Mechanisms in the WTO Framework Aimed at Ensuring Compliance with Obligations under the TRIPS Agreement*

Matthijs Geuze

Counsellor, Intellectual Property and Investment Division, World Trade Organization, Geneva

Paper outlines the main features of the Agreement, its general provisions and basic principles as well as the Agreement’s transitional arrangements, including technical cooperation. The experience with the implementation of the TRIPS Agreement so far and the work on its development that is under way or envisaged is presented. The monitoring of compliance with the obligations of the Agreement, experience with dispute settlement, the TRIPS built-in agenda, the work on TRIPS-related matters in other areas of the WTO are discussed.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), which forms part of the Marrakesh Agreement Establishing the World Trade Organization (WTO), has now been in existence for nearly three years. What I would like to do in this presentation is to inform you about the experience with the implementation of the TRIPS Agreement so far and the work on its development that is under way or envisaged. I will discuss the monitoring of compliance with the obligations of the Agreement, experience with dispute settle-

Through the TRIPS Agreement, the protection of intellectual property has become an integral part of the multilateral trading system as reflected in the WTO. Indeed it is one of the three pillars of the WTO, the other two being trade in goods (the area traditionally covered by the GATT) and the new agreement on trade in services. The fact that the protection of intellectual property has thus moved to the centre stage of international economic relations is not surprising given its major and growing importance for the conditions of international competition in many areas of economic activity. Let me stress the importance of three consequences of the place that intellectual property has thus acquired, in view of their likely impact on implementation of the TRIPS Agreement.

The first point is that it explains why it was possible to negotiate in the context of the Uruguay Round such a major advance in the international protection of intellectual property. It became accepted, at least from the half-way point of the Uruguay Round negotiations, that a major agreement on intellectual property was a necessary component of a successful conclusion to the negotiations and therefore, in a certain sense, to the maintenance and strengthening of the multilateral trading system as a whole.

The second consequence of the place of the TRIPS Agreement within the trading system is that there is a good prospect that, in due course, there will be something near to universal acceptance of the obligations of the TRIPS Agreement. One of the important changes in the WTO compared to the GATT is that all countries that wish to be Members, and to enjoy the market access it provides, will have to accept all the main WTO Agreements including the TRIPS Agreement. The WTO currently has 132 Members and many other countries are expected to become Members in the not too distant future, once their accession negotiations will have been concluded.

The third consequence of the place of TRIPS within the multilateral trading system is that, under the WTO dispute settlement mechanism a link may be made between a country's compliance with its TRIPS obligations and its enjoyment of the benefits that the WTO provides to it, including in regard to market access. In other words, in case of non-compliance with a TRIPS obligation, a WTO Member country could ultimately be faced with sanctions of significance to its economy.

**Brief summary of the Agreement**

The TRIPS Agreement covers each of the main areas of intellectual property—copyright and related rights, trademarks including service marks, geographical indications including appellations of origin, industrial designs, patents including plant variety protection, layout-designs of integrated circuits and undisclosed information including trade secrets. Most substantive provisions of the main pre-existing international intellectual property conventions have also been incorporated in the TRIPS Agreement, so that non-compliance with any of these provisions will also be subject to dispute settlement within the framework of the WTO. But the TRIPS Agreement goes much further than that, since it establishes, unlike for example the Paris Convention, also obligations on the essential features of intellectual property protection such as what subject matter must be protected, what rights must be conferred upon right holders, what exceptions to these rights are permitted or what must be the minimum term of protection. And when a country decides to provide more extensive protection than specified in the Agreement,
the national treatment and most-favoured-nation clauses prohibit discrimination between right holders that are nationals of a WTO Member, subject to a few exceptions only. The Agreement also specifies, in a fair amount of detail, the procedures and remedies that must be available so as to allow right holders to effectively enforce their rights with the assistance of the judicial authorities. All these obligations apply equally to all Member countries, subject only to a number of transitional periods.

