



**General Council
Council for Trade-Related Aspects of
Intellectual Property Rights
Committee on Trade and Development**

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**THE ROLE OF TRANSFER OF TECHNOLOGY IN RESILIENCE BUILDING:
THE TRIPS AGREEMENT**

COMMUNICATION FROM THE AFRICAN GROUP (ANGOLA; BENIN; BOTSWANA; BURKINA FASO; BURUNDI; CABO VERDE; CAMEROON; CENTRAL AFRICAN REPUBLIC; CHAD; CONGO; CÔTE D'IVOIRE; DEMOCRATIC REPUBLIC OF CONGO; DJIBOUTI; EGYPT; ESWATINI; GABON; THE GAMBIA; GHANA; GUINEA; GUINEA-BISSAU; KENYA; LESOTHO; LIBERIA; MADAGASCAR; MALAWI; MALI; MAURITANIA; MAURITIUS; MOROCCO; MOZAMBIQUE; NAMIBIA; NIGER; NIGERIA; RWANDA; SENEGAL; SEYCHELLES; SIERRA LEONE; SOUTH AFRICA; TANZANIA; TOGO; TUNISIA; UGANDA; ZAMBIA AND ZIMBABWE)

The following communication, dated 3 July 2023, is being circulated at the request of the African Group.

1 CONTEXT

1.1. This communication should be read in conjunction with the paper WT/GC/W/883, WT/WGTTT/W/34/Rev.1, WT/COMTD/W/277, IP/C/W/700 "The Role of Transfer of Technology in resilience Building: Reinvigorating the discussions in the WTO on trade and transfer of technology", as submitted to the General Council, the Working Group on Trade and Transfer of Technology, the Committee on Trade and Development and the Council for Trade-Related Aspects of Intellectual Property Rights and document WT/GC/W/868 "Policy space for industrial development - a case for rebalancing trade rules to promote industrialisation and to address emerging challenges such as climate change, concentration of production and digital industrialisation". These latter two submissions set out the design and parameters for discussions on Agreement-specific issues as pertain to industrial development in general, including the role, towards that end, of transfer of technology and trade.

1.2. The preamble and Articles 7 and 8 of the TRIPS Agreement set out the general goals, objectives and principles of the Agreement. Article 7 entitled "OBJECTIVES" reflects the search for a balanced approach to IP protection in the societal interest since IP protection is expected to contribute not only to the promotion of technology, but also to the transfer and dissemination of technology in a way that benefits both its producers and users and that respects a balance of rights and obligations, with the overall goal of promoting social and economic welfare. Article 8, entitled "Principles", recognizes the rights of Members to adopt measures for public health and other public interest reasons and to prevent the abuse of IPRs, provided that such measures are consistent with the provisions of the TRIPS Agreement.¹

1.3. As recognized by WTO dispute settlement Panels, those articles are to be borne in mind when the substantive rules of the Agreement are being examined.² The 2001 Doha Declaration on TRIPS

¹ https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm

² Panel Reports, Australia – Tobacco Plain Packaging, para. 7.2402, "Articles 7 and 8, together with the preamble of the TRIPS Agreement, set out general goals and principles underlying the TRIPS Agreement, which are to be borne in mind when specific provisions of the Agreement are being interpreted in their context and in light of the object and purpose of the Agreement."

and Public Health provides, in paragraph 5(a) that "... *in applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in light of the objective and purpose of the Agreement*".³

1.4. Paragraph 15 of the MC12 Declaration on the WTO Response to the COVID-19 Pandemic and Preparedness for Future Pandemics (WT/MIN(22)/31)⁴ recognizes that "*increasing the level of global preparedness to COVID-19 and future pandemics requires strengthened productive, scientific and technological capacity across the world. We also recognize that such capacity is instrumental for developing solutions to public health crises beyond COVID-19, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, as well as neglected tropical diseases, and for diversifying manufacturing locations. In line with WTO rules, we underscore the importance of promoting technology transfer that contributes to building capacity in related sectors*".

