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1 ARTICLE 63

1.1 Text of Article 63

Article 63

Transparency

1. Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them. Agreements concerning the subject matter of this Agreement which are in force between the government or a governmental agency of a Member and the government or a governmental agency of another Member shall also be published.

2. Members shall notify the laws and regulations referred to in paragraph 1 to the Council for TRIPS in order to assist that Council in its review of the operation of this Agreement. The Council shall attempt to minimize the burden on Members in carrying out this obligation and may decide to waive the obligation to notify such laws and regulations directly to the Council if consultations with WIPO on the establishment of a common register containing these laws and regulations are successful. The Council shall also consider in this connection any action required regarding notifications pursuant to the obligations under this Agreement stemming from the provisions of Article 6*ter* of the Paris Convention (1967).

3. Each Member shall be prepared to supply, in response to a written request from another Member, information of the sort referred to in paragraph 1. A Member, having reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement, may also request in writing to be given access to or be informed in sufficient detail of such specific judicial decisions or administrative rulings or bilateral agreements.

4. Nothing in paragraphs 1, 2 and 3 shall require Members to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

1.2 Article 63.1

1.2.1 "Laws and regulations ... of general application"

1. In *China – IPRs Enforcement (EU)*, the Arbitrator in the *ad hoc* appeal arbitration under Article 25 of the DSU, in interpreting the term "of general application", relied on prior Appellate Body findings under Article X:1 of the GATT 1994:

"Before us is the interpretation of the term 'of general application' in the phrase 'final judicial decisions ... of general application' in the first sentence of Article 63.1. We note that, while this is the first time Article 63.1 is being interpreted in the context of WTO dispute settlement, the provision bears important parallels with Article X:1 of the GATT 1994 which equally addresses the matter of publication and administration of trade regulations within its scope.¹

The Appellate Body has highlighted the 'fundamental importance' and due process dimensions of the transparency provisions in Article X of the GATT 1994. In particular, its paragraph 1 addresses the due process notion of notice, i.e. by requiring publication that ensures that those who need to be aware of certain laws, regulations, judicial decisions and administrative rulings of general application can become acquainted with them. The 'essential implication' of this due process dimension is 'that Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures.'

Similarly, we consider Article 63.1 of the TRIPS Agreement to reflect the fundamental importance of transparency. Article 63 should be understood as part of the regime on transparency of the TRIPS Agreement that was negotiated by Members 'to ensure the availability of information while at the same time not creating onerous burdens on Members'. In this regard, Article 63.1 offers some latitude to Members in terms of the timing and means available to them to ensure that other Members and right holders become acquainted with relevant IP rights-related rules.²³

2. The Arbitrator then applied its interpretation of the term "of general application" to the term "judicial decisions" in Article 63.1:

"Turning to the term 'judicial decisions', it refers to an action or pronouncement by a judicial body or authority. The Panel considered, and the parties agreed, that the legal standard articulated by the panel in *Japan – Film* in the context of Article X:1 of the GATT 1994 with respect to whether administrative rulings in individual cases are 'of general application' should also apply to judicial decisions. According to that panel, 'inasmuch as the Article X:1 requirement applies to all administrative rulings of general application, it also should extend to administrative rulings in individual cases where such rulings establish or revise principles or criteria applicable in future cases.' We agree with this standard, namely that a final judicial decision is of general application within the meaning of Article 63.1 if it establishes or revises principles or criteria applicable in future cases.⁴ This standard also allows for an individual inquiry into final judicial decisions, in order to ascertain their significance with respect to the subject matter covered by the TRIPS Agreement and accordingly the importance of providing transparency for WTO Members and right holders with respect to such decisions.

...

We agree with China that, whereas laws and regulations are by default 'generally applicable' as they affect an unspecified number of parties, judicial decisions are

¹ (footnote original) We note that this reasoning is supported by the drafting history of the TRIPS Agreement which suggests that the language in Article 63.1 has been drawn from Article X of the GATT 1994. (GATT document MTN.GNG/NG11/17, para. 34).

