sup>64</sup> by focusing on “one level more than the previous clause”.<sup>65</sup> The English word “and” need not have a similar emphasis.<sup>66</sup>

The China Communications Standards Association (CCSA) has used the parataxis conjunction *qie* in lieu of *he* meaning “and” in its translation of FRAND.<sup>67</sup> CCSA is a Chinese partner of ETSI through the mobile broadband Third Generation Partnership Project (3GPP),

<sup>57</sup> The State Council of the PRC, Civil Code of the People's Republic of China (2020), <https://english.www.gov.cn/atts/stream/files/5feda5b8c6d0cc300eea77ac>.

<sup>58</sup> *Huawei v Interdigital* (Patent dispute, Guangdong High Ct. 2013) (case no.2).

<sup>59</sup> *Huawei v Conversant* (Nanjing Intern. Ct. 2018) (case no.32).

<sup>60</sup> *Reasonable*, Cambridge Dictionary—English Dictionary, <https://dictionary.cambridge.org/dictionary/english/reasonable>.

<sup>61</sup> See Appendix 1.

<sup>62</sup> Peter K. Yu, “The Transplant and Transformation of Intellectual Property Laws in China”, *Texas A&M University School of Law*, Research Paper No.17–40 (2016), at p.17, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2645010](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2645010).

<sup>63</sup> [*qie*], Collins Chinese-English Dictionary, defining *qie* as “even” as the primary definition, and “and” as the secondary definition, <https://www.collinsdictionary.com/dictionary/chinese-english/%E4%B8%94>.

<sup>64</sup> Train Chinese B.V., Word Discussions, [*bing*] v/adv/conj. be side by side; together; simultaneously; (used before a negative for emphasis with a tinge of refutation) actually, definitely; (used between two verbs or verbal phrases, etc.) <https://www.trainchinese.com/v2/search.php?searchWord=%E5%B9%B6&rAp=0&height=0&width=0&Language=en>.

<sup>65</sup> Due to this ambiguity, several Indonesian scholars of translation have noted the most appropriate way. To translate the English conjunction “and” into the Chinese conjunction *he* when it refers to parallel terms that are connected in a sentence. Henggar Prasetyowati, Adilla Achmad Syahputri, Zuyinatul Isro, Chendy Ariesanty, IP SP Leksika, “Translation of “and” by students of Mandarin Language Diploma: a translation evaluation” (2022), at p.13. <https://media.neliti.com/media/publications/500189-translation-of-and-by-students-of-mandarin-190b4a7d.pdf>.

<sup>66</sup> *And*, Cambridge Dictionary—English Dictionary, <https://dictionary.cambridge.org/dictionary/english/and>.

<sup>67</sup> China Communications Standards Association, CCSA Intellectual Property Rights Policy (for trial implementation, Approved By the Council (September 13, 2007), published August 21, 2020; <https://www.ccsa.org.cn/detail?id=3019&title=%E4%B8%AD%E5%9B%BD%E9%80%9A%E4%BF%A1%E6%A0%87%E5%87%86%E5%8C%96%E5%8D%8F%E4%BC%9A%E7%9F%A5%E8%AF%86%E4%BA%A7%E6%9D%83%E6%94%BF%E7%AD%96%28%E8%AF%95%E8%A1%8C%29%28%E4%B8%AD%E6%96%87%29>. See also text at n.39.



an organisation consisting of seven telecommunications SDOs. The Chinese courts, in cases such as *Huawei v InterDigital*<sup>68</sup> and *Huawei v Samsung*<sup>69</sup> have however rejected this translation of CCSA in their diverse translations of FRAND by “re-translating” the CCSA standard from the emphatic conjunction of *qie*, to one that uses the enumerative comma (*dunhao*) which is traditionally used for lists, without any conjunction whatsoever.

## Non-Discriminatory

Translations of “non” have also varied but the terms are all synonymous. The three terms used are *wu*, (meaning without or no), *fei* (meaning lacking or no), and *bu* (meaning no).

There are, however, three distinct translations used by the Chinese courts for “discriminatory”. Two of these different translations are attributable to differing meanings of “discriminate” in English. The most common translation of “discrimination” by the courts in FRAND disputes is *qishi*, which in modern Chinese refers to unfair differential treatment.<sup>70</sup> The “New English-Chinese Dictionary” (1975), one of the first English language dictionaries to emerge from China during the Cultural Revolution, reverted to this older meaning<sup>71</sup> when it declined to use “*qishi*” in defining “discriminate” or “discriminatory” and also utilised on the Chinese term meaning differential treatment.<sup>72</sup> Discriminatory is defined by this dictionary as “differential treatment” (*chabie daiyu*) or unfair/unequal treatment (*bu gongping daiyu*).

The decision to translate discriminate as “unfair” and not “differential” is not unique to China. It is similar to the translation practices involving “ND” of many European countries, which may have also been influenced by anti-discrimination laws.<sup>73</sup>

The concept of discriminatory pricing is found in China’s Pricing Law (1998), which is an important predecessor to China’s Antimonopoly Law (AML) (2008, 2022). The earlier Pricing Law provides that “Operators shall not engage in the following unfair pricing practices: ... practicing price discrimination [*qishi*] against other operators with the same trading conditions” (art.30). Article 22 of the AML instead substitutes the more neutral meaning of “differentiating” in its reference to price discrimination: “treating transaction counterparties with the same conditions differently [*chabie*] in terms of

transaction price or other transaction conditions without an appropriate reason”. This more neutral translation also clarifies the ND leg of FRAND when it is applied by SAMR by focusing on objective differential treatment of market participants under similar terms and conditions, rather than looking at factors that may be found in antidiscrimination law such as intentionality, predatory behavior or a vulnerable class.

In choosing the definition of discrimination in the Pricing Law, Chinese courts have also declined to follow other Asian neighbors, including Japan, Korea and Taiwan which also generally utilize the older Chinese characters that originally meant “differentiation” (*chabie*) rather than any more narrow terms for “discrimination” (such as *qishi* in Chinese characters) in their translations of FRAND.<sup>74</sup>

China’s civil court docket provides additional insight into the exceptionality of the Chinese translation of *qishi* for “discrimination”. The term predominantly appears in civil (23,263).<sup>75</sup> cases, and the majority of times it appears with respect to family matters. The largest subcategory consists of cases involving children. By contrast, there are 170 patent cases in which *qishi* has appeared. The percentage of patent cases involving discrimination amounted to 0.65% of the total published patent cases. By comparison, there are 203 civil cases involving the Pricing Law and discrimination. This was out of a total of 10,563 civil pricing law cases, or about 1%.<sup>76</sup> Discrimination/*qishi* cases are, therefore, a relatively small share of both the Patent and Pricing Law dockets.

What distinguishes the SEP docket, however, is the large percentage of foreign-related cases. As one example, there appear to be, based on the names of the parties, 55 cases in my database of 65 civil FRAND disputes that had at least one foreigner and less than 10 cases in my database that involved Chinese litigants suing each other. This suggests that ND is often being used to address “discriminatory” behavior involving foreigners in FRAND disputes. The dominant share of foreign-related cases in SEP litigation also contrasts to the low level of foreign-related cases in other areas of intellectual property, which are a minority that may account for as little as 1%, according to official statistics.<sup>77</sup> The concern over discrimination, as expressed in the translation of ND may reflect Chinese claiming that they have been discriminated against in technology markets, perhaps by

<sup>68</sup> *Huawei v InterDigital* (2013) (case no.2) (Huawei is required to implement Chinese communications standards under fair [*dunhao*] reasonable [*dunhao*] non-discriminatory conditions). The three judges who heard the trial court decision in *Huawei v InterDigital* identically mistranslated the CCSA standard in an article describing their case. “Huawei is implementing Chinese Communication Standards and is seeking to obtain a license from IDC for its standard essential patents under Chinese communication standards under FRND conditions ...” See Ye Ruosi, Zhu Jianjun, and Chen Wenquan, “The Judicial Application of FRAND Principles in the Dispute Over SEP Royalties” (2013) 4 *Journal of Electronics Intellectual Property*, (hereafter “Ye Ruosi et al. article”).

<sup>69</sup> *Huawei v Samsung* (Shenzhen 1st. 2016) (case no.16, See also other cases between the parties case nos.11–15, 17).

<sup>70</sup> Collins Chinese English Dictionary, definition of *qishi*, <https://www.collinsdictionary.com/dictionary/chinese-english/%E6%AD%A7>.

<sup>71</sup> “English speakers borrowed [discriminate] from the past participle of the Latin verb *discriminare* (meaning ‘to distinguish or differentiate’), which, itself, is derived from the verb *discernere*, meaning ‘to distinguish between’. *Discernere*, in turn, was formed by combining the prefix *dis-* (meaning ‘apart’) and *cernere* (‘to sift’). Other descendants of *discernere* include discern and discernible...” *Discriminate*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/discriminate>.

<sup>72</sup> Discriminate, Discriminatory, *New English-Chinese Dictionary* (Xinyinghan Cidian) 1st edn (1975) p.337.