1.5. Paragraph 23 further underscores the importance of understanding how WTO rules have supported Members during the COVID-19 pandemic, and their role in future pandemics. This paragraph affirms "*the need to review and build on all the lessons learned and the challenges experienced during the COVID-19 pandemic, to build effective solutions in case of future pandemics including on balance of payments, development, export restrictions, food security, intellectual property, regulatory cooperation, services, tariff classification, technology transfer, trade facilitation, and transparency, in an expeditious manner.*"

2 CHALLENGES RELATED TO MECHANISMS FOR TECHNOLOGY TRANSFER

2.1. There are numerous market-related channels through which technology may be transferred across international boundaries and these must be encouraged. One major channel is trade in goods, especially capital goods and technological inputs. A second is foreign direct investment (FDI), which may be expected generally to transfer technological information that is newer or more productive than that of local firms. A third is technology licensing, which may be done either within firms or between firms. Licenses typically involve the purchase of production or distribution rights (protected by some intellectual property right) and the technical information and know-how required to make effective the exercise of those rights. In this regard various intellectual property rights play a role in knowledge transfer. However, such market-related channels are at times insufficient to address issues of global commons.

2.2. There are also important non-market channels for technology transfer. Perhaps most significant is the process of imitation through product inspection, reverse engineering, decompilation of software, and even simple trial and error. Imitation can be a time consuming and a costly process but at times is the only means available to developing countries to access the requisite technologies. Another means is to study available information about those technologies. Patent applications are available for this purpose. In exchange for a state backed monopoly, patent disclosure provides both a direct source of technology transfer, through FDI and licensing, and an indirect form through inspection. However, there is much debate over whether such patent disclosures provide sufficient information for persons skilled in the art to understand the technologies.

2.3. Existing mechanisms of technology transfer have not adequately boosted the productive capacities of developing countries in a broad-based fashion. This is particularly true of African countries which severely hampered the continent's ability to respond to the COVID-19 pandemic and other health emergencies, as well as other pressing challenges such as food insecurity and the impact of climate change. Shortcomings of existing mechanisms for technology transfer include, among others: restrictive contractual terms in licensing agreements; information asymmetries related to R&D and pricing; and market concentration.

2.4. Pricing strategies are based on determinants such as, inter alia the cost of R&D, costs of production or financial returns to incentivize future R&D programmes. The true costs of R&D, especially for pharmaceuticals are often unknown and highly variable, while the contribution made by public and non-profit-making sectors is not always accounted for. The lack of transparency in the

³ https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm

⁴ <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/31.pdf&Open=True>

true cost of technologies, how public funding is taken into account and determinants of the market price contributes to concerns about inaccessibility of key technologies, especially those that contribute to the global commons. Members need to engage on the role of the private sector and mechanisms that need to be put in place to ensure better accountability by the private sector in relation to technology transfer, especially in promoting affordable access to key technologies required to address global commons such as public health and green technologies to fight climate change.

3 ISSUES TO BE DISCUSSED WITH A VIEW TO MAKING RECOMMENDATIONS FOR ADOPTION AT MC13

3.1. The key objective of the discussions would be to harness the potential of WTO instruments to render technologies accessible and affordable on fair and reasonable terms. The reinvigoration of the discussions could be centered around the following issues and questions. It is expected that each theme or sub-theme will be thoroughly analysed and discussed among Members, with a view to making recommendations to Trade Ministers for adoption at MC13.

- a. How have the flexibilities contained in the TRIPS Agreement contributed to technology transfer to developing countries and in particular to LDCs? How developed countries have allowed for compulsory licensing in their national legislations?
- b. In light of the Paragraph 6 system, following the Doha Declaration on TRIPS and Public Health, how have members countries addressed the problem of countries with insufficient or no manufacturing capacities in the pharmaceutical sector?
- c. How have compulsory licensing and the Paragraph 6 system contributed to the issue of technology transfer in the pharmaceutical sector?
- d. What kind of flexibilities are needed to promote the transfer of technology in the industrial sector more generally, and in particular for the benefit of Small and Medium Sized Enterprises in developing countries, including LDCs?
- e. How can TRIPS provisions be utilized to boost industrial development and productive capacities?
- f. What kind of flexibilities are required, and which TRIPS provisions are relevant to support climate change mitigation and adaptation efforts, green industrialization and integration of developing countries, including LDCs in global value chains in the green economy?
- g. How can existing mechanisms of technology transfer be improved within the context of the multilateral trading system and the TRIPS Agreement in particular to ensure equitable and affordable access?
- h. The participation of developing countries in R&D takes many forms, including clinical trials - how can this be leveraged to ensure better terms of accessibility and affordability to medical products from this contribution?
- i. What are the mechanisms that can be put in place to encourage greater transparency on the true cost of R&D with a view to ensure affordable access to key technologies?

4 WAY FORWARD

4.1. It is proposed that the reinvigoration of work on trade and transfer of technology commence as soon as possible in the TRIPS Council.