General Provisions and Basic Principles

Like the pre-existing international intellectual property conventions, the TRIPS Agreement is a minimum standards agreement. It leaves Members free to provide more extensive protection of intellectual property if they so wish - for purely domestic reasons or because they have concluded international agreements to this effect, whether bilateral, regional, as for example in the case of the European Communities and NAFTA, or multilateral, such as in WIPO. This is made clear in Article 1.1, which provides that Members may, but shall not be obliged to, implement in their law more extensive protection than is required by the Agreement, provided that such protection does not contravene the provisions of the Agreement. Article 1.1 also makes it clear that the Agreement is not intended to be a harmonization agreement; provided that Members conform to the minimum requirements established by the Agreement, they are left free to determine the appropriate method of doing so within their own legal system and practice.

As in the main pre-existing intellectual property conventions, the basic obligation on each Member country is to accord the treatment in regard to the protection of intellectual property provided for under the Agreement to the persons of other Members. Article 1.3 defines who these persons are. These persons are referred to as "nationals" but include persons, natural or legal, who have a close attachment to other Members without necessarily being nationals. The criteria for determining which persons must thus benefit from the treatment provided for under the Agreement are those laid down for this purpose in the main pre-existing intellectual property conventions of WIPO, applied of course with respect to all WTO Members whether or not they are party to those conventions.

Articles 3,4 and 5 include the fundamental rules on national treatment and most-favoured-nation treatment (MFN) of foreign nationals, which are common to all categories of intellectual property covered by the Agreement. These obligations cover not only the substantive standards of protection but also matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in the Agreement. While the national treatment clause forbids discrimination between a Member's own nationals and the nationals of other Members, the MFN treatment clause forbids discrimination between the nationals of other Members. In respect of the national treatment obligation, the exceptions allowed under the pre-existing intellectual property conventions of WIPO are also allowed under TRIPS. Where these exceptions allow material reciprocity, a consequential exception to MFN treatment is also permitted. Certain other limited exceptions to the MFN obligation are also provided for.
An issue that the Uruguay Round negotiations left unresolved is the question of exhaustion. Article 6 provides that for the purposes of dispute settlement under the TRIPS Agreement, nothing in the Agreement shall be used to address the issue of the exhaustion of intellectual property rights, provided that the national treatment and MFN treatment obligations are complied with.

Article 7 of the Agreement is entitled "Objectives". It should be read in conjunction with the preamble which reproduces the basic Uruguay Round negotiating objectives established in the TRIPS area by the 1986 Punta del Este Declaration and the 1988/89 Mid-Term Review. There is also an Article entitled "Principles" (Article 8) which recognizes the rights of Members to adopt measures for public health and other public interest reasons and to prevent the abuse of intellectual property rights, provided that such measures are consistent with the provisions of the TRIPS Agreement. Developing countries attach importance to these Articles, which put emphasis on the transfer and dissemination of technology.

**Transitional Arrangements and Technical Cooperation**

**Transitional periods**

The Agreement gives all WTO Members transitional periods so that they can meet their obligations under it.

The transitional periods, which depend on the level of development of the country concerned, are contained in Articles 65 and 66.

The general transitional period applicable to developed country Members was one-year; this period ended on 1 January 1996. For developing countries, the general transitional period is five years, i.e., until 1 January 2000, and for those countries on the United Nations list of least-developed countries the period is eleven years, i.e. until 1 January 2006. A country whose economy is in transition, but which is not a developing country, may nonetheless delay application until the year 2000, if it meets the three tests specified in Article 65.3.

However, all Members, even those availing themselves of the longer transitional periods, have had to comply with the national treatment and MFN treatment obligations as of 1 January 1996. Moreover, there are two important substantive obligations that have been effective for all Members from the entry into force of the TRIPS Agreement on 1 January 1995. One is the so-called "non-backsliding" clause in Article 65.5 which concerns changes made during the transitional period, and the other the so-called "mail-box" obligations relating to pharmaceutical and agricultural chemical products that are the subject of patent applications field during the transitional period.

The "non-backsliding" clause in Article 65.5 forbids countries from using the transition period to reduce the level of protection of intellectual property in a way which would result in a lesser degree of consistency with the requirements of the Agreement. In this connection, it may also be noted that the transition periods of the TRIPS Agreement...
cannot provide of course any legal basis for a country to escape from international obligations that it has already accepted in another context.

