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**General Council
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

The following communication, dated 15 May 2023, is being circulated at the request of the delegation of 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 (WPEC) in line with the General Council Decision of December 2019 as well as the WTO Ministerial Decision on the WPEC reached at MC12 in June 2022, this delegation proposes an intensification of discussions under paragraph 4.1 of the WPEC.

3. Since this area of engagement is mandated, the TRIPS Council should inscribe this item as a standing item on the agenda. 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.

4. The relationship between intellectual property (IP) and development and the various Sustainable Development Goals (SDGs) needs 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, supported by an effective framework for technology transfer.

5. The UNCTAD Digital Economy Report of 2021² captures the transformative effect of digital technologies as follows: "Increasing digitalization of the economy and society is changing the ways people act and interact. One of the distinguishing features of various digital transformations has

* This document is a Revision of document IP/C/W/665.

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/2021 *ad p.* 1.

been the exponential growth in machine-readable information, or digital data, over the Internet (UNCTAD, 2019a). Such data are core to all fast-emerging digital technologies, such as data analytics, artificial intelligence (AI), blockchain, internet of Things (IoT), cloud computing and all Internet-based services – and they have become a fundamental economic resource. The COVID-19 pandemic has accelerated digitalization processes, as more and more people have continued, to the extent possible, with their activities through online channels – for example, for working, studying, communicating, selling and buying, or entertainment (UNCTAD, 2021a)." 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 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. 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 countries to participate in the technological learning processes needed to catch up and thrive in the digital economy".³

2 DISCUSSION

7. The preamble of the TRIPS Agreement emphasizes the underlying policy objectives of national systems for 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.

8. 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.

9. In order to industrialise, 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 constraining than it was in the 19th century when today's advanced economies were pursuing their industrialisation.

10. 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 as long as 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, including in relation to discussions that are taking place in other fora that may impact intellectual property rights.

11. Data is a valuable resource from which information and knowledge can be extracted, and economic value created enabling the transformation of traditional sectors (i.e., the digitalization of trade via e-commerce). It can facilitate the creation of new business models (i.e., platform economy) and new opportunities for industrialization. Preserving policy space to utilize data for digital industrialization is therefore important.

12. Electronic commerce has clear implications for developing countries' traditional means for protecting intellectual property rights, and for the protection and dissemination of indigenous intellectual property in e-commerce. Members need to identify the intellectual property issues arising from e-commerce, and discuss appropriate policy responses that address the development concerns, including in relation to the protection of the rights of indigenous artists, creators and small businesses, while also providing an appropriate balance to promote economic development and investment and achieve the objectives that are set out in the TRIPS Agreement, including in Article 7, 8 and 66.2.

³ UNCTAD (2019) ad p. 21.

3 SUMMARY

13. Article 7 of the TRIPS Agreement broadly captures the need for balance between private property rights and public interest in respect of socio-economic and technological development. This links the TRIPS Agreement directly with the 2030 SDGs and requires the promotion of technological innovation, transfer and dissemination of technology in a manner that advances the SDG goals.

14. Further bolstered by Article 8 and Article 66.2 of the TRIPS Agreement, technology transfer is central to addressing 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 favorable environment and incentives to their enterprises and institutions to promote transfer of technology to LDCs.

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

4 QUESTIONS

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

1. How can exceptions and limitations, in the IP system, be used as tools to ensure that the copyright and patent systems contribute to the promotion of innovation and to the dissemination and transfer of technology?
 2. What are Members' experiences in applying limitations and exceptions in the digital environment?
 3. Article 40.1 and 40.2 of the TRIPS Agreement deal with anti-competitive licensing practices. How have countries addressed anti-competitive conduct and structures with respect to e-commerce, including abuse of IPRs?
 4. There is a rapid expansion in the number of patent applications related to AI technologies, including AI-assisted inventions and these may also be protected through trade secrets. What are countries adopting to improve access to such technologies?
 5. What IP related policies have Members implemented in the area of source code protection, software and algorithms? What lessons have been learned in this regard in relation to competition, technology transfer and public interest?
 6. Countries may establish in their national laws and regulations a series of liabilities for internet service providers (ISPs) & digital platforms. How are these issues addressed to balance IP enforcement with facilitating online use and digital content creation?
 7. What are Members' experiences with regards to regulating indigenous people's rights and protections over data, indigenous data privacy, indigenous data sovereignty and indigenous data governance?
 8. What are Members' experiences with regulating data that is derived from vulnerable populations, including rights and protections of those populations. What are the policy rationales for this approach to regulation and the implications for trade rules on e-commerce?
 9. What are the implications of new business models – such as streaming services, e-commerce retailing platforms, machine learning companies, among others – on the IP system?
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