<sup>73</sup> See Appendix 1.

<sup>74</sup> See Appendix 1.

<sup>75</sup> See Appendix 1.

<sup>76</sup> Searches performed on CJO on December 22, 2024.

<sup>77</sup> Mark A. Cohen, “Patent Litigation, Local Protectionism and Empiricism: Data Sources and Data Critiques” (March 10, 2016), *www.Chinaipr.com Blog*, <https://chinaipr.com/2016/03/10/patent-litigation-local-protectionism-and-empiricism-data-sources-and-data-critiques/>.

being denied “equal” (*gongping*) treatment. Such Chinese allegations have long existed in other IP areas, such as in response to US International Trade Commission s.337 investigations to exclude Chinese tech imports due to IP infringements or claims of discrimination by the United States in its allegations during the recent trade war that China engages in “forced technology transfer”.<sup>78</sup>

China's choice of “discrimination” (*qishi*) for ND under FRAND is exceptional in many ways. A less combative choice was available and had been widely adopted (*chabie*). Unlike other areas of anti-discrimination law in China, the discrimination that is being pursued is against foreigners by Chinese litigants in their own country. The Chinese companies claiming discrimination are also typically major commercial companies or even state-owned enterprises (such as Huawei, ZTE, Oppo or Xiaomi) who are part of China's growing, dynamic high-tech economy, and do not otherwise constitute an endangered or vulnerable economic or social class. Application of “discrimination” by the courts has also been problematic. In some of the published cases, the Chinese litigants are also asking for preferential treatment with lower royalty rates than companies located in developed countries would otherwise need to pay.<sup>79</sup> Indeed, the issue is typically not addressing discrimination by foreigners towards China but rather advancing a preference for Chinese enterprises.

In *Oppo v Nokia*, the SPC confirmed a royalty rate that was lower for China-based companies compared to developed countries, thereby establishing more favorable treatment for these companies.<sup>80</sup> As another example, Chinese sensitivities were apparently pricked by a blog of mine which expressed concern that more favorable treatment for China-based entities could potentially offend core WTO principles of most favored nation or national treatment absent an adequate economic or legal justification. In intellectual property and standards setting, WTO disciplines require equal treatment without regard to nationality.<sup>81</sup> In an op-ed, the official *China Daily* newspaper criticized my view by noting that differential royalties are “about different treatment of countries, economies and territories where the royalty base originates ... So the whole discount issue has nothing to do with the WTO's MFN [Most Favoured Nation] doctrine”.<sup>82</sup> This point is hard to justify solely on these suggested legal grounds. The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”) explicitly governs the “availability,

scope and use of trade-related intellectual property rights” (Preamble). “Protection” in the TRIPS Agreement is further defined to include “the availability, acquisition, scope, maintenance and enforcement of intellectual property rights” (fn.3). There is no carve out for “royalty-bases”. Patent royalty rates, patent infringement damages, as well as antitrust issues involving patents (TRIPS art.40), are unambiguously within the scope of the TRIPS agreement. The Agreement on Technical Barriers to Trade (TBT Agreement) (art.2.1) and the GATT (art.1) similarly impose MFN and national treatment in standardisation and trade. Although these practices have long been tolerated, MFN and national treatment restrictions may be reasonably interpreted to restrict Chinese courts from determining a lower royalty base carve-out for China compared to other similarly situated economies, or the grandfathering of early preferences when China was at a lower stage of economic development.

A third translation of ND in the cases, substitutes the obligation to “not discriminate” with an affirmative obligation to “treat all equally” (in modern vernacular Chinese) or, in classical Chinese as “viewing all with equal benevolence” or “equal love” (*yishitongren*).<sup>83</sup> This phrase originated with the great Neo-Confucian philosopher and essayist Han Yu (768–824) and is widely used in vernacular Chinese. This four-character phrase is derived from Han Yu's statement in classical Chinese that “Of old, saints [or sages] viewed all with equal benevolence, treating those near with respect, and elevating those far away”.

This “equal benevolence/equal treatment” translation of ND has appeared several times in the cases and commentary, including in judicial translations of ETSI IP rule 6.1.<sup>84</sup> As explained by the Nanjing Intermediate Court in *Huawei v Conversant*, ETSI rule 6.1 requires SEP owners to license according to the principles of “Fair [dunhao] Reasonable and Equal Benevolence/Equal Treatment (*gongping [dunhao] heli ji yishitongren*)”. Otherwise, the court notes, the patentee will engage in a kind of “patent hijacking” by licensing according to “not fair [dunhao] not reasonable provisions, and/or [yi/huo] discriminatory provisions”.<sup>85</sup>

The use of “equal benevolence/equal treatment” (*yishitongren*) for ND had first appeared in legal academic literature prior to any published FRAND rate setting case. In context, the term raises a potential ambiguity, having changed over time from classical to vernacular Chinese

<sup>78</sup> Searches in Chinese for “technology transfer” (*jishuzhuanrang*) and “discrimination” (*qishi*) on [bing.com](http://bing.com), [google.com](http://google.com) and [baidu.com](http://baidu.com), performed on December 23, 2024.

<sup>79</sup> *IP and Strategic Competition with China: Part IV—Patents, Standards, and Lawfare: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Committee on the Judiciary*, 118th Cong. Second Session (20124) (written statement of Mark A. Cohen), <https://www.congress.gov/118/meeting/house/117764/witnesses/HHRG-118-JU03-Website-CohenM-20241218-U9.pdf>.

<sup>80</sup> *Oppo v Nokia*, (SPC 2022) (case no.62), and *Oppo v Nokia* (Chongqing 1st.) (case no.59).

<sup>81</sup> Mark A. Cohen, “Oppo v Nokia in Context”, [www.chinaipr.com/Blog](http://www.chinaipr.com/Blog) (December 18, 2023), <https://chinaipr.com/2023/12/18/oppo-v-nokia-in-context/>.

<sup>82</sup> John Gong, Ruling in *Oppo v Nokia* Addresses Patent Royalties Row, *China Daily*, (Jan 8, 2024), <https://www.chinadaily.com.cn/a/202401/08/WS659b4f4aa3105f21a507b035.html>.

<sup>83</sup> Hanyucidian, *yishitongren*, <https://cidiangushici.net/b2/709e1e02d29d.html>.

<sup>84</sup> See, e.g., *Huawei v Conversant* (Nanjing 1st 2018) (case no.32), *Huawei v Samsung* (Shenzhen 1st 2016) (case no.16), *Huawei v Samsung*, (Beijing Intell. Prop. Ct. 2017) (case no.24). See also the article of the Guangdong IP Court judge Jiang Huasheng, “Research on the Normative Interpretation and Judicial Adjudication of the FRAND Principle for Standard Essential Patents”, 2023 *Falvshiyong* [Applied Law] 123 (“Jiang Huasheng Article”).

<sup>85</sup> See, e.g., *Huawei v Conversant* (Nanjing 1st 2018) (case no.32), *Huawei v Samsung* (Shenzhen 1st 2016) (case no.16), *Huawei v Samsung*, (Beijing Intell. Prop. Ct. 2017) (case no.24). See also *Transfer of Patented Technology*, and *Jiang Huasheng Article*.

to mean an affirmative obligation of equal treatment or non-discrimination, but having an original meaning that requires equal benevolence. It also offers one example of how academic discourse may have influenced FRAND translations.<sup>86</sup> The subsequent repetition of the phrase also suggests a judicial willingness to follow prior cases' translations, despite its interjecting a potentially additional meaning, and despite China lacking a system of precedent. It has appeared in a minority of published cases.

In non-SEP court cases this phrase typically refers to an obligation to treat others equally, thereby imposing an affirmative obligation for licensing behavior towards one's counterparties in place of a negative FRAND obligation to avoid discrimination. Chinese leader Xi Jinping's letter to Pakistani students studying in China during the pandemic offers a good example of how this phrase requires benevolence and not simply non-discrimination: "Whether you are Chinese or a foreigner in China, the Chinese government and the Chinese people treat you with equal benevolence [*yishitongren*] and with care and love".<sup>87</sup> This kind of benevolent relationship between licensor and licensee is likely rarely seen in commercial FRAND negotiations.

Another translation of "non-discrimination" which also imposes an affirmative obligation involves providing "mutual benefit" or *huli*. This term appears in diplomatic discourse as a compound term "equality and mutual benefit". "Equality and Mutual benefit" was a guiding principle of international relations with the developing world that originated with Premier Zhou Enlai in a meeting with India's leadership in 1953. It forms part of one of China's "Five Principles of Peaceful Coexistence" with other countries. Thus far it has appeared in one case involving an allegation of de facto SEPs held by the former Hitachi Metals. However, a synonym for mutual benefit, *huhui* (reciprocity), is also found in cases such as *Huawei v Interdigital* to describe the licensing relationship in SEPs.<sup>88</sup>

Along with use of "*gongping*" for fair, the Chinese courts' use of "*qishi*" (discrimination) in lieu of "*chabie*", as well the translations into affirmative obligations of "equal benevolence/equal treatment" and "equality/mutual benefit" have likely been used to drive down royalty rates by reinforcing an obligation to license on equal terms, including with preferences available to China-based manufacturers.

