



CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

**TOWARDS A FULL REVIEW OF THE WTO'S TRIPS  
AGREEMENT UNDER ARTICLE 71.1**

**BY**

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## I. INTRODUCTION<sup>1</sup>

1. This paper provides some reflections on the review of the TRIPS Agreement required under Article 71.1.<sup>2</sup> It notes the need for a full review of the Agreement from a sustainable development standpoint, in line with the decision of WTO Members at the General Council Meeting of 7 February 2000, which provides that “The General Council also agreed that mandated reviews should address the impact of the agreements concerned on the trade and development prospects of developing countries.”<sup>3</sup> It suggests that the review should carefully examine the impact of implementing the TRIPS Agreement on developing countries, and ensure that intellectual property rights serve not merely the interests of private title-holders, but the broader interests of society to innovation, environmental protection, health, socio-economic and technological development, and to a balance of rights and obligations that is consistent with the WTO’s overarching objective – noted in the preamble to the WTO Agreement – of promoting sustainable development.

2. In Section II, the paper commences with a discussion of the scope of the review. Section III explores a number of issues that have been identified by developing countries as relevant to the Article 71.1 review. It begins by examining the TRIPS Agreement’s objectives and principles, including the need to maintain a balance of rights and obligations. It then identifies the importance to WTO Members of gaining experience about the potential impacts of implementing the Agreement on the transfer and dissemination of technology, competitive markets, and the capacity of Members to maintain a balance of rights and obligations by establishing exceptions to the rights of, and applying obligations to, title-holders. The Section concludes by suggesting that Members should extend the moratorium on the application to the Agreement of the non-violation remedy, and explore the possibility of bringing the Agreement into line with other WTO Agreements by inserting general exceptions to ensure that, in the event of conflict, intellectual property rights are not given preeminence over other important national policy goals.

3. The discussion in this paper is not intended to provide a comprehensive overview of these subjects, but rather to provide a useful starting point for developing countries when considering how to approach the Article 71.1 review.

## II. SCOPE OF ARTICLE 71.1 REVIEW

4. Article 71 is entitled *Review and Amendment* and includes two main provisions. Article 71.2, provides a procedure for amendments to the TRIPS Agreement “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”.

5. Article 71.1, by contrast, provides a more detailed procedure for reviewing and amending the Agreement in light of experience gained in relation to its implementation and new developments. The Article’s three sentences establish three procedures for review:

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.

6. The review included in the first sentence forms the main focus of this paper. It commences after the expiration of the Article 65.2 transitional period, in 2000, and requires the TRIPS Council to “review the implementation of this Agreement”. A variety of views have been expressed about the scope of this review.

7. In our opinion, the review requires an assessment of the implementation of the TRIPS Agreement as a whole in order to assess its implications for developing countries. This approach is in line with decision of WTO Members at the General Council Meeting of 7 February 2000. It is also supported by the second sentence of Article 71.1 which notes the need for “experience gained in its implementation” to be used as part of the second review. Experience, including that of the trade and development implications of implementing TRIPS Agreement, gained during the first review will thus be important when determining whether amendment is required during subsequent reviews.

### **III. ISSUES RELEVANT TO ARTICLE 71.1 REVIEW**

#### **A. OBJECTIVES AND PRINCIPLES**

8. Ensuring that the practical implementation of the TRIPS Agreement conforms to its objectives and principles is the responsibility of the TRIPS Council and of all WTO Members. The objectives of the TRIPS Agreement are articulated in Article 7:

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.

Article 8 establishes principles that underpin the TRIPS Agreement:

1. Members may, in formulating or amending their laws and regulations, adopt measures 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 this Agreement.

2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the 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.

9. These objectives and principles are supported by the preamble to the TRIPS

Agreement, which notes the desire to ensure that “measures and procedures to enforce intellectual property rights do not themselves become a barrier to legitimate trade” and the need for “effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems”.

10. They are also supported by preamble to the WTO Agreement, which enunciates as the overarching objectives of all WTO Members raising standards of living and expanding the production of and trade in goods and services, in accordance with the objective of sustainable development. It also recognizes the need for “positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.”

