Historical Background, General Provisions and Basic Principles of the TRIPS Agreement and Transitional Arrangements*

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Paper provides an overview of the TRIPS Agreement. Beginning with its background, general provisions and basic principles of the agreement and transitional arrangements made under it are discussed.

The Agreement on Trade-Related Aspects of Intellectual Property Rights, commonly known as the “TRIPS Agreement”, was negotiated and concluded as an integral part of the multilateral trade negotiations under the Uruguay Round of the General Agreement of Tariffs and Trade (GATT). It is a multilateral trade agreement which is binding on all members of the World Trade Organization (WTO), the successor of GATT. In order to be a member of the WTO a country must be party to the TRIPS Agreement. There were, as of May 1997, 131 members (and 29 accessions to membership under consideration) of the WTO.

The agreement came into effect on 1 January 1995 and covers: copyright and related rights (i.e., the rights of performers, producers of sound recordings and broadcasting organizations); trademarks including service marks; geographical indications including appellations of origin; industrial designs; patents including the protection of new varieties of plants; the layout designs (topographies) of integrated circuits; and undisclosed information, including trade secrets and test data.

Background

The GATT Uruguay Round

On 15 April 1994, ministers signed “the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations” in Marrakesh. The Final Act is some 550 pages

in length and contains the legal texts which set out the results of the negotiations from their inception in Punta del Este, Uruguay, in September 1986. The Final Act covers all of the negotiating areas set out in the Punta del Este Declaration, with the exception of the results of the “market access negotiations” and “initial commitments”, which are both recorded in national schedules that form an integral part of the Act. The agreement establishing the World Trade Organization (WTO) creates a single institutional framework encompassing the GATT, as modified by the Uruguay Round, and the complete results of the Uruguay Round, including all agreements and arrangements which were concluded.

The World Trade Organization (WTO)

The WTO structure is headed by a Ministerial Conference which meets at least once every two years. The General Council oversees the operations of the agreement and ministerial decisions on a regular basis and acts as a Dispute Settlement Body and a Trade Policy Review Mechanism. These two bodies concern themselves with the full range of trade issues covered by the WTO. The WTO General Council has established subsidiary bodies such as a Goods Council, a Services Council and a TRIPS Council.

TRIPS Agreement

The TRIPS Agreement came about in recognition of the fact that widely differing standards of protection and enforcement of intellectual property rights, and the absence of a multilateral framework of principles, rules and disciplines to deal with the international trade in counterfeit goods had become a serious tension in international trade relations. The agreement addresses applicability of basic GATT principles and those of existing intellectual property conventions and agreements; the provision of adequate intellectual property rights; the provision of effective enforcement measures; multilateral dispute settlement; and transitional arrangements. A key feature of the TRIPS Agreement is the extension of the multilateral GATT dispute settlement procedures to intellectual property. This allows for the application of trade sanctions including, for example, the suspension of concessions or other obligations where a Member fails to meet its obligations under the agreement.

General Provisions and Basic Principles

Nature and Scope of Obligations

The TRIPS Agreement addresses the availability, scope, use and minimum term of protection for intellectual property rights. The Agreement, in Part II, defines intellectual property to include: (1) copyright and related rights, (2) trademarks, (3) geographical indications, (4) industrial designs, (5) patents, (6) layout-designs (topographies) of integrated circuits, and (7) protection of undisclosed information.

The Agreement also addresses the control of anti-competitive practices in contractual licences.

The Agreement sets out the minimum standards of intellectual property protection which Members must provide in their do-

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1 The preamble to the TRIPS Agreement states that it is the desire of Members: “to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.”
mestic laws. As such, it is left to the discretion of Members to determine how best to implement these minimum standards in their domestic legislation and practice. Members are also free to implement in their laws more extensive protection than is required by the agreement.

It should be noted that Members are obliged "to accord the treatment provided in this Agreement to the nationals of other Members". The "nationals of other Members" is to be understood to be those natural or legal persons that would meet the criteria for eligibility for protection provided for in key intellectual property conventions as if all members of the WTO were members of these conventions. The conventions are administered by the World Intellectual Property Organization (WIPO) and are: (i) The Paris Convention for the Protection of Industrial Property (1967); (ii) The Berne Convention for the Protection of Literary and Artistic Works (1971); (iii) The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (The Rome Convention, 1961); and (iv) The Treaty on Intellectual Property in Respect of Integrated Circuits (1989).

The TRIPS Agreement further specifies that Members shall comply with Articles 1-12 and 19 of the Paris Convention (1967), and that nothing in the Agreement shall derogate from existing obligations that Members may have to each other under the Paris, Berne, or Rome Conventions, or under the Treaty on Intellectual Property in Respect of Integrated Circuits. Thus the TRIPS Agreement does not require Members to join the above conventions or treaties but does require Members to comply with the provisions of some of these, such as the Paris Convention (1967) and the Berne Convention (1971).