### Semantic Variants by the Numbers

The total number of combinations arising from the different translations of the FRAND substantive components excluding synonyms are:

"Fair" 2 variations x

"Reasonable" 1 variation x

"And" 3 variations x

"Non" (synonymous) 1 variation x

Discrimination 4 variations =

24 Total Distinct Variations

This leads to a possibility of 24 semantically distinct translations of the four FRAND pillars with different meanings in a Chinese court decision. If synonyms are included, the variants increase further:

"Fair" 2 variations x

"Reasonable" 1 variation x

"And" (synonymous and non-synonymous) 5 variations x

"Non" (synonymous) 3 variations x

Discrimination 4 variations =

120 Total Distinct and Synonymous Variations

I have not included variants that negate a FRAND element such as "not fair" and "not reasonable" or "discriminatory" in lieu of "non-discriminatory", nor have I included alternative definitions to the enumerative comma, such as including a "slash" with and/or conjunctions.

### Fragmenting FRAND Through Re-Punctuation

Our counting of variants is yet incomplete, for it fails to account for several other changes made by the Chinese courts to the meaning of FRAND, especially grammatical changes that fragment a unified concept of FRAND. The different grammatical variations of FRAND impact meaning at least as much as different translations of individual FRAND components.

The most extensive fragmentation of FRAND made by the Chinese courts involves the removal of "and" (most commonly translated as *he*) and the introduction of the enumerative comma or *dunhao*. The *dunhao* is literally a "pause marker"; its use overlaps but does not coincide with the Western comma or *douhao*, which points in the opposite direction of an enumerative comma or *dunhao*. This is the enumerative comma enlarged:

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### Types of Grammatical Variants

There are three principal different FRAND grammatical translations which have the effect of further multiplying the semantic variations three-fold, to 360. One of the FRAND translations includes an "and" with an enumerative comma (*gongping [dunhao] heli he wuqishi*). This translation is in the minority in court decisions, but it is relatively faithful to the English. The second variant

<sup>86</sup> Tao Xinliang, *Transfer of Patented Technology* (2010), at p.463 "At its most basic level, a patent owner must behave with 'equal benevolence' to all the standards users and cannot without reason refuse a standards user's request for a license".

<sup>87</sup> *Qishi Theory*, [www.qstheory.cn](http://www.qstheory.cn), "Xi Jinping wrote back to all Pakistani students studying at University of Science and Technology Beijing" (May 18, 2020), [http://www.qstheory.cn/yaowen/2020-05/18/c\\_1125999550.htm](http://www.qstheory.cn/yaowen/2020-05/18/c_1125999550.htm). *Qishi Theory* is the leading Communist Party policy journal.

<sup>88</sup> *Ningbo Ketianciye Ltd v Hitachi Metals* (Ningbo First 2014) (case no.4). Note that the names of the parties to this case have changed several times, including changes in the corporate name of Hitachi Metals to Proterial during the SPC appeal.

omits the “and” while keeping the enumerative comma (*gongping [dunhao]heli [dunhao] wuqishi*). A third variant combines all three terms into one compound word, often without any punctuation. In the English language, we might call it a large compound noun. In Chinese, this new word is sometimes described as a “lexical compound”. If translated directly into English this translation would read something like this: fairreasonablenondiscriminatory.<sup>89</sup> This third variant is the rarest of the three grammatical variations, but it is also more accurate than the dominant FRND translation that omits the “and” as it maintains FRAND in Chinese translation as a unified concept.

Maintaining the original English grammar with a western comma and conjunction to directly replicate FRAND in Chinese (*gongping, heli he wuqishi*) is not feasible as FRAND is viewed as a list of nouns that necessitates an enumerative comma.<sup>90</sup> The Western comma is instead used in Chinese to join phrases.

Keeping the original English grammar of FRAND in ETSI Rule 6.1 raises another set of issues based on its vague English structure. The first two components of FRAND are separated by a comma. The Oxford, or serial comma does not separate “reasonable” and “non-discriminatory”. The current English phraseology of FRAND leaves ETSI 6.1 open to two possible interpretations. One interpretation looks at “Fair” being a separate concept from “Reasonable and Non-Discriminatory”. Alternatively, three component terms may all be viewed as coequally joined, i.e., “Fair” [and] “Reasonable” [and] “Non-Discriminatory”. This latter translation makes the most sense.

This ambiguity was addressed, without explanation, in a recent precedential decision of the United States Court of Appeals for the Federal Circuit involving FRAND, *Telefonaktiebolaget LM Ericsson v Lenovo (United States), Inc, Motorola Mobility LLC*, No.24-1515, (Prost, J) (October 24, 2024). In that case, the Federal Circuit inserted the Oxford comma despite its absence from ETSI’s definition of FRAND. The court thereby clarified that, at least for this proceeding, the constituent elements of FRAND form one unitary concept. As the court noted:

“ETSI has an Intellectual Property Rights (“IPR”) policy under which SEP holders declare that they are “prepared to grant irrevocable licen[s]es” to their SEPs on “fair, reasonable[,] and non-discriminatory (‘FRAND’) terms and conditions.” [brackets in original] (p.3).

As a way of structuring a list, the Chinese enumerative document does not by itself mandate any conjunctive meaning but depends on grammatical rules and context. In most cases where clarity is required, it ultimately requires an “and” or an “or”. The use of the enumerative comma is regulated by a national governmental standard “Usage of Punctuation Marks” (GB/T15834-2011) *Biaodianfuhaoyongfa*, which was promulgated by the same governmental body that publishes and regulates national technical standards, the Standardisation Administration of China (“SAC”). Article 4.5 of this standard states that the enumerative comma “indicates the pause between juxtaposed words within the sentence”.<sup>91</sup> These juxtaposed terms are assumed to be parallel in nature. They do not inherently constitute a unified concept or a composite whole.

Additional insights on use of the *dunhao* are found in the drafting policies of the National People’s Congress, Legal Affairs Commission “Legislative Technical Specifications (Trial) (1)” of the National People’s Congress Standing Committee, (2009) No.62. Article 1.2 of this policy notes that “If there are multiple juxtaposed words in a sentence, use an enumerative comma between each word, and use “and” to connect the last two words. Example: The state protects citizens’ lawful ownership of income [*dunhao*] savings [*dunhao*] houses [*dunhao*] and other legal property”.<sup>92</sup>

These two policies have been cited as sources of interpretative authority by Chinese courts at all levels.<sup>93</sup> The former is mentioned 133 times, and the latter is mentioned 53 times in court documents on CJO.<sup>94</sup>

The SPC has mandated another interpretation of FRAND when it is used in interpreting civil causes of action that are separated by an enumerative comma. The SPC has stated that the cause of action should be interpreted considering the overall practical situation, and that the whole cause of action should not necessarily be seen as one cause of action.<sup>95</sup> This approach towards the *dunhao* authorises a disintegrated approach to the terms separated by the enumerative comma. As an example in the criminal context, an intermediate court in Jiangxi Province clarified that the meaning of an enumerative comma in the middle of “to accommodate [*dunhao*] introduce two or more people to prostitution”, means “or” from the perspective of its grammatical structure.<sup>96</sup>

Considering the unclear conjunctive role of the enumerative comma, as well as the desire of a judge to not unduly constrain his ability to reach decisions, another alternative is to translate the enumerative comma as

<sup>89</sup> See, e.g., Claudia Ross, “Compound Nouns in Mandarin” (Inst. of Educ. Sci., US Dep’t of Educ. 1994), <https://eric.ed.gov/?id=ED258454>.

<sup>90</sup> See “Commas, Which One is Proper?”, *Chinese Language Stack Exchange* <https://chinese.stackexchange.com/questions/28335/commas-which-one-is-proper>.

<sup>91</sup> *National public service platform for standards information*, [Usage of Punctuation Marks], (GB/T15834-2011) (2012). The standard was developed by Peking University, reporting to China’s Ministry of Education. Available at <https://std.samr.gov.cn/gb/search/gbDetailed?id=71F772D7FE25D3A7E05397BE0A0AB82A>.

<sup>92</sup> National People’s Congress Legislative Affairs Committee, Technical Specifications for Legislation, Trial Version, No.1 (2009), available at: <https://npcobserver.com/wp-content/uploads/2023/02/Technical-Specifications-for-Legislation-for-Trial-Implementation-I.pdf>.

<sup>93</sup> Criminal ruling of the second instance of Zhang Longying for enticing, harboring and introducing prostitution, Administrative Judgment of the Intermediate People’s Court of Yichun City, Jiangxi Province (2018) (Gan 09 Xing Zhong No.11).

<sup>94</sup> *Wenshuwang*, searches conducted on December 12, 2024.

<sup>95</sup> Notice of the SPC on Printing and Distributing the Revised Provisions on Causes of Action in Civil Cases, (2020) art.6, <https://www.faxin.cn/lib/zyfl/zyflcontent.aspx?gid=A296598>.

