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## An Overview on: Trade-Related Aspects of Intellectual Property Rights

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### ABSTRACT

The World Trade Organisation's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) substantially changed the international intellectual property regime by introducing the principle of minimum intellectual property standards. In effect, this principle means that any intellectual property agreement negotiated subsequent to TRIPS among and/or involving WTO members can only create higher standards – commonly known as “TRIPS plus”. The TRIPS-plus concept covers both those activities aimed at increasing the level of protection for right holders beyond that which is given in the TRIPS Agreement and those measures aimed at reducing the scope or effectiveness of limitations on rights and exceptions. Such intellectual property rules and practices have the effect of reducing the ability of developing countries to protect the public interest and may be adopted at the multilateral, plurilateral, regional and/or national level. The TRIPS Agreement addresses a wide range of intellectual property subject matter areas (copyright, trademark, patent, and so forth). It also covers competitive markets, enforcement measures, dispute settlement, and transitional arrangements. This Module provides an introduction to these various aspects of the TRIPS Agreement, and seeks to focus on the kinds of questions that should be asked when approaching dispute settlement. In some areas, the questions are answered, but the entire field of intellectual property rights protection, including enforcement measures, cannot be covered in a single Module or short course. Moreover, the questions will change along with the technologies that form the subject matter of intellectual property rights protection. The objective of this Module is to provide sufficient background so that as specific issues arise, the diplomat or lawyer understands how to approach them.

**Key words:** TRIPS. WTO. WIPO GATT. IPR.

### INTRODUCTION

It is one of the agreements signed at the end of the Uruguay Round of GATT negotiations in 1995. The United States put intellectual property rights (IPR) onto the agenda of the last GATT round. They said that since developing countries don't have strong IPR regimes, US industries are losing unpaid royalties when their products are sold abroad. (You pay royalties to the Coca-Cola Company every time you buy Coke in a registered container, because they have a trademark on the logo.) In fact, American manufacturers argued that the rest of the world owed them about \$24 billion per year in unpaid royalties. At that time, developing countries were already paying \$18 billion per year to developed countries for technology transfer. If countries like the US actually paid the developing countries for access to their biodiversity. Which the US pharmaceutical and farming industries rely on the debt burden would be reversed. For example, the Botanical Research Institute of Texas has already collected over 100,000 specimens in the most interesting and endangered areas of the country (Reichman, 1998). The US pushed hard and TRIPS became part of the Uruguay Round package of agreements It covers seven fields of intellectual property:

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copyrights, trademarks, geographical indications (Scotch whisky), industrial designs, patents, topographies of integrated circuits and trade secrets. For these seven areas, TRIPS lays down minimal standards of protection and enforcement procedures. TRIPS are also subject to the basic rules of the World Trade Organization, which replaced the GATT.

### Objectives and Principles

Articles 7 and 8 of the TRIPS Agreement refer to the objectives of the Agreement and to principles that generally apply to its interpretation and application. Article 7 confirms that the IPRs are intended to reflect a balance between the interests of private stakeholders that are relying on IP protection to provide an incentive for creativity and invention (and investment in those activities), and society that is expected to benefit from access to creations and the transfer and dissemination of technology. Article 8:1 indicates that Members may adopt measures necessary to protect public health and nutrition, provided that those measures are consistent with the Agreement. The Article 8:1 formulation may assist in the defense of so-called non-violation nullification or impairment claims, if these are eventually permitted under the Agreement. In more general terms, the usefulness of Article 8:1 in dispute settlement is limited by the requirement that measures be consistent with the Agreement, Article 8:2 acknowledges the right of Members to take action against anticompetitive practices relating to IP, also with the provision that such action must be consistent with the Agreement. The role of Articles 7 and 8 in dispute settlement has so far been limited. These provisions have been invoked as an aid in interpretation, but have not exercised an identifiable influence on the outcome of cases (Abbott et al, 1999).

