

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

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**MECHANISM FOR ENSURING THE MONITORING AND FULL IMPLEMENTATION OF
THE OBLIGATIONS UNDER ARTICLE 66.2 OF THE TRIPS AGREEMENT IN
ACCORDANCE WITH PARAGRAPH 11.2 OF THE DOHA DECISION ON
IMPLEMENTATION-RELATED ISSUES AND CONCERNS**

Communication from Least-Developed Countries

The following is the final text of a communication, as received from the Permanent Mission of Uganda on behalf of least-developed countries on 25 June 2002, which was circulated as an advance copy for the Council's meeting of 25-27 June 2002.

Background

1. The TRIPS Agreement in similar fashion to a number of other international Agreements includes technology transfer provisions. These provisions are included both as objectives and principles of the TRIPS Agreement and in Article 66.2 as an operational provision. Experience with the implementation of international agreements with transfer of technology provisions, including the TRIPS Agreement, has however shown that beyond the negotiating rooms, the provisions on technology transfer have often turned out to be paper promises. It is an effort to ensure that the obligation of developed country Members under Article 66.2 of the TRIPS Agreement does not turn into a paper promise that paragraph 11.2 of the Doha Decision on Implementation-Related Issues and Concerns (WT/MIN(01)/17) mandated the TRIPS Council to develop a mechanism for ensuring the monitoring and full implementation of the obligations of developed country Members to provide incentives to enterprises and institutions in their territories to promote transfer of technology to least-developed country Members. In particular, the Decision provides that:

Reaffirming that the provisions of Article 66.2 of the TRIPS Agreement are mandatory, it is agreed that the TRIPS Council shall put in place a mechanism for ensuring the monitoring and full implementation of the obligations in question. To this end, developed country Members shall submit prior to the end of 2002 detailed reports on the functioning in practice of the incentives provided to their enterprises for the transfer of technology in pursuance of their commitments under Article 66.2. These submissions shall be subject to a review in the TRIPS Council and the information shall be updated by Members annually.

2. Paragraph 11.2 confirms the understanding of all Members that Article 66.2 is tantamount to special and differential treatment for least-developed country Members and that the obligation under that Article is of a mandatory and continuing nature. Secondly, the Decision makes clear the aim of the envisaged mechanism. The mechanism is aimed at: (1) ensuring that the obligation under Article 66.2 is fully implemented by developed country Members by providing for a reporting obligation on the steps taken by these countries and (2) establishing a review system to monitor the

steps taken, their timeliness, appropriateness and effectiveness. The first purpose requires the TRIPS Council to identify the type and nature of measurable actions that developed country Members need to take so as to comply with the obligation under Article 66.2. The second deals with the question of how to measure the steps taken against the stated objectives of Article 66.2 read together with the Preamble and Articles 7 and 8 of the TRIPS Agreement.

Considerations for Establishing a Monitoring Mechanism under Article 66.2

3. The process of establishing a mechanism to ensure the monitoring and full implementation of the obligation of developed country Members under Article 66.2 was already started by the Ministerial Conference in Doha itself. Three basic parameters for establishing the mechanism were set down in the Ministerial Decision. First, the Ministers agreed that as part of ensuring that the obligation under Article 66.2 is fully implemented, developed country Members must, by the end of 2002 submit to the TRIPS Council detailed reports (initial reports) on the functioning in practice of the incentives provided to their enterprises for the transfer of technology. Second, the Ministerial Declaration established that the reports shall be subject to a review in the TRIPS Council. The third condition set by the Ministers is that the information provided in reports shall be updated annually.

4. To establish an effective monitoring mechanism and live up to these expectations, the TRIPS Council needs to establish four basic parameters: (1) the type and nature of the reports to be submitted by developed country Members in terms of the information contained and the level of specificity; (2) When and how the review should be carried out and what the review of each report should achieve? (3) What information the annual updates should contain and when they should be submitted? (4) What measures should be taken in case of failure to comply with the reporting mechanism? In this regard, it would be desirable if such failure could amount to a breach of WTO obligations.

5. To assist the Council in answering the above questions, several considerations should be taken into account. The type of mechanism that is established must ensure that:

- (a) the initial reports submitted and the annual updates of those reports are sufficiently detailed and specific so as to identify the incentive, the correlation between the particular regime of incentives and the obligation under Article 66.2, the enterprise or institution given the incentive, the type and cost of the technology transferred, the terms under which technology is transferred, the least-developed country Members where the technology was transferred, the appropriateness and local adaptability of the technology transferred and the beneficiary enterprise or institution in the least-developed Member;
- (b) the initial reports and annual updates include information showing that the type of incentives reported are specific only to enterprises and institutions transferring technology to least-developed country Members and do not fall within the general rubric of overseas development assistance;
- (c) the annual updates include information in response to questions, requests and concerns of least-developed country Members raised during previous reviews;
- (d) the annual updates are submitted on time and sufficient time is given to other Members, especially least-developed country Members, to consider the information provided by each developed country Member;
- (e) a comprehensive review is undertaken by the TRIPS Council of the initial reports and annual updates;

- (f) there are measures to take against developed country Members if they fail to comply with the reporting mechanism and if such failure could amount to a breach of WTO obligations;
- (g) the terms under which technology is transferred meet certain standards of competitiveness and in particular, a mechanism that fully preserves the rights of least-developed country Members under Article 40 of the TRIPS Agreement.

6. In this regard, it should be accepted that reference to "taking measures" envisages the taking of specific legislative policy and regulatory actions by the developed country Members.

Conclusion

7. In conclusion, Members should agree at the onset of this process that the mechanism in question should not be an ad hoc system. Once a monitoring mechanism is worked out, it will be critical that such a mechanism become a permanent part of and is incorporated into the TRIPS Agreement.