² (footnote original) Differently from Article X of the GATT 1994, Article 63.1 does not require "prompt" publishing and provides for the alternative of making laws and regulations, and final judicial decisions and administrative rulings of general application "publicly available", where publication is not practicable.

³ Award of the Arbitrators, *China – IPRs Enforcement (EU)*, paras. 4.210-4.212.

⁴ (footnote original) We acknowledge that judicial decisions are different from individual administrative rulings in terms of their nature and scope of application. At the same time, their publication under the obligation of Article 63.1 addresses the same transparency objective. We therefore consider that there are sufficient parallels between them allowing for a similar legal standard to be applied, as recognized by the parties and the Panel.

typically directed at specific situations involving identified parties. While this may be the reason why the transparency obligation in Article 63.1 only applies to final judicial decisions 'of general application', nothing in the language of this provision suggests that this is 'an *exceptional* rule'. Because judicial decisions are applicable between the parties to the dispute, a meaningful interpretation of the term 'of general application' would involve assessing whether there is something specific in the interpretation of a provision or its application to the facts of a case by a judicial decision, such that the decision assumes significance in establishing or revising principles and criteria beyond the parties to the dispute. While not every application of the law to a 'new' factual situation would have that significance, we agree with the Panel that a decision that determines that an existing provision can be applied 'in a novel fact situation' and 'breaks new ground' could amount to a revision of a principle or a criterion. This assessment would have to be undertaken on a case-by-case basis and informed by the transparency objective of Article 63.1 to ensure that Members and right holders are informed about laws and regulations, as well as final judicial decisions and administrative rulings of general application, within the subject matter of the TRIPS Agreement."⁵

3. The Arbitrator noted that to be considered "of general application", a judicial decision must have a certain degree of authoritativeness, but added that the degree of authoritativeness would require a case-by-case assessment:

"We agree with China to the extent that, to be considered 'of general application', a judicial decision must have a certain degree of authoritativeness and be expected to be followed by other courts in the future. We believe this reasoning to be consistent with the standard that the Panel articulated under this element of the test. Indeed, the Panel itself explained its reasoning by reference to the concept 'degree of authoritativeness' articulated by the panel in *EC – IT Products*. However, we find it important not to confine the scope of the transparency obligation in Article 63.1 to cases where courts are bound by domestic law to apply such rulings. Such a distinction may render the scope of the obligation very different from Member to Member, depending on whether they adhere to a system of precedent. As the Panel observed, the drafting history of the TRIPS Agreement confirms that 'Members with judicial systems without binding precedent are not excused from publication but will have to determine on a case-by-case basis whether a particular decision should be published depending on its significance.'

In this regard, we further highlight that the meaning of 'judicial decisions ... of general application' must be assessed in light of the content and substance of the instrument, rather than its form or nomenclature. This phrase should be capable of encompassing more than those instruments formally characterized as such by a WTO Member. Otherwise, WTO Members themselves could determine which provisions would be subject to the transparency obligation in Article 63.1 merely by the labelling of those instruments. What constitutes a 'degree of authoritativeness' would require a case-by-case assessment of the particular factual features of the final judicial decisions in each case."⁶

4. Turning to the measure at hand, the Arbitrator declined to base its assessment on China's view as to which court decisions have a compelling force for future cases under Chinese law, noting that such an approach would leave it to each Member to determine the extent of the transparency obligation under Article 63.1:

"At the hearing, China explained that, under Chinese law, only guiding cases selected and published by the SPC have the effect to compel other courts to follow in similar cases and in nearly or almost all similar instances and this is not true of typical cases. In our view, this criterion cannot be dispositive of whether a judicial decision is applicable in future cases since it leaves it to the Member's domestic laws and practices to determine the extent of the transparency obligation under Article 63.1.