11. These provisions are of central importance to the successful functioning of the TRIPS Agreement. They set an important benchmark for WTO Members when conducting the Article 71.1 review, and establish that intellectual property rights must serve not merely the interests of private title-holders, but the broader interests of society to innovation, health, socio-economic and technological development, and to a balance of rights and obligations. In particular, Articles 7 and 8 are included in the operative text of the Agreement and must be implemented by all WTO Members. In addition, these articles help to establish the object and purpose of the other provisions of the Agreement, which should be interpreted and applied by all WTO Members in a way that promotes and does not undermine these goals.

## **B. TECHNOLOGY TRANSFER**

12. The objectives and principles of the TRIPS Agreement affirm the importance of technological innovation and of the transfer and dissemination of technology. Today, technology is among the most important determinants of economic development, and its transfer and dissemination is essential for developing countries. WTO Members should examine as part of the Article 71.1 review the impact of implementing the TRIPS Agreement on the transfer and dissemination of technology and the related trade and development prospects of developing countries.

13. Transfer and dissemination of technology is the central focus of the TRIPS Agreement’s objectives as articulated in Article 7. Article 8.2 notes that abuse of intellectual property rights may adversely affect the international transfer of technology. Operationalizing these provisions is important because providing developing countries with access to technologies identified by them as appropriate is an essential way to accelerate their economic and social development.

14. WTO Members have also agreed specific obligations to assist least-developed countries. These are included in Article 66.2:

Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to

create a sound and viable technological base.

15. Article 66.2 acknowledges that special difficulties may be faced by least-developed countries, and that additional measures over and above the implementation of Articles 7, 8 and other provisions of the Agreement that promote technology transfer would be required. It reflects that, unless the price of the technology can be brought within manageable limits, the high cost of technology will impose a burden on the local economy of these countries.<sup>4</sup>

16. Despite the importance of technology transfer, developing countries seem to be facing increasing barriers to access to technology as a result of a number of factors including the changing pattern of international economic activity, strengthened intellectual property rights required by the TRIPS Agreement, and inadequate counterbalancing policies and measures to promote technology transfer.

17. Changing patterns of technology generation and transfer have been researched intensively. A recent analysis of the mode of technology transfer suggests a reversal of the growing popularity of arm's length licensing in the 1970s and mid-1980s to intra-firm transfers since the mid-1980s. For example, 80 per cent of transfers by US corporations and 95 per cent by German corporations in 1995 were made on internal basis compared to 69 per cent and 92 per cent respectively in 1985.<sup>5</sup> Similarly, the ratio of technology transfers to foreign direct investment has fallen sharply over the last decade, suggesting that the transfer of technology may not be keeping pace with inflows of FDI.<sup>6</sup>

18. Strengthened intellectual property rights required by the TRIPS Agreement may also inhibit technology transfer. Many prospective technology seekers in developing countries face serious difficulties in their commercial dealings with technology holders in developed countries. Stronger intellectual property rights increase the bargaining power of firms, allowing them to raise royalties and impose more onerous conditions. Increasing control over core technologies, the consolidation of patent portfolios, and increasing vertical and horizontal integration and new strategic alliances allow a small number of large corporations and countries to dominate the technologies that are required for the development of many WTO Members, and heighten the barriers facing these countries when seeking new technologies.<sup>7</sup>

19. These problems are exacerbated by an absence of policies and measures to promote technology transfer. There is concern that the provisions of the TRIPS Agreement that refer to the dissemination and transfer of technology are inadequate. Little effort has been made to operationalize Articles 7 and 8, raising questions about the capacity of the Agreement as currently drafted to promote technology transfer. Moreover, efforts by developed countries to implement Article 66.2 have been limited. While some developed countries have submitted information about national schemes that may promote technology transfer to least-developed countries, further information is required to ensure that these meet the requirements of Article 66.2 and are effective.

