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1 ARTICLE 1

1.1 Text of Article 1

Article 1

Nature and Scope of Obligations

1. Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

2. For the purposes of this Agreement, the term "intellectual property" refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II.

3. Members shall accord the treatment provided for in this Agreement to the nationals of other Members.[1] In respect of the relevant intellectual property right, the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits, were all Members of the WTO members of those conventions.[2] Any Member availing itself of the possibilities provided in paragraph 3 of Article 5 or paragraph 2 of Article 6 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for Trade-Related Aspects of Intellectual Property Rights (the "Council for TRIPS").

(*footnote original*)[1] When "nationals" are referred to in this Agreement, they shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.

(*footnote original*)[2] In this Agreement, "Paris Convention" refers to the Paris Convention for the Protection of Industrial Property; "Paris Convention (1967)" refers to the Stockholm Act of this Convention of 14 July 1967. "Berne Convention" refers to the Berne Convention for the Protection of Literary and Artistic Works; "Berne Convention (1971)" refers to the Paris Act of this Convention of 24 July 1971. "Rome Convention" refers to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting

> Organizations, adopted at Rome on 26 October 1961. "Treaty on Intellectual Property in Respect of Integrated Circuits" (IPIC Treaty) refers to the Treaty on Intellectual Property in Respect of Integrated Circuits, adopted at Washington on 26 May 1989. "WTO Agreement" refers to the Agreement Establishing the WTO.

1.2 Article 1.1

1.2.1 General

1. In *China – Intellectual Property Rights*, the Panel considered that the overall language of Article 1.1 cannot justify derogations from the obligations Members have under the TRIPS Agreement with respect to its provisions on IP enforcement:

> "The first sentence of Article 1.1 sets out the basic obligation that Members 'shall give effect' to the provisions of this Agreement. This means that the provisions of the Agreement are obligations where stated, and the first sentence of Article 61 so states. The second sentence of Article 1.1 clarifies that the provisions of the Agreement are minimum standards only, in that it gives Members the freedom to implement a higher standard, subject to a condition. The third sentence of Article 1.1 does not grant Members freedom to implement a lower standard, but rather grants freedom to determine the appropriate method of implementation of the provisions to which they are required to give effect under the first sentence. The Panel agrees that differences among Members' respective legal systems and practices tend to be more important in the area of enforcement. However, a coherent reading of the three sentences of Article 1.1 does not permit differences in domestic legal systems and practices to justify any derogation from the basic obligation to give effect to the provisions on enforcement."[1]

1.2.2 "Members shall give effect to the provisions of this Agreement"

2. In *EC – Trademarks and Geographical Indications* (Australia), the Panel considered a claim that a WTO Member is obliged to give effect to the provisions of the TRIPS Agreement before it is able to offer more extensive protection for one particular category of intellectual property right. The Panel noted that a Member is obliged to give effect to the provisions of the Agreement with respect to each category of intellectual property right irrespective of whether it implements more extensive protection, then exercised judicial economy:

> "The Panel notes that the first sentence creates an obligation for Members to give effect to the provisions of the TRIPS Agreement and the second sentence recognizes Members' freedom to implement more extensive protection, subject to a condition. After the expiry of the transitional arrangements in Articles 65 and 66 (and 70.8 and 70.9), as applicable, a Member is obliged to give effect to the provisions of the Agreement with respect to each category of intellectual property right, irrespective of whether it implements more extensive protection in the same or another category of intellectual property right."[2]

1.2.3 "free to determine the appropriate method of implementing"

3. In *India – Patents (US)*, the Appellate Body reviewed the Panel's finding that India did not meet its obligations under the TRIPS Agreement in that it failed to provide "a sound legal basis to preserve novelty and priority" of certain patent applications:

> "[W]hat constitutes such a sound legal basis in Indian law? To answer this question, we must recall first an important general rule in the *TRIPS Agreement*. Article 1.1 of the *TRIPS Agreement* states, in pertinent part:

[1] Panel Report, *China – Intellectual Property Rights*, para. 7.513.
[2] Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.755.