⁵ Award of the Arbitrators, *China – IPRs Enforcement (EU)*, paras. 4.213 and 4.216.

⁶ Award of the Arbitrators, *China – IPRs Enforcement (EU)*, paras. 4.219-4.220.

In the present case, the Panel had already noted that China is not a common law country. Therefore, most judicial decisions would normally not have a binding but rather may have a persuasive authority for other courts. Therefore, in our view, the Panel rightly took into account the designation of the *Xiaomi v. InterDigital* case as typical and the language in the Hubei Province Higher People's Court Work Report signalling its significance as 'useful practice' in matters of 'judicial protection of intellectual property rights'. We agree with the Panel that this designation speaks to the role of the case as a reference for courts in future similar cases."⁷

1.2.2 "as to enable governments and right holders to become acquainted"

5. In *China – IPRs Enforcement (EU)*, the Arbitrator in the *ad hoc* appeal arbitration under Article 25 of the DSU stated that the phrase "as to enable governments and right holders to become acquainted" both refers to the manner of the requisite publication and reflects the objective of Article 63.1:

"We agree that, as a matter of syntax, the phrase 'as to enable governments and right holders to become acquainted' informs the manner in which laws and regulations, and final judicial decisions and administrative rulings of general application shall be published or made publicly available. At the same time, in our view, this phrase more generally addresses the objective of the transparency obligation in Article 63.1 and speaks to its practical dimension, i.e. the need for Members and right holders to be afforded an actual and reasonable opportunity to acquire information about the instruments listed therein and be able to adjust their activities accordingly. This interpretation reflects the objective of Article 63.1 which, as noted above, balances the need to ensure availability of information while at the same time not creating onerous burdens on Members."⁸

1.3 Article 63.3

6. The Panel in *China – IPRs Enforcement (EU)* described the scope of Article 63.1, first sentence as follows:

"A request for information under Article 63.3, first sentence is limited to information of the sort referred to in Article 63.1 (that shall be published or made publicly available, as considered above). It is helpful to recall that Article 63.1 refers to the following sort of information: (a) types of measure (namely, laws and regulations, and final judicial decisions and administrative rulings of general application, as well as certain bilateral agreements), pertaining to (or concerning) (b) types of subject matter (namely, the availability, scope, acquisition, enforcement and prevention of the abuse of IP rights)."⁹

7. The Panel in *China – IPRs Enforcement (EU)* stated that Article 63.3, first sentence supplements the obligation in Article 63.1 by allowing Members to access certain information. The Panel then made a detailed description of the obligation contained in that provision:

"Reading its terms in context, Article 63.3, first sentence provides for a request for 'information', not information 'in sufficient detail' (unlike the second sentence), nor explanation or justification (unlike questions posed in initial reviews of implementing legislation under Article 63.2). Requests under the first sentence do not need to be based on any particular concern, such as monitoring the operation of the Agreement, and they do not need to specify a particular measure.

The provisions in Article 63.3 are based on a recognition that a Member's compliance with Article 63.1 does not guarantee that Members and their right holders have, by virtue of publication, all the relevant information of the sort referred to in that paragraph. This could occur because of various factors. For example, Members are free to determine the appropriate method of implementing the provisions of the

⁷ Award of the Arbitrators, *China – IPRs Enforcement (EU)*, paras. 4.232-4.233.

⁸ Award of the Arbitrators, *China – IPRs Enforcement (EU)*, para. 4.222.

⁹ Panel Report, *China – IPRs Enforcement (EU)*, para. 7.424.

Agreement within their own legal system and practice, which may vary considerably from one legal system to another as regards matters such as which decisions are 'of general application'.¹⁰ Members have no obligation to put in place a separate judicial system for the enforcement of IP rights, which means that IP law decisions and rulings may be published or made publicly available through general legal publications and court registries. Further, publishing or making publicly available is required to be in a national language, not necessarily a WTO official language. In the Panel's view, a request for information under Article 63.3, first sentence enables Members to obtain information additional to that provided under Article 63.1 through the obligation to publish or make publicly available. Article 63.3, first sentence thus supplements the obligation in Article 63.1 by providing an additional avenue for Members to gain access to certain information.