Somewhat more complicated transition rules apply in the situation where a developing country does not presently give product patent protection to pharmaceutical or agricultural chemical inventions. According to Article 65.4, such a developing country may delay up to ten years the extension of patent protection to such inventions. However, in accordance with the "mail-box" obligations referred to above, it has to accept, from 1 January 1995, the filing of patent applications in these areas of technology and, if a product that has been the subject of such a patent application obtains marketing approval before the decision on the grant of the patent is taken, there is an obligation under Article 70.9 to grant, subject to certain conditions, exclusive marketing rights for a period of up to five years to tide over the gap. The practical effect of these various transition provisions should be that inventions which meet the criteria for patentability on or after the date of entry into force of the Agreement itself will normally be eligible for protection in such countries by the time that protection becomes of commercial significance — either by the grant of a patent after the expiry of the ten-year transition period or by an exclusive marketing right if such products get marketing approval before that time.

Protection of existing subject matter

Another important aspect of the transition arrangements under the TRIPS Agreement is contained in the provisions relating to the treatment of subject matter already existing at the time that a Member starts applying the provisions of the Agreement. As provided in Article 70.2, the rules of the TRIPS Agreement generally apply to subject matter existing on the date of application of the Agreement for the Member in question and which is protected in that Member on the said date. In respect of copyright and most related rights, there are additional requirements. Articles 9.1, 14.6 and 70.2 of the TRIPS Agreement oblige WTO Members to comply with Article 18 of the Berne Convention, not only in respect of the rights of authors but also in respect of the rights of performers and producers of phonograms in phonograms. Article 18 of the Berne Convention as incorporated into the TRIPS Agreement includes the so-called rule of retroactivity, according to which the Agreement applies to all works which have not yet fallen into the public domain either in the country of origin or the country where protection is claimed through the expiry of the term of protection. The provisions of Article 18 allow some transitional flexibility where a country is as a result, taking subject matter out of the public domain and putting it under protection, in respect of the interests of persons who have in good faith already taken steps on the basis of the material being in the public domain. These provisions are complemented by Article 70.5 of the TRIPS Agreement, which confirms that a Member is not obliged to apply the provisions of Articles 11 and 14.4 of the TRIPS Agreement on rental rights with respect to originals or copies purchased prior to the date of application of the Agreement for that Member.

Technical cooperation

Given the extensive changes to the legislation, institutions and practices of many Members, especially developing ones, required by the TRIPS Agreement, technical cooperation is of great importance. Article 67 of the TRIPS Agreement provides that...
developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. According to this provision, the objective of such cooperation is to facilitate the implementation of the Agreement. The Article specifies that such assistance shall include assistance in the preparation of laws and regulation on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.

Most developed countries already have considerable programmes which are being directed towards assisting with implementation of TRIPS obligations. The Council has agreed that these Members shall annually provide updated information to the Council on their technical cooperation activities. It has also requested intergovernmental organizations with observer status in the TRIPS Council to provide information. In addition, the WTO Secretariat has provided information on its technical cooperation activities related to the implementation of the TRIPS Agreement. The Council has also decided that developed country Members should establish and notify contact points in their administrations for technical cooperation purposes on TRIPS.

The provision of such information to the TRIPS Council serves two main purposes. In regard to the technical cooperation activities of developed country Members vis-à-vis developing country Members, it serves as a vehicle for the Council to carry out its task of monitoring the operation of the Agreement, in this case its Article 67. However, more generally, the provision of information also serves a key transparency function in enabling developing country Members who may wish to seek technical and financial cooperation to know what types of assistance are being made available and to whom they might address their requests.