### Rights and Obligations

The TRIPS Agreement does not only impose obligations or duties on WTO Members, but also grants them an important set of rights. The TRIPS Agreement and incorporated WIPO Conventions are often drafted in general terms. Intellectual property (“IP”) law contains much inherent flexibility. Members have the “right” to use the flexibility inherent in the Agreement, as well the “obligation” to meet its minimum requirements.

### Structure of the Agreement

The TRIPS Agreement consists of seven Parts. The first two parts are concerned with substantive rules that WTO Members are expected to implement and apply in their national (or regional) legal systems. The third Part establishes the enforcement obligations of Members, and the fourth addresses the means for acquiring and maintaining intellectual property rights (“IPRs”). The fifth Part is directed specifically to dispute settlement under the TRIPS Agreement, though of course the other Parts of the Agreement will form the subject matter of disputes. The sixth Part concerns transitional arrangements, and the seventh concerns various institutional and other matters. The TRIPS Agreement establishes the Council for Trade-Related Aspects of Intellectual Property Rights (“TRIPS Council”) that plays an important role in the review of national legislation and in ongoing negotiations

under its “built-in agenda”, as well as in other negotiations (Abbott, 2002).

### The Relationship of the TRIPS Agreement to the WIPO Conventions and Treaties

The TRIPS Agreement is unique among the WTO agreements in that it incorporates provisions of various pre-existing Conventions into its body of rules, the most important of which are the Paris Convention on the Protection of Industrial Property and the Berne Convention on Literary and Artistic Works. Article 2 of the TRIPS Agreement generally defines the relationship with the WIPO Conventions. It requires Members to comply with the relevant provisions of the Conventions, and also provides that nothing in the TRIPS Agreement will be deemed to derogate from the obligations of parties to the Conventions. In the latter respect, it should be noted that while the TRIPS Agreement may not interfere with “obligations” under the Paris and Berne Conventions, it is theoretically capable of modifying “rights” that Members may have under those Conventions. Because the WIPO Conventions have been in force far longer than the TRIPS Agreement, some interesting issues of international treaty law are raised regarding the relationship of state practice under the Conventions with interpretation of the TRIPS Agreement. Assume, for example, that a question arises in TRIPS dispute settlement regarding the interpretation of a provision of the TRIPS Agreement that is established by incorporation of a provision of the Berne Convention. Assume further that over the course of the Berne Convention’s history, a number of national courts have interpreted that provision to have a particular meaning. We have already seen the Appellate Body and panels relying on documents produced by the WIPO Secretariat (the “International Bureau”) as a source for interpreting the relevant Conventions (United Nations, 1975).

### Approaching WTO Dispute Settlement

The general provisions of the TRIPS Agreement referred to above suggest certain questions that should be asked by diplomats and lawyers when facing a claim of non-compliance with its terms.

- Does the complaint involve a very precise rule, or is it one where is substantial flexibility? If the latter, have other WTO Members implemented the rule in a way that is similar to the practice being challenged?
- Is the challenge based on an alleged failure to adopt or implement a TRIPS rule? If it is, does the Member being challenged recognize a doctrine of direct effect of treaties so that the TRIPS Agreement may itself be considered as part of national law.
- Is the challenged rule mandatory or discretionary? Has the government actually acted in a way inconsistent with TRIPS obligations, or has it only been granted powers wide enough to allow it to do so?

### Some key rules of WTO

- The Uruguay Round agreements which established WTO formed a take-it-or leave it package. A country could not say it

liked the Agriculture Agreement but not TRIPS. Nor can one express reservation on an agreement.

- National Treatment is a basic principle. Any right or privilege given to a national in implementing the WTO agreements must be available for nationals of all other WTO members. No discrimination is allowed.

Dispute settlement is what gives the WTO. If a country fails to honor a commitment, another WTO member can retaliate through trade sanctions. In case of disputes, bilateral negotiations between the countries are encouraged. If the parties don't settle the dispute within 60 days on their own, a panel of three experts will take an independent decision on the case. The ruling of the panel can be appealed, but the decision of the Appellate Body will then be final and binding (Abbott, 1998).

