



**Council for Trade-Related Aspects of
Intellectual Property Rights**

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**REVIEW OF THE IMPLEMENTATION OF THE TRIPS AGREEMENT:
ARTICLE 71.1**

COMMUNICATION FROM COLOMBIA

1 ARTICLE 71 AS AN OPPORTUNITY FOR DIALOGUE

1. A comprehensive review of the implementation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) is both an unfulfilled commitment and a necessity. Carrying out the review mandated in Article 71¹, along with the 30th anniversary of the TRIPS Agreement, will provide an opportunity to: i) increase dialogue and transparency on the impact of international rules on Intellectual Property (IP) issues; ii) start overcoming the existing impasse of the TRIPS discussions and negotiations at the TRIPS Council; iii) support political and technical discussions that are taking place in other forums and settings; iv) identify/produce relevant metrics to inform better implementation in the future.

2. Colombia considers that after 30 years of the TRIPS Agreement implementation, a Member driven policy discussion, supported by metrics and data, should provide the basis for a review on best practices, identification of obstacles, potential implementation improvements, among other elements. The discussions will provide added clarity and transparency, offer learning experiences for every Member to enhance their strategies within the general balance among the policy goals underlying the TRIPS agreement.

3. The World Trade Organization is a relevant forum for these discussions, as the host of the strictest framework that binds intellectual property laws worldwide. The valuable experience accumulated by other International Organizations, primarily WIPO, WHO and UNCTAD should inform the WTO discussion.

2 THE CONTEXT: 30 YEARS OF THE TRIPS AGREEMENT

4. The TRIPS agreement entered into force on 1 January 1996. Since then, it generated significant changes in domestic legal systems worldwide, especially but not limited to the developing world. New legislations were enacted or updated to comply with the requirements of the new agreement. This happened at varying speeds, depending on accession processes or transition times, but the

¹ The review provision of TRIPS reads as follows:

Art.71. Review and Amendment: (1). The Council for TRIPS shall review the implementation of this Agreement after the expiration of the transitional period referred to in paragraph 2 of Article 65. The Council shall, having regard to the experience gained in its implementation, review it two years after that date, and at identical intervals thereafter. The Council may also undertake reviews in the light of any relevant new developments which might warrant modification or amendment of this Agreement.

(2). Amendments merely serving the purpose of adjusting to higher levels of protection of intellectual property rights achieved, and in force, in other multilateral agreements and accepted under those agreements by all Members of the WTO may be referred to the Ministerial Conference for action in accordance with paragraph 6 of Article X of the WTO Agreement on the basis of a consensus proposal from the Council for TRIPS.

process of harmonizing domestic laws to the degree required by the TRIPS Agreement (with the agreed transition periods), thirty years from its entry into force, is now mostly completed.

5. The TRIPS Agreement is both a menu of options and a minimum standards treaty. Domestic legislations must choose among the alternatives provided for by the Agreement, as long as they conform with minimum provisions. Despite offering options, the TRIPS Agreement provides a floor of norm-setting markedly stricter than previous multilateral Intellectual Property Agreements in force at WIPO (and than most domestic legislations at the time of entry into force).

6. The TRIPS Agreement has an important cumulative character: subsequent trade agreements (whether regional or bilateral) may have increased the level of protection of IP globally; that is, not only among the contracting parties of such FTAs but also regarding everyone else. Further, subsequent accession processes to the WTO elevated such minimum standards for acceding countries (or curtailed parts of the menu of options) vis-à-vis everyone else. As a result, the real level of protection standards today may be quite higher in average than what the Agreement provisions entail.

7. The TRIPS Agreement included by reference (Art. 2, 9) the substantive provisions of the WIPO Substantive Conventions (Paris, Berne, Rome Conventions, now administered by WIPO), which form an integral part of the TRIPS Agreement. The TRIPS Agreement then builds on top of those provisions. Colombia would like to highlight among the most relevant changes introduced by the WTO agreement in 1996, and that required significant changes in domestic norm-setting, the following aspects:

- Minimum protection periods for intellectual property rights protection (Term of protection): e.g., such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making. (Art.12); no less than 7 years for trademarks (Art.18); no less than a period of twenty years counted from the filing date (Art.33). The option to provide for a longer term is allowed by the Agreement.
- No discrimination between productive sectors: TRIPS included a general rule in the sense that patents shall be available and patent rights enjoyable without discrimination as to (...) the field of technology (Art. 27.1). This means that in principle all industrial/productive sectors must have the same IP protection regime. Unlike before TRIPS, it appears not possible to have differentiated IP regimes for different types of contexts in regard to different technologies and knowledge innovations.
- A special Most-Favoured-Nation Treatment Clause (MFN): the TRIPS Agreement MFN treatment clause (Art.4) suggests that bilateral disciplines related to IP that are part of a Free Trade Agreement normally become multilateral (i.e., the usual exceptions to MFN provided for by Article XXIV of the GATT, or by Article V of the GATS, do not apply to the TRIPS Agreement²). In the case of intellectual property rights (IP), what a country gives to its treaty partner in an FTA is normally extended to everyone else, with no exception. This is an unusual and much stricter feature of TRIPS than common trade rules.
- The regulatory space for compulsory licences is maintained, but under new conditions: Under TRIPS, the regulatory space for compulsory licences as provided for example in the WIPO-Paris Agreement on Industrial Property Art 5. Section A was constricted with new conditions (Art. 31). In the WIPO treaties, the provision that allowed for compulsory licencing was relatively unrestricted³.

² With some exceptions to the exception, as for example "pre-dating" FTAs, when fully notified.
Footnote 3 to Article 4 of TRIPS.

³ WIPO-Paris Convention on Industrial Property, ARTICLE 5, Section A

(2) Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.

(3) Forfeiture of the patent shall not be provided for except in cases where the grant of compulsory licenses would not have been sufficient to prevent the said abuses. No proceedings for the forfeiture or

- Compliance and enforcement of IP rights entailed significant changes at the domestic level: Members were required to introduce changes to their criminal, civil, administrative and customs systems. Under WIPO rules, Parties are allowed to freely determine the structure and proceedings of administrative and judicial remedies.
- The WTO Dispute Settlement Mechanism: under TRIPS, the DSM applies to Member-to-Member disputes regarding IP rights.
- No general public policy exception in the TRIPS Agreement: The potential justifications for departure from compliance are much more limited in TRIPS than in other WTO Agreements and WIPO rules. There is no 'mirror' exception in TRIPS for public policy goals, as Art XX of GATT, and Article XIV of the GATS provide for goods and services trade.
- The review clause in article 71.1 of the TRIPS Agreement: the Agreement includes a review clause. This type of implementation review is quite common in WTO Agreements (other examples include Article 15.3 of the Technical Barriers to Trade (TBT) Agreement, Article 12.7 of the Sanitary and Phytosanitary (SPS) Measures Agreement, Article 23.1.6 of the Trade Facilitation Agreement, and Article 18 of the Agreement on Agriculture). The TRIPS review shall be conducted by the WTO every two years (starting on the year 1998), but as of yet, none has been accomplished.

8. In summary, the TRIPS Agreement norms provide a significantly stricter framework than what existed under the WIPO substantive agreements, despite its important menu of options. Moreover, TRIPS exhibits important differences or peculiarities when compared with other WTO Agreements. The Agreement entailed a new institutional framework, both at the international and domestic levels, which has been described as a "watershed event".⁴

9. These provisions entailed a change of paradigm: A different version of the balance of the triangle of policy goals associated with intellectual property protection was achieved: i.e., the promotion of innovation on one side; the broad access to technologies on another, and the promotion of national competitiveness-industrial policy on the third. It must be underscored that the TRIPS Agreement's balance is a set of normative choices that reflects the ideas, experiences, and conditions prevalent in the early 1990s. The whole notion of including a review clause hints at the negotiators acknowledgement that contexts might change in time and that the permanent and periodic review of the implementation of the agreement should remain an integral part of the Members actions at the WTO. However, the review mechanism has not been carried out since the TRIPS adoption. Now, after 30 years of implementation, it is just the right time to do so.

3 PROPOSAL

10. Colombia supports to formally start the review on the implementation of this Agreement of TRIPS.

11. We request the Secretariat to propose a Procedure for the review process (following common practice at the TBT or SPS Committees, or other relevant committees), to be accepted by the

revocation of a patent may be instituted before the expiration of two years from the grant of the first compulsory license.

(4) A compulsory license may not be applied for on the ground of failure to work or insufficient working before the expiration of a period of four years from the date of filing of the patent application or three years from the date of the grant of the patent, whichever period expires last; it shall be refused if the patentee justifies his inaction by legitimate reasons. Such a compulsory license shall be non-exclusive and shall not be transferable, even in the form of the grant of a sub-license, except with that part of the enterprise or goodwill which exploits such license.