20. Together, these factors are widening the gap between technologically rich and poor countries, with the latter facing increasing barriers to sharing in the benefits of

technological development. They illustrate the need to address in the WTO issues such as transfer, dissemination and innovation. Previous proposals, made in the Committee on Trade and Environment and the General Council, have called for owners to sell environmentally sound technology and products at fair and most favorable terms and conditions as suggested in the 1992 Rio Declaration, in many multilateral environmental agreements and in other discussions of sustainable development.<sup>8</sup> Increased technology transfer on fair commercial rates is also important in the areas of electronic commerce. The preamble of the WTO Agreement affirms the objective of sustainable development in a manner consistent with the respective needs and concerns of Members at different levels of development. Consequently, an obligation is cast upon the WTO to bring about easy access to and wide dissemination of technology relevant for sustainable development.

21. As part of the Article 71.1 review, the TRIPS Council should assess how implementation of the TRIPS Agreement is affecting the transfer and dissemination of technology in light of recent changes in the international economy. It should examine ways to increase the effective implementation of the Agreement's objectives, principles and other provisions relating to the transfer and dissemination of technology. In relation to Article 66.2, Members should examine the extent to which developed countries have implemented specific legislative measures that are targeted to the requirements of least-developed countries. To facilitate this, developed countries should provide more specific information on any existing schemes including the precise incentives, number of applying firms, and the effectiveness of these measures.

22. To the extent that intellectual property rules do not promote technology transfer, WTO Members should consider the establishment of additional mechanisms to facilitate access by developing and least-developed countries to technologies on a reasonable basis in order to fully implement the TRIPS Agreement, and to harmonize its operation with the broader objectives of the WTO Agreement.

### **C. COMPETITION**

23. While intellectual property rights may occasionally serve as a tool to enhance competition, strengthened intellectual property rights may have adverse impacts on competitive markets. WTO Members may wish to examine the implementation of the TRIPS Agreement to ensure that strengthened intellectual property rights are not having an adverse effect on competition, especially in developing countries that do not have established rules and institutions for addressing anti-competitive conduct.

24. The TRIPS Agreement includes provisions on competition. Article 40 notes, Members agree 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. Similarly, Article 8.2 notes that appropriate measures may be required to address abuses of intellectual property rights.



25. Intellectual property rights, by nature, restrict competition. In addition, abuses of intellectual property rights may give rise to problems of cartels, including price fixing, restrictions on supply, and market and customer divisions. In the international economy, this tendency is exacerbated by the practice in some industrialized countries towards granting over-broad patent claims, the acquisition and strategic use of patent portfolios to prevent competition by similar but non-infringing products, and the continued blurring of the lines between invention and discovery.

26. Many WTO Members are concerned about the growing risk of intellectual property-related anti-competitive impacts. Intellectual property rights have become an important strategic tool for firms that are seeking to consolidate their dominant competitive positions through horizontal and vertical integration of international markets, and through mergers, acquisitions and other strategic alliances.

27. Horizontal integration is occurring at an unprecedented rate. In the area of agricultural biotechnology, for example, the top 10 corporations in the pharmaceutical, seed and agrochemical markets now account for approximately 36, 40 and 82 percent of their respective global markets.<sup>9</sup> Vertical integration is similarly consolidating the control of a few global firms. Again, in agricultural biotechnology the vertical integration of seed, agrochemical, food processing, and food distribution markets has given a few firms located in industrialized countries disproportionate control over the world's food system. There is also a tendency for most powerful firms to cross-link across traditional industry boundaries in strategic alliances that may restrain competition, restrict trade or adversely affect the international transfer of technology. The tendency of firms in agricultural, medical and related industries to cross-link across traditional boundaries is clearly illustrated by the creation of "life" firms; one of which now ranks simultaneously as the world's largest agrochemical corporation, second seed and plant breeding firm, third pharmaceutical corporation, and the ninth ranking animal pharmaceutical corporation.<sup>10</sup>

28. The consolidation of industry has serious implications for the welfare of citizens in developing countries, particularly in relation to industries of vital importance to their socio-economic and technological development. WTO Members should acknowledge that to address these impacts developing countries require competition policies that are appropriate to their level of development and that may differ significantly from the approaches that are normally applied in developed countries.