### **Copyright and Related Rights Incorporation of Berne**

The TRIPS Agreement substantive provisions on copyright primarily involve incorporated provisions of the Berne Convention (Articles 1 through 21, and the Appendix). As such, in a dispute settlement proceeding, a panel or the Appellate Body will be called upon to interpret the relevant provisions of the Berne Convention within the framework of the TRIPS Agreement.

### **Supplements to Berne**

The TRIPS Agreement adds certain new elements to the rules of the Berne Convention in areas such as rental rights, and performance and broadcast rights. Therefore, WTO Members that are parties to the Berne Convention and that implemented its requirements in national law must still adopt new rules to take into account the TRIPS copyright provisions that supplement the Berne Convention.

### **Specificity**

The Berne Convention contains rules of varying levels of specificity. Some rules, such as those describing the subject matter of copyright, are rather detailed. Even then, there is substantial room for interpretation because technology is rapidly evolving, and this outmodes the terminology of the Convention. Other rules, such as those establishing permissible exceptions that may be accorded to copyright protection, are drafted very generally, and are therefore capable of flexible implementation (Correa, 2000).

### **Options, Including Fair Use**

The Berne Convention by its express terms provides Members with choices as to whether to apply protection and what form of protection to apply. For example, Article 2(4) of the Berne Convention authorizes each Member to decide whether it will provide copyright protection "to official texts of a legislative, administrative and legal nature", and to what extent. Since there is a substantial publishing industry built around supplying legislative texts to the public, it is easy to imagine a complaint from that industry that a Member is failing to adequately protect legislative texts against copying. But neither the TRIPS Agreement nor the Berne Convention requires such protection, and this is part of the flexibility reserved to Members. This illustrates the importance of

recognizing that the TRIPS Agreement provides rights to Members, and not only obligations. The most controversial copyright provisions of the TRIPS Agreement and Berne Convention are likely to be those addressing the "fair use" of copyrighted works, principally Article 13 of the TRIPS Agreement and Articles 9(2), 10 of the Berne Convention, incorporated by reference in the TRIPS Agreement. This hypothesis is based on the fact that the rights of fair use are among the most heavily litigated within national legal systems, including within the OECD countries.

### **Trademark**

#### **Trademark ownership**

Article 15:2 of the TRIPS Agreement provides that Members may deny trademark registration on other grounds than those of failure to meet the criteria of constituting a distinctive sign, so long as those grounds are not precluded by the Paris Convention. This provision was interpreted in the context the Section 211 Appropriations Act case, in which the Appellate Body decided that the United States could deny the registration of a trademark when it determined that the party asserting a right to registration was not the legitimate owner of the mark. This case establishes a very important principle the implementation of the TRIPS Agreement that is; it is up to Members to decide who the legitimate owners of IPRs are. In US – Section 211 Appropriations Act the United States had denied ownership of an IPR on public policy grounds (Adrian, 2003).

#### **The Scope of Trademark Protection:**

Article 16 of the TRIPS Agreement defines the scope of protection, to allow the holder to oppose the use without its consent in the course of trade of an identical or similar sign on identical or similar goods or services, where such use would result in a likelihood of confusion. The use of an identical sign on identical goods or services raises a presumption of likelihood of confusion. The definition of the scope of trademark protection in Article 16 allows Members a considerable degree of flexibility regarding the level of protection that will be provided. For example, the basic requirement is that a "similar" sign may not be used on "similar" goods. This might be construed strictly, such that signs and goods must be nearly identical to justify protection, or this might be construed liberally, such that signs and goods need only be within a category or class to justify protection.

#### **Exceptions and Fair Use**

There are a variety of circumstances under which it may be necessary or useful to permit the use of a trademark or service mark outside the specific context of the marketing of the particular good or service on which it is used by its holder. These circumstances are addressed in a broad way by Article 17 of the TRIPS Agreement which permits limited exceptions, such as the fair use of descriptive terms (Maskus, 2000).