<sup>96</sup> Criminal ruling of the second instance of Zhang Longying for luring [*dunhao*] harbouring [*dunhao*] introducing prostitution, Criminal Ruling of the Intermediate People’s Court of Jingdezhen City, Jiangxi Province, Gan 02 Xingzhong No.81 (2020).

“and/or”. As an example of this approach, in 2009, a WTO panel in an intellectual property dispute between the United States and China determined that the use of a *dunhao* to impose criminal penalties on “reproducing [dunhao] distributing” copyrighted works in certain defined numerical thresholds, “has no precise English equivalent” and can be replaced by the “slash” ([/]).<sup>97</sup> The slash is understood to not exclusively mean “and”, and can mean “and/or”.<sup>98</sup>

Based on the preceding, FRAND with enumerative commas and no “and”, cannot legally substitute for the “and” in English FRAND as it does not require a translated meaning of “and”. The dominant translation of FRAND by the Chinese courts where “and” is removed and an enumerative comma is substituted similarly mistranslates FRAND to “fair and/or reasonable and/or non-discriminatory”. Reverse translations of the acronym from Chinese back into English might account for the removal of the “and” by reverse translating from Chinese to English FRAND as “FRND”.

### Additional Variants Created by Punctuation Changes

From a judicial perspective, translating FRAND as FRND (gongping [dunhao] heli [dunhao] wuqishi) empowers a court to use each limb of FRAND without needing to consider FRAND as a single concept. This mistranslation allows the components of FRND to be selectively applied as follows: (1) F and R and ND; (2) F and R; (3) R and ND; (4) F and ND (5) F only; (6) R only; and (7) ND only. This yields a total of seven additional different combinations when FRAND is translated with an enumerative comma and no conjunction and creates 280 variants when combined with the semantic variations previously identified.<sup>99</sup> Of these 280 variants, 120 would be the component combination of “F and R and ND”, which are already accounted for in the 360 variations previously calculated, leaving 160 as the remainder. Thus, the total hypothetical number of potential semantic and *dunhao*-based grammatical translations of FRAND is 360 + 160 or 520.

In the disaggregated grammatical mistranslation of FRND, individual FRND components need not be applied one after the other like a checklist but rather may be cherry-picked or consumed as a kind of buffet, where there is no need to sample all the dishes. Returning for a moment to the translation of “F”, if a judge relies upon the *gongping* translation of F meaning equality, the disaggregated FRND approach of the Chinese courts

facilitates a judge focusing exclusively on whether a proposed royalty rate is “equal” to rates paid by another licensee, regardless of whether it is otherwise “reasonable” considering differential (*chabie*) terms or conditions. A judge can utilise “F” exclusively, because one reading of FRAND is that all the component terms are only joined by an “or”. In addition, a judge may decide that only “F” matters, because it incorporates “R” in the Civil Code (2020) and predecessor civil law legislation, and as it mandates equality, it is unnecessary to consider “non-discrimination”. Alternatively, if the goal is to establish a rate that is the lowest possible, the judge may also rely upon “ND” including imposing an affirmative obligation of “equal benevolence” or “equal benefit”. As has been previously observed, a judge can also rely upon different variations in one case, since FRAND is being translated inconsistently.

In such an approach, each component may be emphasised or combined with other components in accordance with the desires of the court, much as individuals at a buffet line may focus only on the appetisers, main course, salad, desert, etc., alone or in varying combinations and sequences with each other.

### Judicial Application of Disaggregated FRAND in Rate Setting

The hypothetical variants noted above are also being applied in practice. FRND cases fragment into such disaggregated approaches as: “Fair and Reasonable” (FAR); “Reasonable and Non-Discriminatory” (RAND); Fair and Non-Discriminatory (FAND), only “Fair”; or a checklist including each of Fair and/or Reasonable and/or Non-Discriminatory. The following are some examples:

In the appellate civil FRAND licensing case of *Huawei v Interdigital* (2013), the dominant translation is FRND, while a secondary translation is FRAND. The court applied the “FRAND buffet” when it noted that Huawei asked Interdigital to engage in a “FAR” manner in licensing discussions, referred to licensing terms as “not fair and also not reasonable”. The court also referred to “RAND” obligations, and “fairness and non-discriminatory obligations”. The court also applied civil law concepts of “fair” and “reasonable” in evaluating Interdigital’s licensing behavior.<sup>100</sup>

In the appellate civil antitrust case of *Huawei v Interdigital*, the court adopted a “FAR” approach when it discussed the “unreasonable and unfair” price proposal and behavior by Interdigital.<sup>101</sup> This approach supported a royalty rate calculation “equal to” the lowest rate ever

<sup>97</sup> *Slash*, Merriam Webster’s Dictionary: “a mark/used typically to denote ‘or’ (as in and/or), ‘and or’ (as in straggler/deserter) ....” (Definition 4(a)) <https://www.merriam-webster.com/dictionary/slash>.

<sup>98</sup> Panel Report, *China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO Doc, WT/DS362/R (adopted January 26, 2009). See p.85, fn.382: “Note in mutually agreed translation: There is neither ‘and’ or ‘or’ between ‘making’ and ‘selling’, only a Chinese repetitive comma or *dunhao* which has no precise English equivalent”. In the prior footnote (fn.381), the WTO panel also looked at the presence of the *dunhao* in another provision of the criminal code and noted that it would be translated as a slash, not as an “and”.

<sup>99</sup> Including the semantic variants for each component of FRAND, the total number of additional variants to the 360 already identified for each variant is as follows: Variant 1: Fair (2 variants) x Reasonable (1 variation) x And (5 variants) x Non (3 variants) x Discrimination (4 variants) = 120; Variant 2: Fair (2 variants) x And (5 variants) x Reasonable (1 variant) = 10; Variant 3: Reasonable (1 variant) x And (5 variants) x ND (3 variants) = 15; Variant 4: Fair (2 variants) x And (5 variants) x Non (3 variants) x Discrimination (4 variants) = 120; Variant 5: Fair (2 variants) = 2; Variant 6: Reasonable = 1; Variant 7: Non (3 variants) x Discrimination (4 variants) = 12. The total is 280.

<sup>100</sup> *Huawei v Interdigital* (Patent, Guangdong 2nd 2013) (case no.2).

<sup>101</sup> *Huawei v Interdigital* (AML, Guangdong 2nd 2013) (case no.3).

offered to the licensor, consistent with the meaning of *gongping* as fair/equal. In the appellate court's view, the comparison with a rate that Interdigital offered to Apple was a "fair" comparison, even if that offer was made prior to any litigation or even product launch by Apple. Thus, "fair", in practice, may not only have meant "equal" but the lowest price previously offered.

In 2014, the judges who decided the unpublished Shenzhen trial court decision of *Huawei v InterDigital* likely cherry-picked from the FRAND buffet. An article that they wrote noted that "FAR" capped the price for technology based on harm to the implementor: "If the licensing fee for standard essential patents is so high that it is unprofitable for standard implementers, this is by no means a fair [*dunhao*] reasonable licensing fee".<sup>102</sup>

In *Huawei v Conversant*, Huawei complained of "unfair and unreasonable licensing terms." The Court also noted that the principle of "equal benevolence" applied. On appeal, the SPC cherry-picked FRND by noting that Conversant may not "license according to the not reasonable [*dunhao*] not fair principle [*dunhao*] and/or according to discriminatory provisions".<sup>103</sup>

In the civil AML case of *TCL v Ericsson* (2019), where FRND was the only translation provided of FRAND, the courts also joined the "F" component of FRAND with ND to address FAND pricing violations.<sup>104</sup>

In *Advance Codec v Oppo* (2022), Oppo repeatedly accused Advanced Codec of violating its FRAND obligations while Advanced Codec argued its behavior was "fair and reasonable" (FAR), and that the behavior of Oppo was "not fair and not reasonable".<sup>105</sup> The court translates FRAND three different ways: as FRND, FRAND and as a lexical compound. It notes that the royalty rates offered by Advance Codec are not "fair" (*gongping*) and that it is not "RAND"; it never fully explains that it is not "FRAND".

The plasticity of applying FRND has also worked to the advantage of Chinese companies seeking to license their SEPs to foreigners. IWNComm, a state-owned company that licenses patents which implement a Chinese standard, has brought several cases against foreign companies over the years. In a first instance decision, *IWNComm v Sony* (2015), the court applying FRND, referred to a requirement of the parties to act in a "reasonable non-discriminatory time frame and conditions to negotiate licensing or patent rights", omitting both "fair" (as a process-oriented term) and the "and" in RAND.<sup>106</sup>

In *IWNComm v Apple*, Apple argued IWNCOMM was charging an "unreasonably high price," thereby relying upon "reasonable" as a constraint on pricing.<sup>107</sup> On appeal, the SPC replied that that Apple needed to negotiate a patent license within "reasonable nondiscriminatory terms and conditions" which suggests that reasonableness constrains negotiating behavior as it does under Civil Code art.6.<sup>108</sup>

A recent set of cases of outbound Chinese SEP licensing involves Huawei and Netgear. In late 2024, Huawei obtained an anti-anti-suit injunction (AASI) from the SPC directed to Netgear's filing of an antitrust suit in the United States. The Chinese decision refers to FRND multiple times and applies only the "reasonable" element of FRND, when it discusses Netgear's negotiation with "unreasonable counterprices".<sup>109</sup> In this sense, it follows the Apple line of cases, which look at "reasonable" as a constraining factor on price negotiations.

