

A Debate on Transparency

--Different Views on Article 63.3 of the WTO TRIPS Agreement

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I. Article 63.3 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

...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.

II. U.S Letter to China on October 25, 2005 (joined by Japan and Switzerland)

1. Request clarifications regarding specific cases of IPR enforcement that China has identified for the years 2001 through 2004, and other relevant cases.

Sources: New Progress in China's Protection of Intellectual Property Rights, April 25, 2005; 2002-2004 Transitional Review in the WTO; other cases statistics published by Chinese government.

Examples: 2001-2004, the industry and commerce administrations investigated **169.6 thousand** trademark infringement cases, **300 persons** from 286 cases transferred to the judicial bodies; 2004, copyright administrations investigated **9,691** copyright infringement cases, with **7,986** administrative penalties.

2. Pursuant to Article 63.3.

3. A list of six clarifications: legal bases; remedies, provisional measures, and repeat infringers; location, year and competent authority; transfer of cases to criminal authorities; nationals of other members/countries; product.

4. Written response on or before January 23, 2006

III. China's response to the U.S. on December 22, 2005

1. China has strictly fulfilled all its WTO obligations under Article 63 of

the TRIPS Agreement; China's competent domestic IPR authorities have also made relevant information publicly available through their official websites, newspapers, magazines and other proper channels. In addition, China has provided much information concerning IPR legislations and their enforcement through its bilateral exchange and cooperation activities with WTO members.

2. U.S. didn't provide the reasons and facts in the letter to prove that it has "*reason to believe.....affects its rights under this agreement.*"

3. "Cases of intellectual property rights enforcement identified by China for the years 2001 through to 2004 and other relevant cases" are not "*a specific case.*"

IV. U.S. response to China on January 20, 2006

1. The rights of WTO Members with respect to enforcement of intellectual property rights are set out in Part III of the TRIPS Agreement. They include, among others, a right under Article 41.1 to the availability in China of enforcement procedures that "*permit effective action against any act of infringement*" and "*remedies which constitute a deterrent to further infringement.*"

China itself has identified the cases in question as being related to the question of its compliance with the TRIPS Agreement. In successive TRIPS Council reviews, China cited these same cases to other WTO

Members in response to questions regarding China's implementation of enforcement provisions of the TRIPS Agreement.

China further confirmed the relevance of this body of cases just prior to U.S. request, when it distributed a white paper referencing them to the TRIPS Council, strongly urging Members who had criticized China's IPR enforcement to study the white paper for evidence of China's enforcement efforts.

2. For "*a specific case*", China, not the United States, identified this set of specific cases to the TRIPS Council.

V. U.S. and China meeting in Beijing, on March 1, 2006

1. James Mendenhall: China's response was frustrating and USTR will consider other formal response, including a WTO challenge to China's enforcement regime, if China does not provide critical information.

2. U.S. official: "We decided to put our differences over the legal basis aside and engage in a discussion about the information specifically.....Whether the information will be provided formally as part of the Article 63 process or informally as part of our bilateral discussion, frankly I don't think it matters a lot to us. What matters is that we would like to get the information that we have asked for.....All of these processes are tools to an end of some sort.....What important to us is the end, not the means. If they give us the information, that is the

critical point. ”

VI. 2006 USTR Special 301 Report on April 28, 2006

1. U.S. has made innovative use of WTO tools.
2. In the full day of meeting, China provided previously unavailable IPR criminal prosecution data, and the two governments identified specific areas in which China will work toward greater transparency on IPR enforcement matters. China also stated that it would make a database of IPR enforcement statistics available to the public on the internet in both Chinese and English to consolidate diverse IPR statistics and provide a consistent view for both government and right holders.
3. U.S. does not consider, however, that China has provided a full response to the October 2005 Article 63.3 request and continues to look forward to China’s full response.

VII. ???