The writer of a news story regarding a company and its products may refer to the products by their trademark since there is a public interest in this type of reference. There are important public health issues in fair use of trademarks. For example, generic

drug producers may consider it important to mimic the color of branded medicines so as to avoid confusion among consumers. The flexible character of Article 17 would appear to permit each WTO Member the scope to decide whether a limited exception for this type of use should be provided

#### **Duration and Other Aspects**

Article 18, TRIPS Agreement, establishes that trademark protection is not limited in duration, provided the relevant criteria for maintaining rights in a mark are met, although Members may require that registrations be renewed not more frequently than each seven (7) years.

### **PATENT**

#### **The Paris Convention**

The Paris Convention was adopted in 1893 to establish a potentially worldwide mechanism for allowing patents to be obtained, and prescribing the basic requirements for registration systems, including the rule of national treatment for patent applicants. Article 28:1 of the TRIPS Agreement establishes basic rights of the patent holder, which is to preclude others without consent from the acts of making, using, selling, offering for sale or importing the patented product, or using the patented process (including importing products made with the process). The rights to preclude others from making, using, selling, offering for sale and importing are commonly referred to as the “enumerated” rights of patent holders since they are expressly provided for in Article 28 (WIPO, 1998).

#### **Other Uses**

Article 31 of the TRIPS Agreement addresses authorization of third parties to use patents without the consent of patent holders. This authorization is ordinarily understood to refer to the practice of “compulsory licensing”. However, since Article 31 also covers government use of patents for noncommercial purposes, the terminology of Article 31 is not specifically addressed to compulsory licensing. Article 31 does not limit the grounds upon which compulsory licenses may be granted. It provides procedures that should be followed in granting such licenses, and requires that certain minimum obligations be fulfilled:

#### **What does TRIPS say about patenting life?**

TRIPS is the first international treaty which makes it legal and compulsory to patent life. This is very controversial. Most biodiversity is found in developing countries. But the developed countries have sophisticated technologies. Such as genetic engineering to extract value from biodiversity. That is the reason they want patent protection on life forms. It would mean that major transnational corporations like Monsanto/Cargill or Pioneer/DuPont can take genes from the fields, forests and coastal waters of countries like the Philippines, manipulate them in their labs back home and patent them. Also, TRIPS requires that all countries provide patents on micro-organisms. Micro-organisms are life forms. And depending on how it is defined, a plant cell can be considered a micro-organism yet it can grow into an entire tree.

A patent on such a cell could extend to trees, even if you can't patent a plant. The Philippine Constitution (Art XII, Sec. 2) states that the State is the owner of all flora and fauna (WTO, 1999).

#### **Intellectual property rights and their implications for international trade**

The objects of intellectual property are the creations of the human mind, the human intellect, thus the designation ‘intellectual property’. They include copyright, patents and industrial designs. Copyright relates to the rights of creators of literary, scientific and artistic works. Patents give exclusive rights to inventors; however, inventions can be patented only if they are new, non-obvious and are capable of industrial applications. Industrial designs are new or original aesthetic creations determining the appearance of industrial products.

Intellectual property also includes trademarks, service marks and appellations of origin (or geographical indications). In the case of these property rights, the aspect of intellectual creation – although existent – is less prominent. However, protection is granted to trademarks and other signs to enable manufacturers to distinguish their products or services from those of others. Trademarks help manufacturers build consumer loyalty. They also assist consumers in making informed choices on the basis of the information provided by manufacturers on the quality of their products (David, 2003).

#### **Implications of IPRs for trade**

Any unauthorized use of intellectual property constitutes an infringement of the right of the owner. Until about two decades ago, such infringements had implications largely for domestic trade. Furthermore, the problems they posed were considered to be mainly at the national level which—apart from affecting the interests of the owners of rights—impinged on scientific progress and cultural life. In recent years, however, there has been increasing realization that the standards adopted by countries to protect their IPRs as well as the effectiveness with which they are enforced have implications for the development of international trade. There are many reasons for this, of which three are especially worth noting. First, economic activity in most developed countries is increasingly becoming research and technology intensive. As a result, their export products – both traditional (such as chemicals, fertilizers and pharmaceuticals) and comparatively new (telecommunications equipment, computers, software) – now contain more technological and creative inputs that are subject to intellectual property rights. Manufacturers are therefore keen to ensure that wherever they market their products these rights are adequately protected, second, with the removal of restrictions on foreign investment by a large number of developing countries, new opportunities are emerging for the manufacture in these countries of patented products under license or within joint ventures. The willingness of industries in industrialized countries to enter into such arrangements and to make their technology available, however, depends on how far the IPR system of the host country provides them an assurance that their property rights to technology will be adequately protected and not usurped by local partners making use of reverse engineering.