Non-Chinese courts have also recognised that Chinese courts cherry-pick FRND. In *Unwired Planet v Huawei* and *Huawei v Conversant*, the UK Supreme Court critiqued Chinese approaches to FRAND by referring to these selective practices:

"Licence terms should be made available which are 'fair, reasonable and non-discriminatory', reading that phrase as a composite whole. There are not two distinct obligations, that the licence terms should be fair and reasonable and also, separately, that they should be non-discriminatory. Still less are there three distinct obligations, that the licence terms should be fair and, separately, reasonable and, separately, non-discriminatory."<sup>110</sup>

The UK Supreme Court further added that "ETSI clause 6(1) 'lends itself naturally to being read in [a] unitary way'".<sup>111</sup> The UK court also cited to the Nanjing Intermediate Court in *Huawei v Conversant* (2018)<sup>112</sup> for the proposition that China engaged in "hard-edged" non-discrimination. The court was likely unaware that Huawei licensed by "FRAND" principles of "equal benevolence", that it applied a concept of "fairness" that demanded equality of treatment, and that the Nanjing court ultimately applied a FRND concept which facilitated disaggregating FRAND into the component parts observed by the court, although the lack of a PACER system makes it difficult to determine the nature of the translations that were relied upon by the UK court.

The need for a unitary approach that does not unduly focus on equality or non-discrimination was underscored again by the UK courts in a more recent case, *Interdigital*

<sup>102</sup> Ye Ruosi et al. article.

<sup>103</sup> *Huawei v Conversant*, (Nanjing 1st. 2018) (case no.32).

<sup>104</sup> *TCL v Ericsson* (SPC AML 2nd 2019) (case no.48).

<sup>105</sup> *Advanced Codec v Oppo* (SPC IP Div Civil Final 2022) (case no.60). This case has been anonymized. The WIPO SEP database posted the case prior to anonymisation, <https://www.wipo.int/wipolex/zh/judgments/details/2249>.

<sup>106</sup> *IWNComm v Sony* (Beijing IP Ct 2015) (2015) (case no.5).

<sup>107</sup> *IWNComm v Apple* (SPC 2022) (case no.62).

<sup>108</sup> See also *IWNComm v Apple* (Patent SPC Final 2022) (case no.64) (this case has also been anonymised).

<sup>109</sup> *Huawei v Netgear* (SPC 2024) (case no.65) (this case has also been anonymised).

<sup>110</sup> *Unwired Planet Int'l Ltd v Huawei Technologies (UK) Co Ltd*. [2020] UKSC 37 at [113], <https://www.supremecourt.uk/cases/docs/uksc-2018-0214-judgment.pdf>.

<sup>111</sup> *Unwired Planet Int'l Ltd v Huawei Technologies (UK) Co Ltd*. [2020] UKSC 37 at 114.

<sup>112</sup> *Huawei v Conversant* (Nanjing Interim. Ct. 2018) (case no.32).

*v Lenovo*. In that case, the Court of Appeals noted that SEP owners are not “required to grant license terms to an implementer equivalent to the most favourable license it has granted to a similarly situated licensee”.<sup>113</sup>

## Transplanting FRAND

In addition to linguistic translations of FRAND, the various components of FRAND have been adapted to Chinese legal norms, particularly Chinese civil law and have thereby been imported into other areas of Chinese law, regardless of whether a party agreed to license or distribute based on a “FRAND” commitment.

*Huawei v Interdigital* (2013) drew the first and most direct link between China’s civil law and FRAND. The judges in this decision explicitly rejected ETSI’s requirement of the application of French law to the interpretation of FRAND commitments. The court also noted that Chinese civil law, particularly the then-applicable General Principles of the Civil Law, would provide the relevant interpretations of FRAND as necessary:

“Although Chinese law does not specifically stipulate “FRAND” ... it has similar provisions. In litigation, if there are differences in understanding of contract terms or words in the agreement, the people’s court may interpret it in accordance with relevant laws and regulations, etc. The principles of fairness [*dunhao*] reasonableness [*dunhao*] non-discrimination are also consistent with Article 4 of the General Principles of the Civil Law of the People’s Republic which stipulates that “civil activities shall be conducted on a voluntary [*dunhao*] fair [*gongping*] compensation for equal value basis, and good faith/integrity basis” as well as the Contract of the People’s Republic of China Article 5 which stipulates that “the parties shall determine the rights and obligations of each party in accordance with the principle of fairness [*gongping*]” and Article 6 further stipulates that “the parties shall exercise their rights and perform their obligations “according to the principle of honesty/integrity”, etc”.<sup>114</sup>”

The substantive provisions referred to by the court of the General Principles of the Civil Law and the Contract Law have since been amended and incorporated into the Civil Code, particularly arts 6 and 7 regarding “fairness” and “honesty/integrity”.

These Civil Code principles have since been applied in decisions such as *Oppo v Sharp* (2020)<sup>115</sup> which maintained that Chinese courts not only shall apply Chinese law, but they can do so on a global rate setting basis. *Advance Codec v Oppo* (2022) similarly relied upon art.6 of the Civil Code and its definition of “fairness” and “reasonableness”.<sup>116</sup>

No Chinese court in a published decision that I reviewed has determined that Chinese civil law or general Chinese legal principles do not apply to the interpretation of FRAND. Chinese courts have also not addressed basic issues such as whether Chinese notions of “fairness” (*gongping*) are the same as fairness under French law as expressed in English, as required by ETSI 6.1. Unlike the practice in SEP litigation in other countries, experts in French law appear to be rarely used in Chinese SEP cases based on ETSI’s FRAND policy.

By applying Chinese civil law legal principles to interpret FRAND, the courts have expanded FRAND principles beyond SEPs to a general Chinese civil law context. However, FRAND cases are premised on the commitment of the patentee to license its patents as a condition of the patent being incorporated into a standard. The effect of this exchange has generally been to limit the rights of the patentee, particularly out of concern for possible abuse through charging monopolistic rents. The expansion of FRAND outside of the SEP context may lack such a bargained exchange. While FRAND decisions could logically govern all types of civil transactions to the extent they are based on the Civil Code, such transplantations in the absence of a patentee’s SEP declaration to an SDO undercut the rights of a patentee to commercialise its property rights as it sees fit. Furthermore, if adopted internationally, it could lead to an increased balkanisation of the FRAND environment based on local civil laws, including potentially those of the 50 states in the US for contract claims. Moreover, this approach may also pose a risk to China’s nascent Civil Code as it should logically apply to all objects of the Civil Code, and not merely SEP cases.

It is unsurprising, therefore, that alert counsel have recognised the inherent contradictions in relying upon general civil law principles to govern FRAND assertions. There have been several patent disputes in China where an accused infringer has stated that damages for infringement should be based on lower than usual FRAND royalties despite the absence of a FRAND commitment by the patentee. China’s IP courts have rejected those assertions in several published decisions.<sup>117</sup>

<sup>113</sup> *Unwired Planet v Huawei and Huawei v Conversant* [2024] EWCA Civ 243; Eeva Hakoranta, “Some Reflections on InterDigital’s Resounding Court of Appeal win over Lenovo in the UK” (July 14, 2024), <https://www.interdigital.com/post/some-reflections-on-interdigitals-resounding-court-of-appeal-win-over-lenovo-in-the-uk>.

<sup>114</sup> *Huawei v Interdigital* (Patents, Guangdong High Ct. 2013) (case no.2).

<sup>115</sup> *Oppo v Sharp* (SPC Jurisdiction 2020) (case no.49).

<sup>116</sup> *Advanced Codec v Oppo* (SPC 2022) (case no.60).

<sup>117</sup> See, e.g., *Qilu Pharma v SihuanPharm* (Huerhaote Intern. Ct. 2015) (cases nos.7, 19, 30), *Knorr-Bremse Commercial Vehicle Braking Systems Co., Ltd v Hengshui Yongxin Braking Materials Co., Ltd.* (Beijing IP Ct. 2018) (case nos.36, 37), and *General Motors et al v Shenzhen Daotongke company* (Guangdong High Ct. 2016) (case no.9).