⁴ "The inclusion of IP rules in the international trading system was a watershed event. Negotiated during the Uruguay Round, the 1994 Agreement on TRIPS significantly broadened the reach of the trading regime. Prior to TRIPS, trade rules generally focused on 'don'ts' - telling countries which practices to avoid or scale back. [...] Provided that countries respected these don'ts, they remained free to adopt or reject any domestic policies they wished. For example, many countries chose not to enforce IP rights - a perfectly acceptable policy under the GATT [and/or WIPO] system. By contrast, the TRIPS Agreement requires countries to "do" something. WTO Members are obliged to adopt policies that protect IPRs in areas such as patents, trademarks, and copyrights". Case Studies in US Trade Negotiations, Vol.1, Chapter3, Charan Devereaux, Robert Z. Lawrence, and Michael D. Watkins, 2006

Members in the next Council session, and to assist them to start their work. As a member-driven process and supported on data, Colombia strongly encourages others to propose information, metrics and/or parameters related to implementation for brainstorming in informal sessions and suggests a final compilation document prepared by the Secretariat summarizing the information, proposals, and convergences, in time for the anniversary of the TRIPS Agreement.

12. Regarding the substantive content, Colombia aims to engage in collaborative discussions at the WTO to identify (or produce) relevant analytical metrics and data, which are currently non-existent, incomplete, or not appropriately used, to better assess the implementation of the TRIPS Agreement over the years, and better guide the discussions and domestic policymaking process of Members. These new metrics could become part of a permanent source of information at the TRIPS Council, at Trade Policy Reviews of individual Members, or at the Trade Monitoring exercise by the Secretariat, among others. For the attainment of these objectives, Colombia proposes to address discussions on the following implementation aspects:

- a. To analyse both domestic and international concentration of production in knowledge intensive sectors over the years, based on relevant metrics.
- b. A global stocktake on royalties paid in and out by country for the use of Intellectual Property Rights, as expressed in the Balance of Payments of countries.
- c. c. A global stocktake on the use of Compulsory Licences since 1996, with a focus on the problem of export limitations faced by 'sandwich' countries (not too small, not too large).
- d. A global stocktake on the residency/nationality of innovators across Members, coupled with an examination of Patenting activity by Office of Subsequent Filing -OSF- (to better understand who is patenting internationally and domestically, and the incentive mechanisms that exist for innovators to go abroad).⁵
- e. A related discussion on the exploitation of 'disclosures' after IPRs finish their terms of protection. As an implementation matter, are these innovations/creations publicly available? Are they used by Members (especially developing ones)? Are they available for training of artificial intelligence models? (optional trigger questions).
- f. The utilization of Article 44(2) of TRIPS by WTO Members.⁶

13. These above listed items are some ideas for informal discussions. It is our belief that these (and other) metrics, parameters and aspects proposed by Members on the implementation of the TRIPS Agreement since 1996 will provide a rich opportunity to brainstorm. They will also provide everyone with relevant information and learning experiences for better future discussions at the WTO, and for better policies at home.

⁵ Given its territorial nature, patent protection only provides exclusive rights for a patented invention within the country that grants the patent. Thus, a patent applicant must file its patent application in each of the countries or regions where it wishes to gain patent protection. Typically, patent applicants would choose to first file a local application in their country of residence. But afterwards, the great majority of applicants choose not to go elsewhere. The Office of Subsequent Filing -OST- provides a very useful metric to better understand the reasons and mechanisms that promote resident innovators to "go abroad". For a good discussion related to the COVID19 landscape of technologies, see "Innovation and patenting activities of covid-19 vaccines in WTO members: Analytical review of medicines patent pool (MPP) covid-19 vaccines patent Landscape (VAXPAL)", WTO Staff Working Paper ERSD-2022-01, February 2022, Section 5.5.

⁶ TRIPS Article 44.2 – Injunctions:
Notwithstanding the other provisions of this Part and provided that the provisions of Part II specifically addressing use by governments, or by third parties authorized by a government, without the authorization of the right holder are complied with, Members may limit the remedies available against such use to payment of remuneration in accordance with subparagraph (h) of Article 31. In other cases, the remedies under this Part shall apply or, where these remedies are inconsistent with a Member's law, declaratory judgments and adequate compensation shall be available.