Several intergovernmental organizations have activities in this field. The most important of these organizations is WIPO, which has increased its resources in order to be able to respond to the additional demand on technical cooperation related to the implementation of the TRIPS Agreement. To facilitate implementation of the TRIPS Agreement, the Council for TRIPS has concluded with WIPO an agreement on cooperation between WIPO and the WTO, which came into force on 1 January 1996. Technical cooperation is one of the three main areas covered by this Agreement. The agreement provides that the International Bureau of WIPO and the WTO Secretariat shall enhance cooperation in their legal-technical assistance and technical cooperation activities relating to the TRIPS Agreement for developing countries, so as to maximize the usefulness of those activities and ensure their mutually supportive nature. The assistance made available by each Secretariat to the members of its own organization will be made available also to the members of the other organization. The General Assembly of the WIPO has also agreed that the International Bureau should make arrangements so as to be able to respond to requests from developing countries for WIPO legal and technical assistance relating to the TRIPS Agreement and that it should expand the coverage of the TRIPS Agreement in existing WIPO development cooperation activities.
Monitoring Compliance

One of the characteristics of the GATT and now of the WTO is the effort made to continuously monitor compliance with the obligations entered into. This is done through a combination of mechanisms. One involves the right of WTO Members to raise, at any time, either bilaterally and/or on the floor of the TRIPS Council (which meets five to six times a year), any concern that it has about compliance on the part of any other Member. In this connection, a number of issues have been raised in the Council (for illustrative examples see Report(1996) of the Council for Trade-Related Aspects of Intellectual Property Rights).

There are also mechanisms aimed at a more systematic monitoring of compliance. These involve, first, notification requirements under which Members are required to notify their national implementing legislation and various other pieces of information (for example, to respond to a checklist of questions on their enforcement procedures and remedies); and, secondly, the review of their legislation by other Members in the TRIPS Council. Because of the transitional arrangements of the Agreement the notification and review mechanisms have been largely only applicable so far to some 30 developed country Members. The task has been divided into four components. It started with the area of copyright and related rights in July 1996. Legislation on trademarks, geographical indications and industrial designs was reviewed in November 1996, while the areas of patents, layout-designs of integrated circuits, undisclosed information and the control of anti-competitive practices in contractual licences were up for review in May 1997. The area of enforcement was the subject of review in November 1997. The review process consists of countries giving advance notice in writing of questions they wish to put on the legislation of other Members, written responses to those questions and follow-up questions and answers on the floor of the Council in the week-long meetings devoted to the reviews. The results are circulated in a series of WTO documents, one for each country (IP/Q/...documents), which will be progressively made available to all, including through the WTO homepage on the Internet(http://www.unicc.wto.org).

The review process should be seen primarily as a "dispute prevention" mechanism. In this regard, it has a number of functions:

- first, the prospect of it may have a useful ex ante effect on legal drafters;
- second, it can and does help remove misunderstandings about a country's legislation;
- third, it leads to the identification of areas of differences of interpretation as well as deficiencies in Members' legislation. Sometimes these matters will be pursued bilaterally. They may eventually be taken up by the dispute settlement system, or constitute part of the issues that will be addressed when the TRIPS Agreement as a whole comes up for review after the year 2000. Of course, if the matter is not felt to be of commercial significance, it may simply be put aside, at least for the time being;
- the fourth benefit which we believe has flowed from the process is that it is an important educational tool for developing and transition economy WTO Members still in the process of bringing their legislation into TRIPS conformity.

One thing should be emphasized: the review does not, either explicitly or implicitly, lead to the granting of a "bill of clean health" to a
Member's legislation. The fact that a matter was not raised or, if raised, not pursued in the follow-up to the review does not in any way prejudice a Member's right to raise the matter subsequently and, ultimately, have recourse to dispute settlement.

Dispute Settlement

Main features of the WTO dispute settlement system

WTO Members are committed, if they wish to seek redress of a violation of a TRIPS obligation (or any other WTO obligation), to have recourse to, and abide by, the multilateral WTO dispute settlement procedures. In such cases, they undertake not to make a determination that a violation has occurred except in accordance with these procedures and not to retaliate except in accordance with authorization from the WTO's General Council (i.e., all WTO Members together) acting in its capacity of Dispute Settlement Body.