National Treatment and Most-Favoured-Nation Treatment

In addition, the TRIPS Agreement requires Members to adopt and adhere to the key principles of national treatment and most-favoured-nation (MFN) treatment. These principles already exist in other intellectual property conventions and multilateral agreements such as the Paris Convention.

(a) National Treatment

Article 3 of the Agreement requires each Member to "accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property". Certain exceptions which are already provided for in the four main intellectual property conventions and treaties referenced above also apply under the TRIPS Agreement. The principal effects of the national treatment provisions are that: (1) Members will not discriminate against the nationals of other Members, and (2) that a

2 Article 1.1 of the TRIPS Agreement provides that, "...Members may, but shall not be obliged to, implement in their domestic law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice".
3 Article 1.3 of the TRIPS Agreement.
4 Article 2.1 and 2.2 of the TRIPS Agreement.
5 "Protection" includes matters affecting the availability, acquisition, scope, maintenance and enforcement of rights, as well as matters affecting the use of rights addressed in the Agreement (Articles 3 and 4 of the TRIPS Agreement).
Member which has in place a higher standard of protection must grant that higher standard of protection to nationals of other Members even though such additional protection may not be accorded to their own nationals in return.

(b) Most-Favoured-Nation Treatment

The Most-Favoured-Nation Treatment principle prevents a Member from discriminating with regard to intellectual property among nationals of other Members. Thus, for example, a Member which has adopted measures which enhance the protection of intellectual property must extend similar protection to nationals of other Members. Article 4 of the TRIPS Agreement states that:

"Any advantage, favour, privilege or immunity accorded by a Member shall be accorded to the nationals of all Members, immediately and unconditionally."

The TRIPS Agreement also contains certain specific exemptions from this obligation, as set out in Article 5.4 of the Agreement. These exemptions include:

1. Deriving from international agreements on judicial assistance and law enforcement of a general nature and not particularly confined to the protection of intellectual property.
2. Arranged in accordance with the provisions of the Berne Convention (1971) and the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country.
3. In respect of the rights of performers, producers of phonograms and broadcasting organizations, or "authors" (National Treatment) and "Mora" (Non-Protection Treatment) of the Agreement, the Member is not subject to the obligations of the Agreement under the provisions of the Agreement.

At the same time, it is worthwhile noting that the TRIPS Agreement provides that, where there is a balance of interests and objectives, the public interest in sectors of vital importance to the Member's socio-economic and technological development, provided that such measures are consistent with the provisions of the TRIPS Agreement, may be adopted in the Member's domestic legislation.

The TRIPS Agreement states that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

At the same time, it is worthwhile noting the wording of the preamble to the Agreement for establishing a useful context for future interpretation.

Principles

The TRIPS Agreement permits Members to adopt, in their domestic legislation, measures which they deem necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of the Agreement.
of this agreement. The Agreement also recognizes the possible need for Members to adopt appropriate measures to prevent abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

**Transitional Arrangements**

The TRIPS Agreement provides that no Members would be obliged to apply the provisions of the Agreement before expiry of a period of one year following the entry into force of the Agreement establishing the WTO on 1 January 1995. Additional delays for the date of application of the provisions of the Agreement are permitted for developing and least-developed country Members.

**Developed Countries**

Developed country Members were required to apply the provisions of the Agreement by 1 January 1996.

**Developing Country Members**

A developing country Member and a Member country which is in the process of transformation from a centrally-planned into a market, free-enterprise economy and which is undertaking structural reform of its intellectual property system and facing special problems in the preparation and implementation of intellectual property laws are entitled to delay implementation for a further four years. These country Members may therefore delay implementation until 1 January 2000.

A developing country Member may avail itself of an additional delay of five years, until 1 January 2005, for the application of the Agreement's provisions on product patents of areas of technology not so protectable in the Member country on the general date of application of the Agreement to that Member.

The delay for implementing the TRIPS Agreement provisions discussed above does not, however, apply to the implementation of Articles 3, 4 and 5. These Articles deal with the National Treatment and Most-Favoured-Nation Treatment principles in the Agreement, and the obligations under multilateral treaties on the acquisition and maintenance of intellectual property rights.

A further exception to the implementation delay provisions of the TRIPS Agreement relate to patent protection for pharmaceutical and agricultural chemical products. In this regard, the Agreement provides that where a Member does not make available on the date of entry into force of the WTO Agreement, namely 1 January 1995, patent protection for pharmaceutical and agricultural chemical products commensurate with its TRIPS obligations, the Member shall:

"Notwithstanding the provisions of Part VI (Transitional Arrangements) provide as from the date of entry into force of the Agreement establishing the WTO a means by which applications for patents for such inventions can be filed".

**Least-Developed Countries**

Least-developed country Members are provided an additional 10 years to implement
the provisions of the Agreement. Thus, least-developed country Members may delay until 1 January 2006, the implementation of TRIPS obligations, with the exception of Articles 3, 4 and 5, as is the case with regard to developing country Members. This 10-year delay can be further extended by the TRIPS Council.