Nonetheless, the situation outside of the patent litigation context is different, with FRAND being progressively integrated into non-patent areas of law and public policy. In intellectual property, FRAND has been extended to collective management organisation copyright licensing (all translated as a lexical compound)<sup>118</sup> as well as non-SEP and non-IP antitrust behavioural remedies.<sup>119</sup> FRAND principles have also been introduced by SAC to guide compulsory licensing for pharmaceuticals.<sup>120</sup> FRAND was also incorporated into the related area of Chinese policy regarding global pandemic preparedness.<sup>121</sup> Export control policies are also governed by FRAND, albeit with substituting the Chinese character for “just” instead of “equal” for “fair” in FRAND, which may imply that not all countries will be treated equally. Such disparate treatment between allies and other parties is typical of export control regimes.<sup>122</sup>

The many translations of FRAND in SEP cases provide a high degree of flexibility to judges and regulators in applying FRAND to different licensing disputes. These new faces of FRAND also confirm that FRAND is well rooted in Chinese civil law. However, they also leave one wondering whether FRAND is well understood in these new applications, and, indeed, whether FRAND has evolved from a vague but well-studied legal concept, into a general Chinese principle, or even a political slogan.<sup>123</sup> To date, FRAND has been applied outside of the SEP context typically when China desires to grant “fair” access to another’s rights. The overall effect of these developments has been to transplant FRAND into other areas of Chinese law and society with their own unique and evolving characteristics. Perhaps, in time, these other areas of law will become more rooted in Chinese society, and their interpretations of FRAND will also influence SEP adjudication as well.

## Conclusion and Next Steps

Translations are rarely perfect. Translations are especially difficult between vastly different languages and legal cultures. Readable and comprehensive translations may also be impossible when the source text is ambiguous. In view of these difficulties, attorneys, judges and policy makers should not assume that a translated text of FRAND is necessarily the most accurate. Further inquiry by counsel and judges regarding the accuracy of FRAND translations should become more common. As part of that process, attorneys should also ensure that translators understand the challenges of translating an inherently vague but important legal term such as FRAND and that translators bring inconsistencies to the attention of counsel and possibly the court.

The importance of translation oversight is not limited to court proceedings in China. Unclear translations or lack of oversight may have also affected foreign court proceedings which have had to consider the impact of their proceedings on a parallel proceeding in China or have sought to better understand how Chinese courts might understand similar problems. In countries like the United Kingdom, which lack a PACER system for court filings, cases would likely also have benefitted from greater public disclosure by translators of variations in FRAND.

Apart from insisting on more accurate translations, China’s inconsistent and often erroneous translations of FRAND should also raise concerns by SDOs as well as intergovernmental organisations involved in intellectual property or standards, such as the WTO, ETSI and the International Telecommunications Union. Moreover, it is entirely possible that other countries have similarly diverse “faces” of FRAND which should be discussed to better educate all users of the system about the divergent meanings inherent in FRAND and to thereby establish best practices for translation and adjudication.

<sup>118</sup> The following six FRAND collective management cases were all decided on March 28, 2022 by the SPC, Civil IPR Division: (1) *Jiangmen Xinhui District Huanchang Catering and Entertainment Co., Ltd. v China Audio-Video Copyright Collective Management Association* (2021) (SPC, Civil IP Division Final, No. 7); (2) *Guangzhou City Lemaidi Entertainment Co., Ltd. v China Audio-Video Copyright Collective Management Association* (2020) (SPC Civil IP Division, Final No. 1448); (3) *Guangzhou Nansha District Nansha California Bar v China Audio-Video Copyright Collective Management Association* (2020) (SPC Civil IP Division, No. 1452); (4) *Meizhou City Meixian District Jiale Hotel Co., Ltd. [anonymized as Meizhou Mou Company] v China Audio-Video Copyright Collective Management Association* (2020) (SPC Civil IP Division Final No. 1458) (AML decision); (5) *Meizhou City Mou Company v China Audio-Video Copyright Collective Management Association* (2020) (SPC IP Division Final No. 1459); (6) *Guangzhou City Jinbi World Catering and Entertainment Co., Ltd. v China Audio-Video Copyright Collective Management Association* (2020) (SPC Civil IP Division Final No. 1519).

<sup>119</sup> SAMR, *SAMR Announcement on the Antimonopoly Review Decision on Approving the Establishment of a Joint Venture between Shanghai Airport (Group) Co., Ltd. and China Eastern Airlines Logistics Co., Ltd. with Additional Restrictive Conditions* (September 14, 2022). The relevant remedy is found at art.6(6): “The Airport Group, China Eastern Airlines Logistics and the joint venture shall provide airport cargo terminal services at Pudong Airport in accordance with principle of fair [dunhao] reasonable [dunhao] non-discrimination [FRND]. They shall not discriminate against downstream customers under the same conditions, in terms of price, quantity and other transaction conditions, shall not impose unreasonably high prices, and shall not unreasonably limit the total amount of Pudong Airport cargo terminal services provided”. This and other SAMR non-SEP behavioral remedy conditions for merger approval are available from the author.

<sup>120</sup> SAC, National Standards for Management of Patents (Provisional) (2013) Text and machine translation available at: <https://www.wipo.int/wipolex/en/text/337261>.

<sup>121</sup> H.E. Xi Jinping, “Adhere to Sustainable Development and Build an Asia-Pacific Community with a Shared Future”, Keynote Address Before the APEC Summit (November 11, 2021), Bilingual text is available here: <https://language.chinadaily.com.cn/a/202111/11/WS618c6adfa310cdd39bc74a2a.html>. Xi uses different combinations of FRAND in his speech including “gongping [dunhao] gongzheng [dunhao] feiqishi” which is liberally translated as “open, fair, equitable and non-discriminatory” Reasonable is used elsewhere in his speech. Xi Jinping’s views that access to medicines should be made on a FRAND-like basis are also held by others in the West, see Petrie flom.Com Blog, *FRAND Terms for Pandemic-essential Intellectual Property Rights*, Kaat Van Delm, (December 7, 2021), <https://blog.petrieflom.law.harvard.edu/2021/12/07/frand-terms-for-pandemic-essential-intellectual-property-rights/>.

<sup>122</sup> The State Council Information Office PRC, *China Issues First White Paper on Export Controls* (December 29, 2021) (“Fair, reasonable, and non-discriminatory export control measures are increasingly important...”), [http://english.scio.gov.cn/whitepapers/2021-12/29/content\\_77959046.htm](http://english.scio.gov.cn/whitepapers/2021-12/29/content_77959046.htm); *State Council White Paper on China’s Export Controls* 1st edn (2021), art.1, [http://english.scio.gov.cn/whitepapers/2021-12/29/content\\_77959040.html](http://english.scio.gov.cn/whitepapers/2021-12/29/content_77959040.html) China “actively promotes the implementation of fair, reasonable and non-discriminatory international export controls”. The Chinese original for FRAND is gongzheng [dunhao] heli [dunhao] feiqishi FRND with “Fair” using the “just” or “equitable” alternative. See the White Paper at: [https://www.gov.cn/zhengce/2021-12/29/content\\_5665104.html](https://www.gov.cn/zhengce/2021-12/29/content_5665104.html).

<sup>123</sup> Falk Hartig, “Political Slogans as Instruments of International Government Communication—The Case of China”, (2018) 24(1) J. of Int’l Comm’n 115 (Chinese leaders put forward vague foreign policy concepts which should be viewed as slogans rather than concrete strategies to mobilise domestic and international actors); Jianlin Song and James Paul Gee, “Slogans with Chinese Characteristics: The Political Functions of a Discourse Form”, (2020) 31 *Discourse & Soc’y* 487 (Slogans in China are an important way to teach people to see themselves as “co-citizens” in the state. Slogans also always link to important ideological goals and intersect with the state as a source of coercive power).



The WTO has an important potential role in standardising how FRAND is translated. The TBT Agreement, which binds all WTO members, requires that standards setting procedures by member countries should “not create unnecessary obstacles to international trade” and that standards shall not be more “trade-restrictive than necessary to fulfil a legitimate objective”.<sup>124</sup> China was an early pioneer in recognising that the role that IP played in standards can be an impermissible “technical barrier to trade” under WTO rules. A proposal was submitted by China’s Ministry of Commerce in 2006 to the TBT committee at the WTO:

“China is of the view that, IPR issues in preparing and adopting international standards have become an obstacle for Members to adopt international standards and facilitate international trade. It is necessary for the WTO to consider negative impacts of this issue on multilateral trade and explore appropriate trade policies to resolve difficulties arising from this issue.”<sup>125</sup>

The TRIPS Agreement in its Preamble similarly acknowledges the importance of standardised terms governing the commercialisation of intellectual property. A goal of the agreement is to “reduce distortions and impediments to international trade” and to advance “the provisions of adequate standards and principles concerning the ... use of trade-related intellectual property rights”.<sup>126</sup>

As SEP litigation continues to grow and impact courts throughout the world, China’s examples of varying FRAND translations should raise concerns under these WTO disciplines. A useful initial goal for diplomatic engagement would be a harmonised understanding of the many meanings of FRAND, through coordination with SDOs such as ETSI or the ITU and international organisations such as WIPO and a set of best practices for translating and applying this key term. Such a diplomatic engagement might be based on a more comprehensive overview of the various translations of FRAND and how they are applied by courts and administrative agencies throughout the world. Countries may also wish to clarify what preferences are permissible in IP licensing, and how they might apply an integrated approach to FRAND. China’s increasingly important role as an outbound licensor can also make it an important partner in those discussions and in establishing an appropriate balance between the needs of the innovator and implementor.