> 'Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.'
>
> Members, therefore, are free to determine how best to meet their obligations under the *TRIPS Agreement* within the context of their own legal systems. And, as a Member, India is 'free to determine the appropriate method of implementing' its obligations under the *TRIPS Agreement* within the context of its own legal system."[3]

4. In *Canada – Patent Term,* the Panel examined Canada's argument that Article 1.1 permitted it to maintain a term for patent protection of 17 years calculated from the date of grant of a patent, in spite of the minimum requirement, under Articles 33 and 70, of granting patent protection for a period expiring 20 years from the date of filing of such application. The Panel noted the discretion of Members, under Article 1.1, to determine the appropriate method of implementing their obligations under the TRIPS Agreement, but emphasized that such discretion did not extend to choosing which obligations to comply with:

> "Article 33 contains an obligation concerning the earliest available date of expiry of patents, and Article 62.2 contains a separate obligation prohibiting acquisition procedures which lead to unwarranted curtailment of the period of protection. We recognize that some curtailment is permitted by the text of these two provisions. However, Article 1.1 gives Members the freedom to determine the appropriate method of implementing those two specific requirements, but not to ignore either requirement in order to implement another putative obligation concerning the length of effective protection."[4]

5. In *EC – Trademarks and Geographical Indications (US)*, the Panel rejected a claim that a condition for GI protection requiring product inspections to take place not only in the country where protection was claimed, but also in the country of origin, forced other countries to adopt a particular set of rules to implement the TRIPS Agreement:

> "To the extent that this claim concerns the inspection structures requirement for particular products, the Panel recognizes that these requirements may require inspections to take place not only within the European Communities but also within the territory of other WTO Members, for example, where the specifications concern production processes or other matters not related to the physical characteristics of the product itself. The evidence before the Panel does not disclose that these inspections concern other WTO Members' system of protection but, rather, only compliance with the product specifications, which are a feature of the European Communities' system of protection.
>
> Therefore, the evidence does not suggest that they are inconsistent with the freedom granted under the third sentence of Article 1.1. For this reason, the Panel rejects this claim."[5]

6. In *EC – Trademarks and Geographical Indications (US)*, the Panel found that the European Communities was not obliged to ensure that one particular measure implemented Article 22.2:

> "In accordance with Article 1.1, the European Communities is free to determine the appropriate method of implementing the provisions of the Agreement within its own legal system and practice. It is not obliged to ensure that this particular Regulation implements Article 22.2 where it has other measures that do so."[6]

7. In *China – Intellectual Property Rights*, the Panel considered the scope of the third sentence of Article 1.1:

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[3] Appellate Body Report, *India – Patents (US)*, para. 59.
[4] Panel Report, *Canada –Patent Term*, para. 6.94.
[5] Panel Report, *EC – Trademarks and Geographical Indications (US)*, paras. 7.766-7.767.
[6] Panel Reports, *EC – Trademarks and Geographical Indications (US)*, para. 7.746. See also Panel Reports, *EC – Trademarks and Geographical Indications* (*US*) para. 7.682, and (*Australia*), para. 7.680.

> "The third sentence of Article 1.1 does not grant Members freedom to implement a lower standard, but rather grants freedom to determine the appropriate method of implementation of the provisions to which they are required to give effect under the first sentence."[7]

1.3 Article 1.2

8. In *US – Section 211 Appropriations Act,* the Appellate Body disagreed with the Panel's interpretation of Article 1.2:

> "The Panel interpreted the phrase ''intellectual property' refers to all categories of intellectual property that are the *subject* of Sections 1 through 7 of Part II' (emphasis added) as if that phrase read 'intellectual property means those categories of intellectual property appearing in the *titles* of Sections 1 through 7 of Part II.' To our mind, the Panel's interpretation ignores the plain words of Article 1.2, for it fails to take into account that the phrase 'the subject of Sections 1 through 7 of Part II' deals not only with the categories of intellectual property indicated in each section *title*, but with other *subjects* as well. For example, in Section 5 of Part II, entitled 'Patents', Article 27.3(b) provides that Members have the option of protecting inventions of plant varieties by *sui generis* rights (such as breeder's rights) instead of through patents."[8]

9. In *EC – Trademarks and Geographical Indications*, the Panel referred to the definition of "intellectual property" in Article 1.2 when interpreting that term as used in Article 3.1.[9]

10. In *EC – Trademarks and Geographical Indications (US)*, the Panel referred to the definition of "intellectual property" in Article 1.2 where that term is used in Part III:

> "These claims are made under the obligations with respect to enforcement procedures found in Part III of the TRIPS Agreement. The obligations in Part III are applicable to acts of infringement of geographical indications by virtue of the use of the term 'intellectual property' in Part III and the definition of 'intellectual property' in Article 1.2."[10]

1.4 Article 1.3

1.4.1 "nationals of other Members"

11. In *EC – Trademarks and Geographical Indications*, a dispute which concerned industrial property, the Panel found that the meaning of "nationals" in the phrase "nationals of other Members" was that understood in the Paris Convention (1967) and under public international law:

> "With respect to the meaning of 'nationals of other Members' for the purposes of the TRIPS Agreement, WTO Members have, through Article 1.3 of the TRIPS Agreement, incorporated the meaning of 'nationals' as it was understood in the Paris Convention (1967) and under public international law. With respect to natural persons, they refer first to the law of the Member of which nationality is claimed. With respect to legal persons, each Member first applies its own criteria to determine nationality."[11]

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[7] Panel Report, *China – Intellectual Property Rights,* para. 7.513. See also Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.2682 and 7.2849, and the explanations under Article 22.2 of the TRIPS Agreement.

