37: Review and Amendment

> **Article 71 Review and Amendment**
>
> 1. 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.
>
> 2. Amendments 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 may be referred to the Ministerial Conference for action in accordance with paragraph 6 of Article X of the WTO Agreement on the basis of a consensus proposal from the Council for TRIPS.

1. Introduction: terminology, definition and scope

Article 71 deals with two distinctive issues: the review and the amendment of the Agreement. While paragraph 1 refers mainly to review, paragraph 2 provides a (simplified) procedure for amendments adjusting the TRIPS standards of IPRs to higher levels of protection. In general, a review does not necessarily have to result in an amendment of a given agreement; it may also confirm the agreement as it is. Despite this distinction of subject matter, it follows from paragraph 1 that review and amendment are closely interlinked: the purpose of a TRIPS review is not limited to an examination of Members' implementation efforts (see first sentence of para. 1); it may equally be undertaken with a view to accommodating relevant new developments warranting modification or amendment of the Agreement (see third sentence of para. 1).

1.1 Review

The purpose of the first paragraph of Article 71 is to monitor the operation of TRIPS in practice with a view to ensuring a successful realization of

its objectives.[159] To this end, paragraph 1 provides for three different review procedures:

a) Its first sentence refers to the review of the implementation by Members of the TRIPS Agreement. This review is mandatory ("The Council for TRIPS shall . . . ") and must take place after the expiration of the transitional period referred to in Article 65.2, i.e., as of 1 January 2000.

b) By contrast, the second sentence refers to the review of the provisions of the TRIPS Agreement itself. This review is also mandatory ("The Council shall . . . ") and must be commenced two years after the expiration of the transitional period under Article 65.2 (i.e., as of 1 January 2002) and every two years thereafter. In reviewing the TRIPS Agreement, the Council for TRIPS shall have "regard to the experience gained in its implementation".

c) Finally, the third sentence of paragraph 1 equally refers to a review of the TRIPS provisions. As opposed to the above review exercises, though, this review is optional ("The Council may . . . ") and may expressly result in a modification or an amendment of the TRIPS Agreement, in case such developments merit an amendment to the treaty. Unlike for the other two cases of review, there is no reference to any date as of when this review may be commenced (see Section 3 for details of all three kinds of review).

1.2 Amendment

Amendments are dealt with under Article 71 paragraph 1, third sentence (see above) as well as under paragraph 2. Contrary to a review, an amendment will necessarily result in the changing of the text of an agreement. It may be (but does not have to be) the consequence of a review, as illustrated by the third sentence of Article 71.1.

The latter provision refers to "modification or amendment" of TRIPS. Due to this language, it could be argued that amendment and modification of a treaty must be distinguished from one another. While an "amendment" seeks to change the treaty between *all* the parties to it, a "modification" operates *inter partes* between two or more parties to the treaty. It seeks to modify that treaty on the basis of an agreement authorized, or conversely not prohibited, by the treaty which neither affects the rights of third parties nor the objectives and purposes of the agreement.[160]

2. History of the provision

2.1 Situation pre-TRIPS

Neither the review nor the amendment or modification of a treaty is specific to TRIPS. Amendment and modification of treaties have been traditional

[159] For the objectives of TRIPS and the rationales underlying its adoption see Section 7. For a detailed analysis, see Chapter 6 (in particular on Article 7) and Chapter 1 (on the preamble).

[160] See Article 41 of the Vienna Convention on the Law of Treaties. It is doubtful, however, if this provision is directly applicable to the TRIPS Agreement. In any case, in the TRIPS context, such modification could occur where a vote among WTO Members does not result in unanimity. In that case, the proposed modifications of the Agreement would apply only to those Members supporting it.

instruments under public international law and are reflected in Part IV of the Vienna Convention on the Law of Treaties (Articles 39-41). Both revision and amendment are provided for in the most important pre-TRIPS conventions on IPR protection, namely the Paris and the Berne Conventions.