The WTO dispute settlement system is a strengthened version of the pre-existing GATT mechanism. Disputes which cannot be settled through consultations can be brought to a panel of three or five independent persons who, after hearing the parties to the dispute and obtaining such advice as they find appropriate, will make findings on the legal consistency of the contested measures. The major element of strengthening that has been introduced is the elimination of the means by which it has been possible for defending or losing countries to delay or block the dispute settlement process. This has been done, on the one hand, by the introduction of stricter time limits for the different stages of the dispute settlement process and, on the other hand, by laying down that panel reports will be adopted, unless there is a consensus against their adoption in the Dispute Settlement Body. Thus, the system has become considerably more juridical in nature than hitherto. In the light of this more binding and automatic nature of panel findings, provision has been made for recourse to a standing Appellate Body (composed of seven persons, three of whom shall serve on any one case) whose findings are

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2 Elements of the dispute settlement procedure:
- Consultations aimed at a mutually agreed solution are encouraged throughout the procedures and are, in any case, a mandatory first stage of the proceedings in any given case.
- Request by the aggrieved party to the Dispute Settlement Body (DSB) for the establishment of a panel, which should make recommendations to the DSB unless a mutually agreed solution is found.
- Possibility of appeal to the WTO's Appellate Body (seven persons, of which three serve on any one case). Appeal suspends a decision by the DSB on the panel report. A mutually agreed solution terminates the proceedings.
- The DSB adopts a panel or Appellate Body report unless it decides by consensus not to adopt the report (in case of appeal, 12 to 15 months after the proceedings started).
- WTO Member is to inform the DSB as to how it intends to comply with the ruling (60 days). A disagreement about the intended time period for implementation is subject to binding arbitration (90 days). A disagreement about whether the intended implementation is consistent with the panel or Appellate Body ruling is to be decided by the DSB after dispute settlement proceedings before, wherever possible, the original panel (90 days).
- In case of non-compliance with the ruling, the aggrieved party has the possibility to request to negotiate a mutually acceptable compensation and, if such negotiations fail, to request the DSB to authorize retaliation by the suspension of concessions. Objection to level of suspension is subject to binding arbitration (60 days).
- Implementation of the ruling kept under surveillance in the DSB.
also subject to adoption by the DSB according to the same decision-making rule. Review by the Appellate Body shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel. Adoption of a panel report by WTO Members, acting through the Dispute Settlement Body (DSB), shall take place within 60 days after its circulation, unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. The same rule applies with respect to Appellate Body reports, except that the time period for adoption is shorter, namely 30 days after the report’s circulation.

Another important feature of the dispute settlement system should also be mentioned. This concerns what is often referred to as cross-retaliation; that is the extent to which it should be possible for an aggrieved Member country to withdraw concessions or obligations in another area of the WTO from a country failing to comply with a dispute settlement finding within a reasonable period of time, for example to curtail market access for textile or agricultural products as a result of a failure to comply with a TRIPS panel ruling. As can be imagined, this was a particularly delicate part of the negotiations, but a necessary component of an institutional link between the TRIPS Agreement and the other results of the Uruguay Round. Clearly, a system of world trade rules designed to be effective is only viable, if there is too much at stake for the countries involved in not complying with any of those rules or in not giving way to multilateral discipline. At the same time, it should be said that the dispute settlement system is very much designed so as to help the parties find a mutually agreed solution and has, in the more than 45 years of experience under the GATT, only once led to an authorization to retaliate, which the country in question, in the end, did not carry out. This element of the system is more a threat that gives credibility to the system than anything else.

Experience with WTO dispute settlement in the TRIPS area

Before discussing the experience so far with the formal use of the system, it should be emphasized that what surfaces by way of formal invocations is only the tip of the iceberg; in a very large number of cases, concerns about compliance are discussed and resolved through informal consultations between the interested WTO Members. It is normally only if such informal mechanisms do not yield satisfactory results that a WTO Member will have formal recourse to the dispute settlement system of the WTO.