29. When reviewing the implementation of the TRIPS Agreement, WTO Members should examine the potential anti-competitive effect of strengthened intellectual property rights, and ensure that Members retain the right to fully implement Article 40 and take other measures, including those referred to in Article 8.2, to prevent the abuse of intellectual property rights by right holders. WTO Members, particularly developing countries, may also wish to consider how to cooperate on a bilateral, regional or multilateral level to address anti-competitive effects of large international mergers and acquisitions, especially those that involve consolidation of control over intellectual property rights. WTO Members should also maintain significant flexibility to use measures such as compulsory licensing, as permitted by Article 31.

#### **D. USE WITHOUT AUTHORIZATION OF RIGHTS HOLDER (ARTICLE 31)**

30. Article 31 acknowledges the right of WTO Members to establish as part of their national legislation an entitlement for third parties and the government to use patented subject matter without the authorization of the rights holder. Use without authorization, through compulsory licenses and other measures, is fundamental to the notion of balance included in the TRIPS Agreement. As part of the Article 71.1 review, WTO Members should assess the implementation of the TRIPS Agreement with a view to clarifying and extending the provisions Article 31.

31. Article 31 provides:

Where the law of a Member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected.

This is followed by a series of requirements, listed in Article 31(a) to (l), that apply to the use of compulsory licenses.

32. Virtually all WTO Members have established procedures permitting use of patented subject matter without the authorization of the rights holder. In the United States, for example, literally thousands of uses without authorization have been granted to address violations of antitrust legislation.<sup>11</sup> Although often used to remedy antitrust violations, Article 31 does not restrict the grounds upon which a compulsory license can be granted.<sup>12</sup> Compulsory licensing can be offered in relation to national emergency, situations of extreme urgency, public non-commercial use, second patents, and anti-competitive conduct, as noted in Article 31, as well as on other grounds, including abuses of patents such as refusal to deal, and other cases affecting the public interest.

33. Some WTO Members have sought to limit the grounds by reference to Article 27.1. They argue that Article 27.1 prevents compulsory licenses to ensure local working of a patent. This Article requires that patents rights shall be enjoyable without discrimination as to whether products are imported or locally produced. The rights referred to in Article 27.1 (as established in Article 28) entitle the patent holder to prevent others from making, using, offering for sale, selling, or importing for these purposes that product. They do not, however, prohibit national laws from imposing a positive obligation on the patent holder to execute locally a patented invention. This interpretation is supported by Article 5(A) of the Paris Convention and by the TRIPS Agreement's preamble and Articles 7 and 8, which identify as an objective of the TRIPS Agreement the transfer of technology, which may be ensured in some circumstances by means of a compulsory license on the grounds of non-working.<sup>13</sup>

34. Whereas the Agreement does not limit the grounds for compulsory licensing, it does require that they satisfy provisions listed in Article 31(a) to (l). As a general matter, these provisions preserve substantial flexibility as to how WTO Members use compulsory licenses. This is confirmed by Article 1.1, which notes that Members are implement the provisions of this Agreement within their own legal system and practice as they determine appropriate. Substantial flexibility is also required to ensure that the

TRIPS Agreement is implemented in a manner consistent with its objectives and principles, and with the broader goals of the multilateral trading system. In particular, the requirement in Article 31(g), that authorization shall be terminated in certain circumstances, should be read to ensure that the legitimate interests of compulsory license-holders are protected, and incentives to apply for compulsory licenses and hence their effectiveness as a tool to balance rights and obligations are maintained.

35. Developing countries place great importance on the compulsory licensing provisions in the TRIPS Agreement. Compulsory licensing provides an important way to secure the balance of rights and obligations sought by the TRIPS Agreement. It may be used to accelerate the transfer and dissemination of technology, to safeguard the supply of essential products to the poor at reasonable rates, and to address the abuse of intellectual property rights. Compulsory licenses may serve an important role in encouraging technological innovation by improving access to research processes and promoting follow-on and incremental research, thereby helping to ensure the mutual benefit of technology producers and users, as required by Article 7. It may help ensure that patents do not adversely affect access to the drugs thereby helping to achieve sound public health and nutrition, and promoting the public interest in sectors of vital importance to socio-economic and technological development in a manner consistent with the TRIPS Agreement, as required by Article 8.1. It may also be used to address abuses of intellectual property rights and practices that restrain trade or affect technology transfer, as suggested in Article 8.2.