In view of the above, the Panel finds that 'information of the sort referred to in paragraph 1', as used in Article 63.3, first sentence, encompasses information on the types of measures that another Member makes effective pertaining to (or concerning) a particular trade-related aspect of IP rights, including a brief description of their nature (such as their finality and general application) and relevance. Requests for elaborate explanations or interpretations thus fall outside the scope of Article 63.3, first sentence because such requests go beyond 'information of the sort referred to in paragraph 1'.¹¹

8. Turning to the European Union's various requests for information from China, the Panel in *China – IPRs Enforcement (EU)* found that some of that information fell within the scope of Article 63.3, first sentence while others did not.¹²

1.3.1 "Shall be prepared to supply"

9. The Panel in *China – IPRs Enforcement (EU)* clarified the meaning of the phrase "shall be prepared to supply" in Article 63.3, first sentence, and, stated, in that context, that the phrase requires action that goes beyond "reasonable efforts":

"The Panel notes that Article 63.3, first sentence provides that a Member 'shall be prepared to supply' the requested information. The use of the word 'shall' indicates that this is an obligation. However, the text does not read 'shall supply' and the inclusion of the phrase 'be prepared to' must be given due weight. The ordinary meaning of the phrase 'to be prepared to do something' is 'to be ready ...; be mentally inclined or willing' to do something. Read in context and in light of the object of the whole of Article 63 to facilitate transparency, for a Member to be willing to supply information in response to a request it would do so in all normal circumstances, subject to the exception set out in Article 63.4.

The Panel does not consider that an obligation to 'be prepared to supply' merely requires reasonable efforts. That is not the ordinary meaning of the terms used. The context shows that where the drafters of the TRIPS Agreement intended to create obligations to make efforts, they used phrases such as 'shall attempt to' as in Article 63.2 and 'shall seek to' as in Article 68 (two obligations borne by the Council, not individual Members). They did not use such terms in Article 63.3."¹³

10. The Panel in *China – IPRs Enforcement (EU)* then found that China had failed to comply with the obligation to be prepared to supply the information requested by the European Union:

¹⁰ (footnote original) Further, in the context of Article X:1 of the GATT, for example, Members are not necessarily required to publish relevant laws, regulations, judicial decisions and administrative rulings of general application in their entirety. Rather, Article X:1 requires publication that ensures that those who need to be aware of certain laws, regulations, judicial decisions and administrative rulings of general application can become acquainted with them. See Panel Report, *EC – IT Products*, para. 7.1015.

¹¹ Panel Report, *China – IPRs Enforcement (EU)*, paras. 7.425-7.427.

¹² Panel Report, *China – IPRs Enforcement (EU)*, paras. 7.441, 7.445, 7.449, and 7.450.

¹³ Panel Report, *China – IPRs Enforcement (EU)*, paras. 7.452-7.453.

"Having determined the ordinary meaning of Article 63.3, first sentence, the Panel now turns to analysing the European Union's request for information. The Panel recalls its finding that Question V, regarding the SPC Provisions, requested information of the sort referred to in Article 63.1 of the TRIPS Agreement. China was therefore obliged to be prepared to supply that information. However, China did not supply that information, maintaining that there was no obligation under the TRIPS Agreement for it to respond. China's reply confirmed its unwillingness to respond to Question V. The fact that China provided responses to certain other questions does not offset its failure to be prepared to supply certain information of the sort referred to in Article 63.1.

Based on the above, the Panel finds that China failed to be prepared to supply, on request from another Member, information of the sort referred to in Article 63.1 of the TRIPS Agreement."¹⁴

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¹⁴ Panel Report, *China – IPRs Enforcement (EU)*, paras. 7.454-7.455.