In regard to the TRIPS Agreement, the dispute settlement system has been formally invoked, to date, on ten occasions in respect of eight separate matters (i.e., in respect of each of two matters, separate complaints were made by two Members). In respect of the mailbox and exclusive marketing right arrangements in India for pharmaceutical and agricultural chemical products, a panel was established whose report became available on 5 September 1997. I am sure, you know that this first TRIPS panel found that India was not in compliance with its obligations under Articles 70.8 and 70.9 of the TRIPS Agreement. Adoption of the panel report had been put on the agenda for the meeting of the Dispute Settlement Body scheduled for 16 October 1997. A panel has also been established and is presently working on certain Indonesian measures affect-

ing the automobile industry; the issues before this panel include a complaint relating to trademarks. In respect of three matters, the issues were resolved successfully as a result of the first stage of the formal procedures (consultation); these were the complaints about the protection of existing sound recordings in Japan, the mailbox and exclusive marketing right arrangements in Pakistan for pharmaceutical and agricultural chemical products and the term of protection for existing patents in Portugal. In respect of three other matters — copyright and neighbouring right protection in Ireland, and the availability of provisional measures in the context of civil proceedings in Denmark and Sweden — bilateral consultations are under way. In all the cases referred to above, the United States was the complainant, with the European Community also making complaints in respect of two of the matters (those relating to the Japanese and Indian measures referred to).

So far, we believe that the experience with dispute settlement under the TRIPS Agreement, and indeed with the WTO dispute settlement system as a whole, has been promising. The system has been quite intensively used, although in the TRIPS area predominantly by one country, and does seem to be leading to a high proportion of cases which are resolved through a mutually satisfactory bilateral solution. Provided that such solutions are consistent with WTO rules, they are the solutions which are preferred. Incidentally, it would seem that constraints on the use of the system are more related to the availability of resources within WTO Members and within the WTO Secretariat than with the number of cases which potentially would be susceptible to resolution in this way. Experience in the GATT is that, where international rules are seen as creating private rights, the pressures on governments to ensure that those international rules and thus private rights are respected tends to be particularly high.

The TRIPS Built-in Agenda

The primary focus of activity in the TRIPS area is on implementation of what already exists, rather than on new initiatives. As you know, it will not be until the year 2000 that TRIPS obligations are fully applicable in developing and transition economy countries and until 2006 in least-developed countries. However, the TRIPS Agreement itself provides for further work in a number of areas. One of these concerns geographical indications. In this regard, the TRIPS Council is initiating preliminary work on issues relevant to the negotiations called for in Article 23.4 of the TRIPS Agreement concerning the establishment of a multilateral system of notification and registration of geographical indications for wines. It is also agreed that issues relevant to such a system for spirits will be part of this preliminary work. At present, the Council is seeking to take stock of the different systems that already exist, first at the national level and then at the international level. The TRIPS provisions on geographical indications also call for a review of their application. The modalities for conducting this review are still the subject of informal consultations between Members in the TRIPS Council. Ideas have been put forward by some delegations for expanding the coverage of the higher level of protection presently only required by the TRIPS Agreement in respect of wines and spirits. However, there are differing views and differing degrees of enthusiasm for pursuing work in these areas and it is unlikely that concrete results will emerge rapidly.
The TRIPS Agreement also calls for a review of its provisions on the protection of plant and animal inventions (Article 27.3(b)) during the course of 1999. While it has been agreed that analytical work and information exchange to prepare for this review might be undertaken in advance, no specific suggestions have been put forward as yet. The same goes for the requirement in Article 64.3 of the Agreement for an examination of the appropriateness of "non-violation" complaints in the TRIPS area. The TRIPS Agreement also calls for an overall review of its implementation after the year 2000. As you may know, suggestions have been made, although no work has yet been initiated to see whether a consensus could be found, for a possible major new negotiating exercise after the year 2000, when further negotiation or review are already required by the WTO Agreement in a range of areas (including agriculture and services as well as intellectual property).

3 In this connection, it should be noted, however, that the relationship between the TRIPS Agreement and the environment has been discussed in the WTO Committee on Trade and Environment, which has the task to examine, inter alia, that relationship. This Committee has discussed a variety of issues in this connection and has agreed that further work is required to help develop a common appreciation, including on such matters as the generation of environmentally sound technologies and products, facilitating the access to and transfer of such technologies, environmentally unsound technologies, the creation of incentives for the conservation of biological diversity and the fair and equitable share in the benefits arising out of the use of genetic resources.