36. As part of the Article 71.1 review, WTO Members should clarify the provisions of Article 31 to preserve and expand the ability of WTO Members to grant compulsory licenses to achieve legitimate national objectives. Greater clarity will ensure that WTO Members are free to implement Article 31 in national legislation without unilateral pressure or threat of dispute settlement proceedings. Members may also wish to evaluate whether certain provisions of Article 31 should be extended to ensure that compulsory licensing can be used to help achieve the objectives of the TRIPS Agreement.

#### **E. OBLIGATIONS OF PATENT HOLDERS**

37. The notion of balance is fundamental to intellectual property systems, and is acknowledged repeatedly in the TRIPS Agreement. To balance rights governments may need to impose obligations on the holders of intellectual property rights. In reviewing the implementation of the TRIPS Agreement under Article 71.1, WTO Members should ensure that the Agreement does not unduly inhibit the capacity of governments to place obligations on intellectual property holders.

38. Obligations may be imposed at the international level in the TRIPS Agreement or other international agreements, or at the national level. Striking a delicate balance between rights and obligations will be particularly important in the field of public health, including between those of States, patients, and of the suppliers of health-related goods and services.

39. In the TRIPS Agreement, the importance of balancing rights and obligations is underlined in Article 7. Article 8.2 similarly acknowledges that WTO Members may need to develop appropriate measures to prevent the abuse of intellectual property rights by rights holders, or the resort to practices that unreasonably restrain trade or affect the international transfer of technology.

40. While the TRIPS Agreement notes the need for balance, its operative provisions provide numerous rights to the owners of intellectual property, without establishing corresponding obligations. Without corresponding obligations, the elevation of private property rights to the international level may give rise to a systemic imbalance between the interests of private actors and the capacity of sovereign states, particularly poorer countries, to promote the public interest.

41. This imbalance is reflected in rules at both at the international and national levels. At the international level, the concept of applying obligations in international agreements to intellectual property rights holders has met with serious resistance by some WTO Members. For example, merely requiring applicants to acknowledge as part of a patent application the source of genetic material and the number of any access contract has been disclaimed on the grounds that it interferes with the rights of intellectual property holders and is thus inconsistent with the TRIPS Agreement.

42. At the national level, private interests have in many cases acquired the capacity to increase price and reduce supply without counterbalancing obligations to guarantee adequate access to essential drugs for the poor, to provide access to core technologies, or to satisfy other basic needs of citizens in developing countries. In addition, some WTO Members have been subjected to unilateral pressure to raise their intellectual property rules beyond the minimum standards required by the TRIPS Agreement, thereby exacerbating imbalances between rights and obligations. To maintain balance in the absence of specific obligations in international agreements it remains to national governments to define the responsibilities of the owners of intellectual property rights.

43. Obligations may be applied to rights holders in a variety of circumstances, including where a WTO Member considers them necessary to ensure that intellectual property rights promote and do not undermine fundamental human rights to health, a healthy environment and development. In particular, Members may need to develop obligations for patent holders to help ensure access to life-saving medicines; but obligations may also be applied to achieve other important national policy objectives. The appropriate balance between rights and obligations may vary significantly between countries with varied legal and cultural traditions, and different levels of development.

44. In this context, *obligations* should be differentiated from *exceptions to rights* such as use of patented subject matter without authorization contemplated in Article 31. Rather than limiting the right of a patent holder to prevent third parties from undertaking certain unauthorized acts, or regulating the use by governments or third parties of patented subject matter without the patent holder's authorization, an obligation may require the patent holder itself to act or refrain from acting in a certain way.

45. The TRIPS Agreement should be reviewed to ensure that the right of WTO

Members to implement these kinds of measures to ensure a balance of rights and obligations is retained. WTO Members should also be vigilant to ensure that unilateral pressure is not applied to encourage governments to go beyond the minimum rights established in the TRIPS Agreement, or that other pressure – including claims not based on the provisions of the TRIPS Agreement – are used to undermine the balance of rights and obligations that is essential to effective and appropriate intellectual property rules.

