

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

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**INTELLECTUAL PROPERTY AND THE 1998 WORK PROGRAMME ON
ELECTRONIC COMMERCE**

**OPERATIONALIZING TECHNOLOGY TRANSFER IN THE CONTEXT OF ARTICLES 7, 8, 40 AND 66.2
OF THE TRIPS AGREEMENT**

COMMUNICATION FROM SOUTH AFRICA

1 INTRODUCTION

1. The Work Programme on Electronic Commerce (WT/L/274) in paragraph 4.1 provides that "the Council for TRIPS shall examine and report on the intellectual property issues arising in connection with electronic commerce. The issues to be examined shall include:

- protection and enforcement of copyright and related rights;
- protection and enforcement of trademarks; and
- new technologies and access to technology."

2. In order to reinvigorate the 1998 Work Programme on Electronic Commerce in line with the General Council Decision of December 2019, this delegation proposes an intensification of discussions under paragraph 4.1 of the Work Programme. Since this area of engagement is mandated, the TRIPS Council should inscribe this item as a standing items on the agenda.

3. This will facilitate a deeper discussion of issues that could be based on a catalogue of themes that could be agreed by Members. Initially the issue of electronic commerce was a standing item on the TRIPS Council Agenda, Members should return to this practice.¹ Members are encouraged to submit further proposals, share information and national experiences, pointing out how the 2030 SDGs may be achieved through an effective framework for technology transfer.

4. Intellectual property can have an impact on development so the link between intellectual property (IP) and development, as well as the relationship with the various Sustainable Development Goals (SDGs) need to be mainstreamed into the discussion of the TRIPS Council. In order to meet the SDGs, new technology needs to be harnessed and accessed by developing countries and LDCs.

5. The UNCTAD Digital Economy Report of 2019² captures the transformative effect of digital technologies as follows: "The world economy is transforming fast as a result of the rapid spread of new digital technologies, with major implications for Agenda 2030 on Sustainable Development. Greater levels of digitalisation of both economies and societies are creating new means for tackling global development challenges; however, there are risks that digital disruptions will favour mainly those that are already well prepared to create and capture value in the digital era, rather than contribute to more inclusive development." At the cusp of this digital revolution are technologies such as key software-oriented technologies such as blockchain, data analytics and Artificial intelligence.

6. The rapid deployment of smart devices and digital interfaces to 3D printing, wearables, automation, robotics and cloud computing are all contributions to a notable digitisation of the world

¹ WTO Secretariat Background Secretariat Note: The Work Programme on Electronic Commerce Addendum IP/C/W/128/Add.1 of 15 May 2003, *ad par.* 8.

² UNCTAD/DER/2019 ad p. 1.

economy, a trend which has been accelerated by COVID-19. In this context the digital divide impedes the participation of developing countries in digital value chains, while digital transformation is disrupting traditional sectors with severe socio-economic consequences.

7. On this basis UNCTAD concludes that: "The current trends of new technologies being concentrated in a few countries and controlled by relatively few companies have implications for the ability of both developing and developed countries to participate in the technological learning processes needed to catch up and thrive in the digital economy."³

2 DISCUSSION

8. The preamble of the TRIPs Agreement emphasizes the underlying policy objectives of national systems of the protection of intellectual property, including developmental and technological objectives. These objectives should be read in conjunction with Article 7 and 8 of the TRIPs Agreement. The Secretariat in its Background Note on the Work Programme on Electronic Commerce⁴ recognises that "... [T]he traditional objectives of the system as reflected in the current international norms, including in the TRIPs Agreement, would appear to remain valid even in "cyberspace".⁵

9. Article 7 of the TRIPs Agreement provides a context to interpret the access to technology by emphasizing that the protection and enforcement of IPRs 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 that is conducive to social and economic welfare, and to balance rights and obligations.

10. In order to industrialize, it is clear that developing countries would need more access to technology, however, it is also clear that as many developing countries pursue industrialisation, they do so in the context of an international IP regime that is more constrained than it was in the 19th century. The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) establishes extensive standards of IP protection that are almost without exception legally binding on all WTO Members.

11. Furthermore, Article 8 recognises the right of WTO Members to adopt national measures to promote public interest in sectors of vital importance to their socio-economic and technological development subject that such measures are 'consistent' with the TRIPs Agreement. When considering consistency of measures, the inbuilt TRIPs flexibilities need to be taken into account across the entire spectrum of the TRIPs Agreement. It is also important to take account of the crosscutting impact of proposals in other WTO bodies or plurilateral initiatives that may impact intellectual property rights.

12. Some members have proposed disciplines to prohibit national localization requirements and government's access to data, this may have unintended consequences for settled practices in Members IP regimes and affect exceptions and limitations that are well established under the TRIPs Agreement. The link between localization and IP is not clear and since it is silent on the implications for trade secrets on transparency of algorithms and access to copyright work in the digital economy, these issues should be approached with caution.

13. A South Centre paper⁶ posits that "...localization requirement policies, which are in full compliance with WTO provisions and which may also have national security implications, are seen as a trade barrier per se, they may substantially impede the development of certain data-intensive industries and also favour those who already hold large amounts of data."

3 SUMMARY

14. Article 7 broadly captures the need for balance between private property right and public interest in respect of socio-economic and technological development. This links the TRIPs Agreement

³ UNCTAD (2019) ad p. 21.

⁴ IP/C/W/128 of 10 February 1999.

⁵ *Ibid ad par.13*, p. 3.

⁶ Policy Brief No.62: *Intellectual Property and Electronic Commerce: Proposals in the WTO and Policy Implications for Developing Countries* (June 2019), p. 5 et seq.

directly with the 2030 SDG Goals and requires the promotion of technological innovation, transfer and dissemination in a manner that will achieve the SDG goals.

15. Further bolstered by Article 8 and Article 66.2 of the TRIPS Agreement, technology transfer is central to address development issues, including the digital divide. Both demand and supply side issues are covered in these provisions, with Article 66.2 imposing a mandatory obligation on developed Members to provide a favourable environment and incentives to their enterprises and institutions to promote transfer of technology to LDCs.

16. On the other hand, Article 8 recognises demand side imperatives that allow Members to promote public interest in sectors of vital importance to their socio-economic and technological development.

4 QUESTIONS

17. Questions that can frame the discussion under this agenda item include:

1. How can exceptions and limitations, including compulsory licenses in the IP system, be used as tools to ensure that the patent system contributes to the promotion of innovation in a competitive environment and to the dissemination and transfer of technology, meeting the objectives of the system and responding to the public interest at large? What are Members' experiences in this regard?

2. Article 40.1 of the TRIPS Agreement, recognises that some licensing practices or conditions pertaining to intellectual property rights, which restrain competition, may have adverse effects on trade and may impede the transfer and dissemination of technology. Read with Article 40.2, Members may address adverse effects of anti-competitive practices through appropriate measures. Such measures may also be applied to digital platforms that could potentially use their dominant position to restrain competition, including through the use of intellectual property rights. How can more effective access to technologies especially in the digital economy be secured for developing and least developed countries in an inclusive way?