2.1.1 The Paris Convention

The Paris Convention for the Protection of Industrial Property in its Article 17 grants state parties the possibility to propose amendments to a number of organizational provisions. Article 18 of the same Convention constitutes the legal basis for revision conferences to be held successively in one of the countries of the Union. Such revisions concern, *inter alia*, the substantive provisions of the Paris Convention. Each revision has the stated purpose of introducing amendments "designed to improve the system of the Union" (Article 18.1). Accordingly, the Paris Convention has been revised at a series of conferences between its entry into force in 1883 and the latest revision in 1967.[161]

2.1.2 The Berne Convention

The Berne Convention for the Protection of Literary and Artistic Works follows the same approach as the Paris Convention. Its Article 26 accords any party the right to propose the amendment of certain organizational provisions.[162] Article 27 provides for the possibility of holding successive revision conferences with a view to introducing "amendments designed to improve the system of the Union" (Article 27.1). These amendments concern, *inter alia*, the substantive provisions of the Berne Convention.[163]

2.2 Negotiating history

2.2.1 The Anell Draft

This draft provided:[164]

> "7. Review and Amendment (68); Amendments (73)
>
> 7A PARTIES shall review the implementation of this Annex after the expiration of the transitional period referred to at point 1 of Part VII above. They shall, having regard to the experience gained in its implementation, review it [-] years after that date, and at identical intervals thereafter. The PARTIES shall also undertake reviews in the light of any relevant new developments which might warrant modification or amendment of this annex. (68)
>
> 7B (i) Amendments to this part shall take effect in accordance with the provisions on entry into force and on provisional application. (73)

[161] The Paris Convention Revision Conferences were held in 1911 (Washington), 1925 (The Hague), 1934 (London), 1958 (Lisbon), and 1967 (Stockholm).

[162] Accordingly, the Berne Convention was amended in 1979.

[163] The 1886 original text of the Berne Convention has undergone revisions or completions in 1896 (Paris), 1908 (Berlin), 1914 (Berne), 1928 (Rome), 1948 (Brussels), 1967 (Stockholm), and 1971 (Paris).

[164] See composite text of 23 July 1990, circulated by the Chairman (Lars E. R. Anell) of the TRIPS Negotiating Group, document MTN.GNG/NG11/W/76.

> (ii) Amendments merely serving the purpose to adjust to higher levels of protection of intellectual property rights achieved, and in force, in other multilateral agreements and accepted by all PARTIES may be adopted by the Committee. (73)"

Comparing these proposals, there is a striking similarity between the proposal under "A" and the final version of Article 71.1. The proposal refers to the same kinds of review as mentioned earlier (see 1.1 above). The only substantive difference is that under the proposal, the Parties were *obliged* to undertake reviews in case of relevant new developments, whereas under Article 71.1, the TRIPS Council *may* do so. By contrast, this proposal did not contain a separate paragraph dealing with amendment as Article 71.2.

The "B" proposal differed from Article 71 in two important respects: first, it did not make any provision for the review of domestic implementation laws. Second, the "B" proposal did not contain a specific legal basis for "spontaneous" reviews of the Agreement in the light of relevant new developments. Finally, the "B" proposal with respect to the introduction of higher levels of IP protection was essentially similar to Article 71.2 TRIPS.

2.2.2 The Brussels Draft

This draft[165] came very close to the current Article 71. It provided:

> "1. PARTIES shall review the implementation of this Agreement after the expiration of the transitional period referred to in paragraph 2 of Article [65]. They shall, having regard to the experience gained in its implementation, review it [-] years after that date, and at identical intervals thereafter. The PARTIES may undertake reviews in the light of any relevant new developments which might warrant modification or amendment of this Agreement.
>
> 2. Amendments 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 by all PARTIES may be adopted by the Committee."