#### **F. NON-VIOLATION COMPLAINTS (ARTICLE 64)**

46. As noted by many WTO Members, the non-violation remedy should remain an exceptional concept and be applied with considerable caution.<sup>14</sup> Many WTO Members are concerned that extending the non-violation remedy to the TRIPS Agreement will further imbalance its implementation, and undermine the trade and development prospects of developing countries. WTO Members should extend the moratorium on the application of the non-violation remedy until further experience is gained with the implementation of the TRIPS Agreement as part of the Article 71.1 review.

47. The non-violation remedy is considered in Article 64, paragraphs 2 and 3, which provide:

2. Subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement.

3. During the time period referred to in paragraph 2, the Council for TRIPS shall examine the scope and modalities for complaints of the type provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 made pursuant to this Agreement, and submit its recommendations to the Ministerial Conference for approval. Any decision of the Ministerial Conference to approve such recommendations or to extend the period in paragraph 2 shall be made only by consensus, and approved recommendations shall be effective for all Members without further formal acceptance process.

48. Subparagraphs 1(b) and (c) of Article XXIII of GATT 1994, in turn, permit claims based not on the failure of a Member to comply with an agreed obligation, but rather where a benefit under the Agreement is being nullified or impaired due to:

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation ...

49. This non-violation remedy stemmed from the early bilateral trade agreements and was subsequently included in the GATT to protect the balance of tariff negotiations by addressing the misuse of non-tariff and other trade-restrictive measures that, while consistent with basic GATT disciplines, may have affected the agreed deal.

50. Transplanting the non-violation remedy from the old GATT system has

introduced legal uncertainty into the rules-based trading system. Its extension to the TRIPS Agreement raises serious concerns for many WTO Members, stemming from a number of sources including its ad-hoc historical development under the GATT and its implications for the more sophisticated obligations and dispute settlement system of the WTO.

51. The evolution of the multilateral trading system and the establishment of the WTO has removed the justification for non-violation complaints. Disciplines on non-tariff measures have reduced the need for non-violation complaints to protect tariff concessions. Additionally, non-violation complaints in relation to new disciplines are unnecessary as these rules include substantial flexibility to address borderline cases. Permitting claims that are not based on a violation of the rules is difficult to justify in a rules-based system: it introduces legal uncertainty and it requires panels and the Appellate Body to offer binding decisions that risk violating Article 3 of the DSU by extending beyond the covered agreements. It threatens to over-extend the jurisdiction of the WTO's dispute settlement mechanism and operates in tension with the predictability and security that the system seeks to guarantee.

52. Extending non-violation complaints to TRIPS Agreement raises additional legal and practical problems. First, many developing countries have not had the benefit of direct experience on the scope and modalities of the non-violation remedy. There is currently also little experience with the application of the DSU provisions to the TRIPS Agreement. It is also unclear how non-violations will apply to minimum regulatory standards that protect private property rights. Extending the non-violation remedy introduces legal uncertainty that may exacerbate the difficulties faced by developing countries when responding to the claims of other Members. It may also encourage unilateral pressure and speculative claims to force countries to raise protection beyond minimum requirements or to refrain from using TRIPS-consistent measures such as compulsory licensing. The application of non-violation complaints to TRIPS threatens to further unbalance intellectual property systems by elevating private rights over other public policy considerations and, more seriously, to unravel the legal certainty and predictability that WTO Members during the Uruguay Round labored so hard to secure.

53. So far, the TRIPS Council has not undertaken its mandated review of scope and modalities for the application of non-violation remedy to the TRIPS Agreement, nor have recommendations been made to the Ministerial Council as required by Article 64. We are of the view that the moratorium in Article 64 on the application of the non-violation remedy under the TRIPS Agreement should be maintained until this examination has occurred, and until Members agree by consensus that sufficient experience has been gained with the application of the Agreement and that the non-violation remedy if adopted will not increase Members' level of obligations.

