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1 GENERAL

1.1 The distinction between goods, services and intellectual property

1. In *US – Large Civil Aircraft (2nd complaint)* (Article 21.5 – EU), the European Union argued that the allocation of intellectual property rights under arrangements between Boeing and the United States' Government involved a subsidy, in the form of a provision of "goods" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. The Panel disagreed, and elaborated as follows on the distinction between goods, services and intellectual property in the context of international trade law, with reference to a number of provisions from the TRIPS Agreement:

"While there is wide and uncertain use of the term 'goods' in general parlance, the term is typically applied to tangible products, as distinguished from intangible services (a distinction made in the context of trade law and trade policy). Specifically with respect to Article 1.1(a)(1)(iii), the Appellate Body has observed that the ordinary meaning of the term 'goods' 'includes items that are tangible and capable of being possessed' and that 'goods' are tangible items'. The European Union argues that intellectual property rights are 'goods' within the meaning of Article 1.1(a)(1)(iii) because: (a) the term 'good' is defined as 'property or possessions'; and (b) patents, rights to trade secrets and rights to data are considered intellectual *property*, as evidenced by the fact that U.S. law explicitly states that 'patents shall have the attributes of personal property'. However, in making these arguments the European Union fails to take into account the fact that the Appellate Body has only defined 'goods' as used in Article 1.1(a)(1)(iii) in terms of tangible items. Given the context of this term, and the use of the term 'services' in the same sentence, the dictionary definition, as well as the Appellate Body's earlier finding, we see no basis to extend the sense of goods in this context to encompass all possible forms of property.

We note, in this connection, that intellectual property rights are generally understood to be economic assets and, in the form of patents, are tradeable categories of property; they are usually treated by national jurisdictions and international organizations as immaterial property, or intangible assets.

Patent law distinguishes a product or process from the patent right which can prevent third parties from making, using, offering for sale, selling, or importing the product that is the subject matter of a patent, or in case of patent-protected process, from using the process, and from using, offering for sale, selling, or importing a product obtained directly by this process. Similarly, the data rights that have been discussed in this dispute refer to the right to prevent a party from using data or disseminating data to third parties for their use for a period of time."¹

2. The Panel in *US – Large Civil Aircraft (2nd complaint)* (Article 21.5 – EU) thus concluded:

"As property rights and assets, intellectual property rights are thus usually distinguished from goods as such: This is apparent in the TRIPS Agreement itself, which distinguishes between goods, and intellectual property rights that are embedded in such goods. Consequently, the TRIPS Agreement refers, for example, to 'goods or services protected by the trademark' and defines the function of trademarks as distinguishing goods or services of one enterprise from another, setting such an intellectual property right in a different category from goods as such. Similarly, a trademark is 'applied' to a good and trademarks are registered 'in respect of' goods. The TRIPS Agreement's requirements relating to the enforcement of intellectual

¹ Panel Report, *US – Large Civil Aircraft (2nd complaint)* (Art. 21.5 – EU), paras. 8.382-8.384.

property rights, including border measures, systematically distinguish intellectual property rights from goods that involve such rights, involve the infringement of intellectual property rights, or that are protected by them.

In sum, in light of the foregoing considerations, we find unpersuasive the European Union's argument that intellectual property rights are goods within the meaning of Article 1.1(a)(1)(iii)."²

1.2 Interpretation of the provisions of the Berne Convention (1971) and the Paris Convention (1967) as incorporated by reference into the TRIPS Agreement

3. In *US – Section 110(5) Copyright Act*, the Panel observed:

"[I]t is a general principle of interpretation to adopt the meaning that reconciles the texts of different treaties and avoids a conflict between them. Accordingly, one should avoid interpreting the TRIPS Agreement to mean something different than the Berne Convention except where this is explicitly provided for."³

4. In *Australia – Tobacco Plain Packaging*, the Panel considered whether the interpretation of Article 6*quinquies* of the Paris Convention (1967) in the context of the Paris Convention and as incorporated into the TRIPS Agreement could lead to different outcomes. Referring to the passage from the panel report in *US – Section 110(5) Copyright Act* cited paragraph 3 above, the Panel noted that:

"In our view, this statement, which was made in relation to the provisions of the Berne Convention (1971) as incorporated into the TRIPS Agreement, applies equally to the interpretation of the provisions of the Paris Convention (1967) as incorporated into the TRIPS Agreement. Dispute settlement panels and the Appellate Body have consistently understood the meaning of relevant provisions of the Paris and Berne Conventions incorporated in the TRIPS Agreement, and even certain provisions of the TRIPS Agreement itself, with reference to their meaning in these conventions. There is no indication in the text of the TRIPS Agreement that negotiators wished to modify the contents of Article 6*quinquies* of the Paris Convention (1967) by incorporating it by reference into the TRIPS Agreement. In the absence of any indication to the contrary, we therefore have no basis to assume that the incorporation of this provision was intended to refer to anything other than its content as contained in the Paris Convention (1967). Accordingly, we also see no basis to interpret it to mean anything other than what it means in this Convention. It is notable that the Appellate Body, in its extensive review of Article 6*quinquies*, viewed this provision within its Paris Convention context and cited a standard commentary on the Paris Convention when establishing its scope. Against this background, we disagree with Honduras that the provisions of Article 6*quinquies* should be interpreted differently as incorporated into the TRIPS Agreement than in the context of the Paris Convention (1967)."⁴

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² Panel Report, *US – Large Civil Aircraft (2nd complaint)* (Art. 21.5 – EU), paras. 8.385-8.386.

³ Panel Report, *US – Section 110(5) Copyright Act*, para. 6.66.

⁴ Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1773.