[8] Appellate Body Report, *US – Section 211 Appropriations Act*, para. 335.

[9] Panel Reports, *EC – Trademarks and Geographical Indications (US),* paras. 7.126-7.128 and *(Australia)*, paras. 7.176-7.178.

[10] Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.761. See also Panel Report, *EC – Trademarks and Geographical Indications (Australia),* para. 7.731.

[11] Panel Reports, *EC – Trademarks and Geographical Indications (US)*, para. 7.147; *EC – Trademarks and Geographical Indications (Australia)*, para. 7.197.

1.4.2 "criteria for eligibility for protection provided for in the Paris Convention (1967)"

12. In *EC – Trademarks and Geographical Indications*, the Panel considered that Articles 2 and 3 of the Paris Convention (1967) set out "criteria for eligibility for protection" for the purposes of the TRIPS Agreement:

> "In respect of the intellectual property rights relevant to this dispute, it is not disputed that the criteria for eligibility for protection that apply are those found in the Paris Convention (1967). Articles 2 and 3 of the Paris Convention (1967) provide how nationals and persons assimilated to nationals are to be treated. In the Panel's view, these are 'criteria for eligibility for protection' for the purposes of the TRIPS Agreement."[12]

1.4.3 Footnote 1 to Article 1.3

1.4.3.1 "separate customs territory Member of the WTO"

13. In *EC – Trademarks and Geographical Indications*, the Panel interpreted the term "separate customs territory Member of the WTO" as used in footnote 1 and agreed that it did not apply to the European Communities:

> "The European Communities does not form a separate part of the territory of a country. Rather, the territory of the European Communities is made up primarily of the territories in Europe, that is, where relevant, the metropolitan territories, of a group of countries, the number of which increased to 25 during this Panel proceeding. It is neither a territory part of another country, nor a separate territory for which other WTO Members have international responsibility. The European Communities has informed the Panel that it has a citizenship for natural persons, and, generally speaking, treats legal persons organized under the laws of an EC member State as EC nationals under its domestic law, as described above.
>
> Therefore, the Panel accepts the European Communities' submission that it is not a 'separate customs territory Member of the WTO' within the meaning of footnote 1 to the TRIPS Agreement, and finds that its nationals, for the purposes of the TRIPS Agreement, are not defined by that footnote. The Panel would like to stress that its finding is limited solely to footnote 1 of the TRIPS Agreement and is not intended to be a finding of general application for other covered agreements."[13]

1.4.3.2 "domiciled"; "real and effective industrial and commercial establishment"

14. In *EC – Trademarks and Geographical Indications*, the Panel interpreted the criteria set out in footnote 1 as substitutes for nationality, to be understood as they were under Article 3 of the Paris Convention (1967):

> "The text of the TRIPS Agreement contains a recognition that discrimination according to residence and establishment will be a close substitute for nationality. The criteria set out in footnote 1 to the TRIPS Agreement are clearly intended to provide close substitute criteria to determine nationality where criteria to determine nationality as such are not available in a Member's domestic law. These criteria are 'domicile' and 'real and effective industrial or commercial establishment'. They are taken from the criteria used for the assimilation of nationals in Article 3 of the Paris Convention (1967). It is clear that, in using these terms, the drafters of footnote 1 of the TRIPS Agreement chose terms that were already understood in this pre-existing intellectual property convention. Under Article 3 of the Paris Convention (1967), 'domicile' is not generally understood to indicate a legal situation, but rather a more or less permanent residence of a natural person, and an actual headquarters of a legal person. A 'real

[12] Panel Reports, *EC – Trademarks and Geographical Indications (US),* para. 7.142; *EC – Trademarks and Geographical Indications (Australia)*, para. 7.192.
[13] Panel Report, *EC – Trademarks and Geographical Indications (US)*, paras. 7.166-7.167.

and effective industrial and commercial establishment' is intended to refer to all but a sham or ephemeral establishment."[14]

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[14] Panel Reports, *EC – Trademarks and Geographical Indications (US)*, para. 7.198; *EC – Trademarks and Geographical Indications (Australia)*, para. 7.234.