The first paragraph derived from the "A" proposal under the Anell Draft and thus established the obligation of Members to have their domestic legislation reviewed by the TRIPS Council (referred to as the "Committee" in the Brussels draft).[166] The second paragraph was directly taken from the "B" proposal in the Anell Draft (see above).

3. Possible interpretations

3.1 Article 71.1

> 1. 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,

[165] Document MTN.TNC/W/35/Rev. 1 of 3 December 1990.

[166] For an historical overview of the Uruguay Round negotiations on the establishment of the Council for TRIPS, see Chapter 35.

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.

As stated in the introduction, this provision establishes three distinct forms of review:

a) The first sentence refers to the *mandatory* review of WTO Members' domestic implementing legislation. It has to be read in conjunction with Articles 65.2 and 63.2. The former provides the basis for computing the actual date for the commencement of the review of the TRIPS implementation in the Council, which is at the same time the date of the expiration of the transitional period after which developing country Members are obliged to comply with TRIPS (i.e., 1 January 2000).[167] Article 63.2 obliges Members to notify the Council about their intellectual property-related laws and regulations for the purpose of assisting the Council in its review of the operation of the Agreement.[168] Such review is one of the core competencies of the Council for TRIPS, as stipulated under Article 68.[169] Seen from a larger perspective, necessity for the review exercise under Article 71.1 arises from each Member's obligation to ensure the conformity of its laws, regulations and administrative procedures with its obligations under the covered agreements (see Article XVI:4 of the WTO Agreement).[170]

The five-year transitional period referred to in Article 65, paragraph 2, expired on 1 January 2000. Therefore, the first review of developing countries' TRIPS legislation started in 2000.[171] As far as developed country Members are concerned, review of their implementing legislation by the Council started as early as 1996.[172] This earlier date is not expressly referred to in Article 71.1. However, it may be inferred from that provision that the review of a Member's implementing legislation may start after the expiry of the transitional period applying to that Member. For developed country Members, that was 1 January 1996 (see Article 65.1).

Article 71 does not define "implementation". However, according to Article 63.2, Members shall notify to the Council their laws and regulations pertaining to the subject matter of TRIPS (i.e., the availability, scope, acquisition, enforcement and prevention of the abuse of IPRs) with a view to assisting the Council in its review of the operation of the Agreement. Thus, review of a Member's implementation encompasses domestic legislation passed by parliament as well as regulations adopted by the administration. On the other hand, the Article 71.1 review does not extend to a Member's final judicial decisions and administrative rulings of general application. This follows from Article 63.2 that refers only to laws and

[167] For details, see Chapter 33.

[168] For more details on Article 63 TRIPS, see Chapter 31.

[169] For more details on Article 68 TRIPS, see Chapter 35.

[170] Article XVI:4 of the Marrakesh Agreement establishing the World Trade Organization reads as follows: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."

[171] For a list of those developing country Members whose legislation is currently being reviewed, see the IP gateway page at <http://www.wto.org/>.

[172] Ibid, with an overview of the reviewed IPR categories.

regulations as the objects of the review. As to judicial decisions, they are not subject to the review because of the division of powers, which makes the judiciary independent of a national government's control. Concerning "administrative rulings of general application", they need to be distinguished from "regulations" that according to Article 63.2 are subject to review by the Council. Both are instruments of the administration, and both are addressed to an undetermined number of people (as opposed to one single party). The difference is that regulations of any sort apply to a multitude of cases, whereas administrative rulings of general application, even though addressed to the public at large, concern only particular facts of one particular case. This follows from the term "ruling". Such ruling is of general application in the sense that it is not addressed to one single party only (like an administrative act), but to an undetermined number of addressees. This limitation to one particular case is the reason why such administrative rulings are not subject to the review by the Council under Articles 63.2 and 71.1. Contrary to laws or regulations that apply to an indefinite number of cases, a case-specific administrative ruling, even though addressed to the public at large, does not represent a generally valid application of the law and therefore cannot be considered as a Member's implementation of TRIPS for the purpose of Article 71.1.