Third, the technological improvements in products entering international trade have been matched by technological advances that have made (Susan, 1998).

#### **Minimum periods of protection for intellectual property rights:**

Patents 20 years from the date of filing of the application for a patent (Article 33). Copyright Life of the author plus 50 years. Cinematographic work: 50 years after the work has been made available to the public or, if not made available, after the making of such work. Photographic work or works of applied art: 25 years after the making of the work. Broadcasting: 20 years from the end of the calendar year in which the broadcast took place (Article 14:5). Trademarks 7 years from initial registration and each renewal of registration; registration is renewable indefinitely (Article 18). Industrial designs At least 10 years (Article 26:3). Layout-designs of integrated circuits 10 years from the date of registration or, where registration is not required, 10 years from the date of first exploitation (Article 38:2 and 3). IPR owners lose their rights when the duration of protection expires.

#### **Implementation of TRIPS in India:**

India currently produces generic versions of the main antiretroviral drugs (ARVs) to treat HIV/AIDS. These drugs will not be affected by the introduction of product patents in January 2005, as they were registered before 1995. However, there are a few new generation ARV drugs currently not being produced in India. If these drugs are in the mailbox, then access to them after the implementation of TRIPS could be a problem. India, the largest producer of generic drugs in the world, benefited from the delay: it has until January 2005 to grant patent protection not only to new drugs, but also to drugs invented since 1995. Drugs invented since 1995 were not patented in India because law did not require it, but TRIPS required patent applications to be stored in a so-called "mailbox" so that they can be enforced as soon as India's law so requires. Introducing patent protection will have dramatic effects: for instance, a study of the impact of TRIPS in India concluded that "by far, the biggest effects of TRIPS concern Indian consumers, for whom we estimate substantial welfare losses." Nevertheless, many developing countries are coming under pressure from richer countries and private corporations – through trade-related technical assistance and bilateral trade agreements gives strict protection to intellectual property (IP). Moreover, implementing the TRIPS Agreement has been a difficult and costly process for many developing countries, particularly for those that did not provide patent protection previously it has given rise to an international campaign on trade and health that has brought together civil society groups working on different issues.

#### **Key problems faced by developing countries in implementing TRIPS**

IPRs on life such as patenting and plant variety protection are controversial and contested, worldwide. Developing countries argue that even as a trade agency, WTO must face up to and resolve the major policy issues raised by TRIPS: the ethics of patenting life, how to prevent biopiracy the need to protect the rights of farmers and indigenous communities, and the unclear

relationship between IPRs and development. One assessment of the developing countries is that TRIPS conflicts with their rights and obligations under the Convention on Biological Diversity. They are therefore demanding reconciliation between the two treaties, through amendment of TRIPS. According to the World Bank, the cost of implementing TRIPS will be high and payoff is not clear. For example, in Mexico it will require at least US\$32 million, in Indonesia US\$15 million and in India US\$6 million (WIPO, 1998).

#### **How does TRIPS affect the right to health?**

A number of TRIPS provisions affect access to affordable medicines, a crucial part of the right to health and the right to life: the rules oblige states to grant patent owners at least twenty years of exclusive commercial rights, allowing them to have monopoly control over making, using or selling their inventions. The effect is that patent owners can keep prices of patented drugs artificially high, putting them out of reach of many, particularly the most poor and vulnerable people. Thus TRIPS has an impact on access to affordable medicines, particularly in the context of epidemics such as HIV/AIDS TRIPS gave different deadlines for implementation according to countries' level of development. Most developing countries implemented TRIPS in 2000.

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