Any change involving Chinese translations of FRAND and the application of its translations of many colors will be burdened by China’s 10+ years history of inconsistently translating FRAND. Nonetheless, China has a rich and unique tradition of recognising that names

may need to be rectified to clarify the appropriateness of one’s intentions. During the Spring and Autumn Period (770–476 BC), the rectification of names was called *zhengming*. Confucius described this practice in his *Analects*:

“[A] superior man considers it necessary that the names he uses may be spoken appropriately, and also that what he speaks may be carried out appropriately. What the superior man requires is just that in his words there may be nothing incorrect”.<sup>127</sup>

I am certain that Confucius would agree that a discussion with China and other trading partners around the appropriate translations of FRAND is long overdue.

## Appendix 1: Examples of Translations of FRAND Into Other Languages

Language	Translation/Expression of FRAND	Case Source
<i>Non-European Languages</i>		
PRC/China	Multiple	Multiple
Taiwan	gongping [dunhao], heli he wu chabie	Antitrust policies and cases (discussions with counsel)
Japan	Kōsei, gōri-teki, katsu, hi sabetsu-teki	<i>Imation v One Blue</i>
South Korea	gong-jeong-ha-go hap-ri-jeok-i-myeo bi-chabyeol-jeog-in jo-geon	<i>Samsung Electronics Co. v Apple Korea Ltd., Qualcomm Incorporated et al. v Korean Fair Trade Commission</i>
Indonesian	adil, wajar dan tidak diskriminatif	NPFD
Malay	adil, wajar dan tidak diskriminatif	NPFD
Turkish	adil, makul ve ayrımcı olmayan	<i>Vestel v Philips</i>
<i>European languages</i>		
English (UK)	fair, reasonable and non-discriminatory	<i>Unwired Planet and Huawei v Conversant</i>
English (USA)	fair, reasonable and non-discriminatory or fair, reasonable, and non-discriminatory	<i>Lenovo v Ericsson</i>
French	à des conditions équitables, raisonnables et non discriminatoires, dites «FRAND»	<i>Huawei v ZTE</i>
German	fairen, zumutbaren und diskriminierungsfreien Bedingungen (sogenannte FRAND-Bedingungen)	<i>Huawei v ZTE</i>

<sup>124</sup> WTO, Agreement on Technical Barriers to Trade (1995), [https://www.wto.org/english/docs\\_e/legal\\_e/17-tbt\\_e.htm](https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm).

<sup>125</sup> WTO, Intellectual Property Right (IPR) Issues in Standardisation, *Communication from the People’s Republic of China*, G/TBT/W/251 (May 25, 2005). See also WTO, *Background paper for Chinese Submission to WTO on Intellectual Property Right Issues in Standardisation (G/TBT/W/251)*, Communication from the People’s Republic of China, G/TBT/W/251/Add.1 (Nov 9, 2006).

<sup>126</sup> WTO, Agreement on Technical Barriers to Trade (the legal text), <https://www.wto-ilibrary.org/content/books/9789287042194c009>.

<sup>127</sup> Confucius, *Analects*, Book XIII, Ch.3, verse 7, *Analects* 13.3, translated by James Legge.

Language	Translation/Expression of FRAND	Case Source
Slovenian	licence pod pravičnimi, razumnimi in nediskriminatornimi pogoji, to je pogoji „FRAND“	<i>Huawei v ZTE</i>
Swedish	på skäliga, rimliga och icke-diskriminerande villkor (”Fair, Reasonable and Non-Discriminatory terms”) (så kallade FRAND-villkor)	<i>Huawei v ZTE</i>
Finnish	oikeudenmukaisin, kohtuullisin ja syrjimättömin ehdoin eli ns. FRAND-ehdoin	<i>Huawei v ZTE</i>
Spanish (Iberian)	en condiciones equitativas, razonables y no discriminatorias, denominadas «condiciones FRAND»	<i>Huawei v ZTE</i>
Italian	a condizioni eque, ragionevoli e non discriminatorie, dette «FRAND»	<i>Huawei v ZTE</i>
Dutch	eerlijke, redelijke en niet-diskriminerende voorwaarden, genoemd FRAND-voorwaarden	<i>Huawei v ZTE</i>
Croatian	po poštenim, razumnim i nediskriminirajućim uvjetima, tzv. uvjetima FRAND	<i>Huawei v ZTE</i>
Bulgarian	справедливи, разумни и недискриминационни условия, наречени „FRAND“	<i>Huawei v ZTE</i>
Czech	práva za rovných, přiměřených a nediskriminačních podmínek zvaných „FRAND“	<i>Huawei v ZTE</i>
Danish	retfærdige, rimelige og ikke-diskriminerende vilkår, normalt kaldet »FRAND«	<i>Huawei v ZTE</i>
Estonian	litsentse õiglastel, mõistlikel ja mitte-diskrimineerivatel ehk nn FRAND	<i>Huawei v ZTE</i>

Language	Translation/Expression of FRAND	Case Source
Greek	δίκαιους, εύλογους και χωρίς διακρίσεις ό ρ ο υ ς , επονομαζόμενους «FRAND»	<i>Huawei v ZTE</i>
Latvian	taisnīgiem, saprātīgiem un nediskriminējošiem jeb t.s. “FRAND”	<i>Huawei v ZTE</i>
Lithuanian	sąžiningomis, teisingomis ir nediskriminacinėmis, t. y. FRAND	<i>Huawei v ZTE</i>
Hungarian	tisztességes, ésszerű és hátrányosmegkülönböztetés-mentes	<i>Huawei v ZTE</i>
Maltese	ekwi, raġonevoli u mhux diskriminatorji, imsejha FRAND	<i>Huawei v ZTE</i>
Polish	na warunkach uczciwych, rozsądnych i niedyskryminacyjnych, zwanych FRAND	<i>Huawei v ZTE</i>
Portuguese (European)	em condições equitativas, razoáveis e não discriminatórias, ditas «FRAND»	<i>Huawei v ZTE</i>
Romanian	în condiii echitabile, rezonabile li nediscriminatorii, numite „FRAND”	<i>Huawei v ZTE</i>
Slovak	spravedlivých, primeraných a nediskriminačných podmienok, tzv. podmienok „FRAND“	<i>Huawei v ZTE</i>
Spanish (Colombian)	“equitativas, razonables y no discriminatorias”--same as Iberian Spanish	Superintendencia de Industria y Comercio (various)
Portug (Braz)	Justo, Razoável e Não Discriminatório	Based on discussions with counsel.

NPFD= No Published Final Decision.

*Huawei v ZTE* refers to the various translations of the European Court of Justice decision, C-170/13 (2015).

## Appendix 2: Use Of FRAND in Selected Chinese SEP Cases

No.	Name in English	Docket Number	Year	Court	Instance	Foreign	Examples of Translations
1	<i>Zhang Jingting v Hengshui Ziyahe Construction Eng.</i>	Mintizi 125	2012	SPC	Unclear	N	LC
2	<i>Huawei v InterDigital</i>	Yuegaofaminsanzhongzi 305	2013	Guangdong High Ct (licensing)	2nd	Y	FIE, FRAND; FRND; LC (two variations); FAND; FAR
3	<i>Huawei v InterDigital</i>	Yuegaofaminsanzhongzi 306	2013	Guangdong High Ct (antitrust)	2nd	Y	FIE; FRND; FRAND Translated; LC; F1; FRAND Translated
4	<i>Ningbo Ketianciye v Hitachi Metals</i>	Zheyongzhichu 579	2014	Ningbo Inter. Ct	1st	Y	FRND; LC, FRND with “Mutual Benefit”, FAR