In this context, it is important to stress that the review of domestic laws and regulations by the Council is neither related to, nor a first phase of, the WTO dispute settlement procedures. In case other Members during the review express doubts about the TRIPS compatibility of the legislation under review, this will not lead to an automatic establishment of a WTO panel. For this purpose, the Dispute Settlement Understanding (DSU) provides for a separate set of procedural rules to be followed.[173] A possible panel would have to assess the case before it independently of some views expressed in the Council during the review exercise. Thus, the review of domestic legislation should rather be considered as a means of multilateral consultations with a view to making the recourse to dispute settlement procedures unnecessary. This is confirmed by the title of Part V of TRIPS that refers to "Dispute Prevention and Settlement". Part V consists of only two Articles, 63 and 64. The latter is on "Dispute Settlement". Thus, the reference in the title to dispute prevention can only be to Article 63, which deals, *inter alia*, with the review by the Council of domestic laws.

b) The second sentence obliges the Council to review TRIPS itself ("review it"). This exercise is not to be commenced at the same time as the review of the national implementing legislation, but two years later (i.e., as of 1 January 2002). This time frame appears very ambitious considering that in actual practice, the Council so far has not started reviewing the provisions of TRIPS under the Article 71.1 mandate. This is due to the fact that the review of the domestic implementing legislations (see above) has not yet been concluded. As the Council when reviewing TRIPS shall have "regard to the experience gained in its implementation", it would be against the spirit of this provision to engage in a substantive TRIPS review before such experience has fully been acquired.

Article 71 contains a general mandate for the review of all TRIPS provisions. In particular cases, other TRIPS provisions that contain a more specific review

[173] For more details on WTO dispute settlement in the context of TRIPS, see Chapter 32.

mandate concerning a particular provision will prevail over Article 71. For instance, as far as the review of the TRIPS rules on the protection of biological material is concerned, Article 27.3(b) represents a *lex specialis*, prevailing over Article 71.1.[174]

With respect to the authorization of the Council to review TRIPS under Article 71, the question arises if such review would be limited to the formulation of non-binding recommendations (concerning the interpretation of certain TRIPS provisions), or if it would authorize the TRIPS Council to actually propose legally binding amendments to the Ministerial Conference according to Article X:1 of the WTO Agreement.[175] In this respect, the view has been expressed that Article 71.1 does not provide the TRIPS Council with a mandate to propose any amendments to TRIPS.[176] In this vein, it could be argued that such mandate would be referred to in express terms, like under Articles 23.4,[177] 64.3[178] and 71.2 (see below). On the other hand, Article X:1 expressly authorizes the GATT, GATS and TRIPS Councils to "submit to the Ministerial Conference proposals to amend the provisions of the corresponding Multilateral Trade Agreements . . . the functioning of which they oversee." In addition, it should not be overlooked that according to the third sentence of Article 71.1, the Council may undertake reviews "in the light of any relevant new developments which might warrant modification or amendment" of TRIPS. This kind of review implies an authorization by the Council to propose amendments (or modifications) to the Ministerial Conference (see below). The purpose behind this provision is to ensure that TRIPS addresses in an efficient way current trends in actual IP practice. The same reasoning applies to the second sentence. By stating that the review of TRIPS shall be guided by the experience gained in its implementation, this provision shows Members' intention to adapt the TRIPS provisions to actual needs and practices, including the amendment of provisions that have proven difficult to implement. Efficiency of TRIPS with respect to its objectives can only be ensured if its provisions may actually be amended in case they turn out to be contrary to what is practicable on the domestic level. Therefore, it appears logical to consider the mandate given to the Council under the second sentence of Article 71.1 as encompassing the possibility of proposing substantive amendments to the Ministerial Conference.[179] While the

[174] Note that the special review of the provisions under Article 27.3(b) should have commenced in 1999. Due to disagreement between Members concerning the scope of the review, this exercise was delayed. For more details on the Article 27.3(b) review, see Chapter 21.