#### **G. GENERAL EXCEPTIONS**

54. It is a basic principle that in the event of an irreconcilable conflict between measures to protect fundamental policy considerations (such as protecting human health), and the rules of the multilateral trading system (such as non-discrimination), the former should in certain circumstances prevail. This principle is embodied in

*General Exceptions* to both the GATT and the GATS. These exceptions balance the goals of the multilateral trading system and other national objectives, and safeguard the legitimacy of the WTO from unjustified accusations that it subordinates to the goal of trade liberalization, other fundamental goals.

55. Unlike the GATT and GATS, however, there are no general exceptions included in the provisions of the TRIPS Agreement. While the TRIPS Agreement does contain a comprehensive exception for national security, other important objectives have not been addressed through a general exception, but have rather been addressed piecemeal throughout the Agreement.

56. The failure to include general exceptions in the TRIPS Agreement raises serious concerns for developing countries. First, whereas other WTO Agreements generally safeguard the rights of WTO Members, the TRIPS Agreement preserves the private property rights of individuals and corporations. Without sufficient exceptions, these private (often commercial) rights of foreign nationals may gain ascendancy over those of the government and the public to safeguard important national values.

57. Second, the patchwork quilt of ad hoc exceptions in the TRIPS Agreement fails to provide comfort to many WTO Members and seems to leave the non-discrimination obligations unqualified by overarching public objectives. This may lead to the paradoxical situation in which the private interests protected by the TRIPS Agreement are offered stronger rights of non-discrimination than are afforded to WTO Members under other WTO agreements.

58. Third, where the TRIPS Agreement does acknowledge the importance of other national goals, these provisions are heavily qualified or limited in scope. For example, the acknowledgement in Article 8.1 of the need for measures necessary to protect public health and nutrition is qualified, not by the traditional formulation “nothing in this Agreement shall prevent the adoption of [these] measures”, but by the requirement that “such measures are consistent with the provisions of this Agreement”. Similarly, exceptions such as those in Article 27.2 permit the exclusion of inventions from patentability where a WTO Member also prevents the commercial exploitation of the product, but it is unclear whether its scope extends to other measures necessary to safeguard public order, morality or other the listed objectives.

59. The case for including general exceptions in the TRIPS Agreement is as strong if not stronger than that for agreements relating to trade in good and services. The TRIPS Agreement is as likely as other WTO agreements to affect important national objectives including public order, health, environment, and food security. By requiring WTO Members to establish minimum standards of protection, the TRIPS Agreement extends deeper into the legislative prerogative of sovereign nations than do many other WTO Agreements.

60. General exceptions, similar to those in GATT and GATS, would provide WTO Members with greater security when seeking to take measures necessary to protect overarching public objectives. They could also contribute to the development of more coherent and consistent practice among WTO agreements; provide a concrete way to

implement the TRIPS Agreement's objectives and principles; and help strike an appropriate balance of rights and obligations, especially where intellectual property rights may compete with other fundamental rights such as the human right to health.

61. It is unclear whether existing exceptions in the TRIPS Agreement are sufficient to safeguard health, environment and other important policy concerns. As part of the Article 71.1 review, WTO Members should give careful regard as to whether the objectives and principles of the TRIPS Agreement would be better served by an overarching general exception to core obligations, as is the case for the two other areas covered by the WTO, goods and services.

## **H. OTHER ISSUES**

62. The scope and content of the obligations contained in the TRIPS Agreement present fundamental problems for many WTO Members. Strengthening of intellectual property rights may empower private interests to further segment markets, limit access to technology on reasonable rates, restrict competition, and impose barriers to legitimate trade, with implications for the trade and development prospects of developing countries, and the broader goals of the multilateral trading system.

63. An international agreement that locks in a patent term of 20 years for all inventions in all fields of technology seems difficult to justify on theoretical or practical grounds. The elevation of choices – such as the minimum term of a patent right – to the international level threatens to overload the multilateral trading system with considerations that are appropriately left to the discretion of national governments. It is inconsistent with notions of subsidiarity, and limits flexibility of individual nations and the international community to respond to rapidly changing circumstances including the tendency in many countries – including the most highly developed – to question the balance of rights and obligations embodied in existing intellectual property systems.

