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Supreme Court clarifies TRIPS applied in Spain since 25 January 1995

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In its recent judgment of 26 October 2012, the Spanish Supreme Court (Judge Rapporteur Mr José Ramón Ferrándiz Gabriel) has clarified an interesting point over which lower level courts offered diverging views over the last few years. The question is from which date are TRIPS' provisions on patents applicable from the perspective of domestic law: (i) the date when TRIPS came into force at the international level (1 January 1995); (ii) the date after TRIPS was officially published in Spain (25 January 1995); or (iii) the date when the transitional period established for developed countries in article 65.1 of TRIPS came to an end (1 January 1996).

In this recent judgment, the Supreme Court concluded that TRIPS is applicable in Spain as from 25 January 1995, notwithstanding paragraph 1 of article 65, since that was the day following its publication in the Official State Gazette ("*Boletín Oficial del Estado*").

In this author's opinion, the Court could not be more right, since article 65.1 of TRIPS did not prevent contracting parties from complying with its protection obligations before the end of the transitional period established in article 65.1. The only legal consequence of this article was that before 1 January 1996 no contracting party was entitled to file a complaint before the WTO dispute settlement body against another contracting party for failing to comply with TRIPS. However, in so-called "monist" countries, such as Spain, where international treaties become part of domestic law the day after they are published, TRIPS became applicable the day after it was published.

Time has proven that Commercial Court number 4 of Barcelona (Judge Mr Luis Rodríguez Vega) was right when, deviating from the then-dominating view of legal scholars, who considered that the relevant date was 1 January 1996, already advanced in its judgment of 29 January 2007 that TRIPS's provisions on patents are applicable in Spain as from 25 January 1995.

Another interesting aspect of the case is that the Supreme Court refused to seek a preliminary ruling from the ECJ regarding the interpretation of the Reservation made by Spain under article 167 of the EPC following the Protocol of Accession to the then-called EEC and articles 27.1 and 70 of TRIPS. The Court, relying on the judgment of 11 September 2007 from the ECJ, concluded that it is clear law that in fields such as patent law, which have not been harmonised yet, it is up to national courts and not up to the ECJ to interpret the scope of the obligations of patent protection assumed by each member state when they ratified the Agreement establishing the WTO.

The conclusion reached by the Supreme Court on this point must also be welcome. This is because

if TRIPS' provisions were now found not to be directly applicable in countries such as Spain, which relied on the direct applicability of TRIPS provisions under domestic law to comply with the obligation to apply TRIPS enshrined in article 1 of TRIPS, Spain would infringe overnight the obligations of patent protection assumed when in the context of TRIPS. Interestingly, when on 18 November 1997 the TRIPS Counsel asked the Spanish Representative to inform about the measures approved by Spain to apply TRIPS, his answer was that after the publication of TRIPS in the Official State Gazette, TRIPS would be automatically applicable as domestic law. Therefore, quite ironically, a hypothetical judgment from the ECJ holding that TRIPS's provisions on patents may not be directly applied by national courts would have "undone" *the* measure approved by Spain to apply TRIPS (to publish it in the Official State Gazette), thus suddenly causing Spain to infringe its obligation to apply TRIPS.

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