No.	Name in English	Docket Number	Year	Court	Instance	Foreign	Examples of Translations
5	<i>IWNComm v Sony</i>	JingJingzhiminchuzi 1194	2015	Beijing IP Ct	1st	Y	FIE; RAND
6	<i>IWNComm v Sony</i>	Gaomin (Zhi) Zhongzi 4322	2015	Beijing High Ct	2nd	Y	R
7	<i>Qilu Pharma v Sihuan-Pharm</i>	Huminzhizi 00130	2015	Huerhaote Inter. Ct	1st	Y	FIE, FRND
8	<i>ZTE v Vringo Infrastructure</i>	Yuegaofaliminzhongzi 502	2015	Guangdong High Ct	2nd	Y	A SEP dispute, but only reference was to stop high pricing.
9	<i>General Motors et al v Shenzhen Daotongke Company</i>	Yueminxiazhong 162, 163	2016	Guangdong High Ct	2nd	Y	LC; FRND
10	<i>Hengshui Mingjian Engin. Rubber v Xu Bin</i>	Xiaminzhong 567	2016	Shanxi High Ct	2nd	N	FRND; RAND
11	<i>Huawei v Samsung</i>	73 Minchu 877	2016	Beijing IP Ct	1st	Y	FRAND Translated
12	<i>Huawei v Samsung</i>	73 Minchu 549	2016	Beijing IP Ct	1st	Y	FRND
13	<i>Huawei v Samsung</i>	Jingminxiazhong 263	2016	Beijing High Ct	2nd	Y	FRND
14	<i>Huawei v Samsung</i>	Jingminxiazhong 262	2016	Beijing High Ct	2nd	Y	FRND
15	<i>Huawei v Samsung</i>	Jingminxiazhong 261	2016	Beijing High Ct	2nd	Y	FRND
16	<i>Huawei v Samsung</i>	Yue03minchu 840	2016	Shenzhen Inter. Ct	1st	Y	FIE; FRND; FRAND Translated; EB
17	<i>Huawei v Samsung</i>	Yue03minchu 816	2016	Shenzhen	1st	Y	FIE, FRND; FRAND Translated; EB
18	<i>Zeng Qingyi v China Construction 2nd Engin.</i>	Yue73minchu 1926	2016	Guangzhou IP Ct	1st	N	FRND
19	<i>Beijing Sihuan Pharma v Qilu</i>	Jing73minchu 42	2017	Beijing IP Ct	1st	N	FRND
20	<i>Huawei v Panoptis</i>	Jingminxiazhong 380	2017	Beijing High Ct	2nd	Y	FRAND Translated
21	<i>Huawei v Panoptis</i>	Yue03minchu 1673(1)	2017	Shenzhen Inter. Ct	1st	Y	FRND; FRAND Translated
22	<i>Huawei v Tianjin Samsung</i>	Jingminxiazhong 407	2017	Beijing High Ct	2nd	Y	FRAND Translated
23	<i>Huawei v Tianjin Samsung</i>	Jingminxiazhong 406	2017	Beijing High Ct	2nd	Y	FRAND Translated
24	<i>Huawei v Samsung</i>	Jingminxiazhong 402	2017	Beijing IP Ct	2nd	Y	FIE
25	<i>IWNComm v Apple</i>	Jingminzhong 454	2017	Beijing High Ct	2nd	Y	FRND; FRAND Translated
26	<i>IWNComm v Apple</i>	Jingminxiazhong 144	2017	Beijing High Ct	2nd	Y	FRND
27	<i>IWNComm v Sony</i>	Jingminzhong 454	2017	Beijing High Ct	2nd	Y	FRND; FRAND Translated; RAND
28	<i>L2 Mobile Tech Co., Ltd. v Beijing Jingdong Sanbalushidu</i>	Jing73minchu 1617	2017	Beijing IP Ct	1st	Y	FRND
29	<i>Qilu Pharma v Beijing Sihuan Pharma</i>	SPCminsJhen 4107	2017	SPC	Retrial	N	FRND
30	<i>Qilu Pharmaceutical Co v Beijing Sihuan Pharma</i>	Neiminzhong 125	2017	Inner Mongolia	2nd	N	FRND
31	<i>Apple v Qualcomm</i>	Yueminxiazhong 482-484	2018	Guangdong High Ct	2nd	Y	FIE
32	<i>Huawei v Conversant</i>	Su01minchu 232, 233, 234	2018	Nanjing Inter. Ct	1st	Y	FIE; FRND; FRAND Translated; FAR; EB
33	<i>Pan Optis Patent Management Co., Ltd. v Optis Cellular Technology Co., Ltd.</i>	Yueminxiazhong 443	2018	Guangdong High Ct	2nd	Y	FIE; FRND

No.	Name in English	Docket Number	Year	Court	Instance	Foreign	Examples of Translations
34	<i>Siemens v Beijing Fengkaidi Economic and Trade</i>	Jing73minchu 1086	2018	Beijing IP Ct	1st	Y	FRND
35	<i>Siemens v Miaomiaohui Technology/Vivo</i>	Jing73minchu 1085	2018	Beijing IP Ct	1st	Y	FRND
36	<i>Knorr-Bremse Commercial Vehicle v Hengshui Yongxin Manufacturing Materials</i>	Jing73minchu 62	2018	Beijing IP Ct	1st	Y	FIE
37	<i>Knorr-Bremse Commercial Vehicle v Hengshui Yongxin Manufacturing Materials</i>	Jing73minchu 63	2018	Beijing IP Ct	1st	Y	FIE
38	<i>ZTE v Conversant</i>	Yue03 minchu 335(1)	2018	Shenzhen Inter. Ct	1st	Y	FIE; FRND
39	<i>Apple v IWNComm</i>	Jingminxiazhong 100	2019	Beijing High Ct	2nd	Y	FRND
40	<i>Hebei Yidali Rubber Products v Xu Bin</i>	SPCzhiminxiazhong 92	2019	SPC	2nd	Y	FRND
41	<i>Huawei v Conversant (1)</i>	SPCzhimin 732, 733, 734(1)	2019	SPC	2nd	Y	FIE; FRND
42	<i>Huawei v Conversant (2)</i>	SPCzhiminzhong 732, 733, 734(2)	2019	SPC	2nd	Y	FIE; FRND
43	<i>Huawei v Conversant</i>	SPCzhiminxiazhong 157	2019	SPC	2nd	Y	FIE; FRND
44	<i>TCL v Ericsson</i>	SPCzhiminxiazhong 32	2019	SPC	2nd	Y	FIE; FRND, FAND, F
45	<i>Xiaomi v Interdigital</i>	E01zhiminchu169(1)	2019	Wuhan Inter. Ct	1st	Y	FRND, R
46	<i>Koninklijke KPNN v Xiaomi</i>	Hu73zhiminchu 1204	2020	Shanghai IP Ct	1st	Y	FRND
47	<i>Oppo v Sisvel</i>	SPCzhiminxiazhong 392	2020	SPC	2nd	Y	FIE; FRND; F
48	<i>Nokia v Lenovo</i>	Yue03minchu 5105	2020	Shenzhen Inter. Ct	1st	Y	FIE; FRND
49	<i>Oppo v Sharp</i>	SPCzhiminxiazhong 517	2020	SPC	2nd	Y	FIE; FRND
50	<i>L2 Mobile Tech. v Beijing JD Sanbailishidu E-Commerce</i>	Jing73minchu 1617	2020	Beijing IP Ct	1st	Y	FRND
51	<i>Oppo v Sisvel</i>	Yue73minchu 451(2)	2020	Guangzhou Inter. Ct	1st	Y	FIE, FRAND Translated; FRND; F
52	<i>Samsung v Ericsson</i>	E01zhiminchu 743	2020	Wuhan Inter. Ct	1st	Y	FIE; FRAND Translated; FRND; FAR
53	<i>Xiaomi v InterDigital</i>	E01zhiminchu169(2)	2020	Wuhan Inter. Ct	1st	Y	FIE
54	<i>Xu Mou v Ningbo Mou Gongsi (anonymized)</i>	SPCzhiminzhong 1696	2020	SPC	2nd	N	FRND; RAND
55	<i>Gangshui Yongxin Braking Materials v Knorr-Bremse</i>	SPCzhiminzhong 12	2021	SPC	2nd	Y	FIE
56	<i>Gangshui Yongxin Braking Materials v. Knorr-Bremse</i>	SPCzhiminzhong 6	2021	SPC	2nd	Y	FIE
57	<i>Rimou v Ningbo Tongmou (anonymized Hitachi Metals)</i>	SPCzhiminzhong 1398	2021	SPC	2nd	Y	FRND
58	<i>Rimou v Ningbo Kemou (anonymized Hitachi Metals)</i>	SPCzhiminzhong 1482	2021	SPC	2nd	Y	FRND
59	<i>Oppo v Nokia</i>	Yu01minchu 1232	2021	Chongqing Inter. Ct	1st	Y	FIE; FRND; FRAND
60	<i>Advanced Codec v OP-PO (anonymized)</i>	SPCzhiminzhong 908, 909, 912, 913, 914, 915	2022	SPC	2nd	Y	FIE; FRND; FAR

No.	Name in English	Docket Number	Year	Court	Instance	Foreign	Examples of Translations
61	<i>IP Bridge 1 v Huawei Technology</i>	SPCzhiminxiangzhong 221	2022	SPC	2nd	Y	FIE; FRND
62	<i>Iwncomm v Apple (anonymized)</i>	SPCzhiminzhong 817	2022	SPC	2nd	Y	FIE; FRND; FRAND
63	<i>Oppo v Nokia</i>	SPCzhiminxiangzhong 167	2022	SPC	2nd	Y	FIE; FRND
64	<i>Iwncomm v Apple (anonymized)</i>	SPCzhiminshen 819	2023	SPC	2nd	Y	FIE; FRND
65	<i>Huawei v Netgear (anonymized)</i>	SPCzhiminzhong 914, 915	2024	SPC	2nd	Y	FIE; FRND

Code to translation examples:

FIE: FRAND in English. FRAND appears as an English term.

FRND: FRAND appears without a conjunction and with an enumerative comma in Chinese.

FRAND—Translated: FRAND appears with an “and” and with an enumerative comma.

EB: Equal benevolence (*yishitongren*).

LC: FRAND appears as a Lexical Compound.

RAND: Reasonable and Non-Discriminatory.

FAR: Fair and Reasonable.

FAND: Fair and Non-Discriminatory.

F: Use of Fair for prices.

R: Use of reasonable to set prices.

Note: conjunction and negative synonyms are omitted.