64. In light of these considerations, many countries believe that the intellectual property rights system embodied in the present TRIPS Agreement sits uncomfortably with other WTO agreements and with the broader goals of the multilateral trading system. Whereas other WTO agreements seek to expand trade, the TRIPS Agreement acknowledges that intellectual property rights may pose barriers to legitimate trade. Whereas other WTO agreements seek to promote competition, the TRIPS Agreement acknowledges that intellectual property rights may be abused to undermine the competitive process. Whereas other WTO agreements seek primarily to protect the rights of nations, the TRIPS Agreement protects private rights. Finally, whereas other WTO Agreements leave significant discretion to sovereign nations to define their own policies, the TRIPS Agreement establishes minimum standards that must be adhered to by all WTO Members, raising questions about whether one set of rules, defined by reference to the experience of developed countries, can meet the fundamental needs of the majority of the world's population.

65. These profound concerns raise the need to critically examine the appropriate relationship between intellectual property rights and the *acquis* of the WTO. Many



WTO Members are aware that the legitimacy of the WTO and the multilateral trading system are closely linked to that of the TRIPS Agreement. They are conscious of the need to carefully evaluate the Agreement's capacity to further the goals and principles of the trading system as articulated by WTO Members in the preamble to the WTO Agreement, including the need to ensure that developing countries secure a commensurate share in the growth in international trade. And they believe that the TRIPS Agreement and other WTO Agreements must support the conceptions of equity, human rights and sustainable development that have been defined by the community of nations and embodied in numerous international agreements, declarations and undertakings during the course of the last century.

66. At this stage it is unclear whether the protection and enforcement of intellectual property rights as required by the TRIPS Agreement is contributing to its objectives and principles, or to those of the multilateral trading system. It is important, therefore, that as part of the Article 71 review WTO Members carefully assess the implications of implementing the TRIPS Agreement, so as to harmonize its implementation with its own objectives and principles, and with those of the WTO Agreement.

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<sup>1</sup> The views expressed are those of the authors and do not necessarily reflect those of CIEL, South Centre or The Rockefeller Foundation.

<sup>2</sup> This paper was authored by Matthew Stilwell, Managing Attorney of CIEL-Europe, as part of a joint project between CIEL and the South Center.

<sup>3</sup> Chairman's Statement on Agenda Item 4, Monday

<sup>4</sup> Communication from India, WT/GC/W/147.

<sup>5</sup> *Id.*, See also Kumar N., *Technology Generation and Technology Transfers in the World Economy: Recent Trends and Implications for Developing Countries*, United Nations University Discussion Paper Series, 1997.

<sup>6</sup> *Id.*, Kumar, at page 17.

<sup>7</sup> The UNDP Human Development Report 2000 notes that "(i)t is estimated that industrialized countries hold 97% of all patents, and global corporations 90% of all technology and product patents", p 84.

<sup>8</sup> *Supra* note 1.

<sup>9</sup> See RAFI, *The Gene Giants: Update on Consolidation in the Life Industry*, 1999.

<sup>10</sup> *Id.*

<sup>11</sup> South Centre/Correa, *Intellectual Property Rights and the Use of Compulsory Licenses: Options for Developing Countries*, 1999 p. 14.

<sup>12</sup> WTO Secretariat. See, WT/CTE/W/8 para 62. (the only exception is in the are of semi-conductor technology)

<sup>13</sup> See South Center: *IPRs and the Use of Compulsory Licenses: Options for Developing Countries*, p9.

<sup>14</sup> According to the United States "non-violation nullification or impairment should remain an exceptional concept. Although this concept had been in the text of Article XXIII of the General Agreement from the outset, a cautious approach should continue to be taken in applying the concept." EEC – Oilseeds, BISD 37S/86, 118, para. 114. Similarly, the European Economic Community has stated "recourse to the 'non-violation' concept under Article XXIII:1(b) should remain exceptional, since otherwise the trading world would be plunged into a state of precariousness and uncertainty." *Id.*, para. 113.