[175] Pursuant to this provision, the TRIPS Council may propose amendments of the TRIPS Agreement to the Ministerial Conference. The final acceptance of any proposed amendment is up to the WTO Members.

[176] See Communication of Australia of 3 October 2000, WTO document IP/C/W/210, page 5.

[177] This provision obligates the TRIPS Council to undertake negotiations concerning the establishment of a multilateral register for geographical indications for wines.

[178] Article 64.3 obliges the TRIPS Council to submit to the Ministerial Conference recommendations with respect to the applicability of non-violation complaints in the context of TRIPS.

[179] Such proposals would then follow the procedure laid down in Article X:1 of the WTO Agreement: the Ministerial Conference would have to decide by consensus to submit the proposed amendment to the Members for acceptance.

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review exercise as such is mandatory ("The Council shall [. . .] review it [. . .]"), the Council is free to actually make proposals for amendment.

c) The third sentence authorizes the Council to conduct reviews in the light of any relevant new development that might warrant amendment or modification of the Agreement. Contrary to the other forms of review (see above), this review is not mandatory and may be undertaken any time. As mentioned above, the TRIPS Council is expressly authorized, under the third sentence, to propose amendments of TRIPS to the Ministerial Conference.

Summing up, the sequential logic of actions to be taken by WTO Members under Articles 63.2 and 71.1 includes:

- notification of relevant laws and regulations by Members implementing TRIPS (Article 63.2);
- collective review of Members' intellectual property systems (Article 71.1, first sentence);
- collective review of the provisions of the TRIPS Agreement (Article 71.1, second and third sentence);
- consideration of possible amendments and modifications in the light of the experience of implementation (second sentence) or relevant new developments (third sentence);
- possible formulation of proposals for modification or amendment to be submitted to the Ministerial Conference (second and third sentence).

3.2 Article 71.2

> 2. Amendments 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 may be referred to the Ministerial Conference for action in accordance with paragraph 6 of Article X of the WTO Agreement on the basis of a consensus proposal from the Council for TRIPS.

Article X:6 of the WTO Agreement provides:

> "Notwithstanding the other provisions of this Article, amendments to the Agreement on TRIPS meeting the requirements of paragraph 2 of Article 71 thereof may be adopted by the Ministerial Conference without further formal acceptance process."

The purpose of Article 71.2 of TRIPS is to facilitate the adoption of certain amendments by exempting them from the lengthy acceptance process provided under Article X:1 of the WTO Agreement. Amendments falling under Article 71.2 may be adopted directly by the Ministerial Conference, and do not have to be submitted, by consensus, to the Members for acceptance.[180]

[180] Acceptance through a Member usually means that the proposed amendment has to be approved by the respective national parliament, depending on constitutional requirements. This might take

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As to the multilateral agreements referred to in Article 71.2, there does not seem to be any of that kind in force at present. The WIPO-sponsored Copyright Treaty (WCT) and the Performers and Phonograms Treaty (WPPT) have some potential eventually to fall under this provision. However, Article 71.2 requires the acceptance by all WTO Members of the higher IPR standards under the respective agreements.

Finally, the case of amending TRIPS for the purpose of adjusting the Agreement to higher levels of IP protection has to be distinguished from the case where higher levels of IP protection are agreed upon in a separate treaty by a limited number of WTO Members and subsequently have to be extended to all other Members on the basis of the most-favoured-nation principle (MFN). MFN requires any Member granting higher IP protection to the nationals of any other country (not necessarily a WTO Member) to accord the same TRIPS-plus protection to the nationals of all other WTO Members (Article 4 TRIPS). But such obligation only applies to those Members that are parties to the relevant TRIPS-plus agreement. Non-party WTO Members are not obliged to grant the same level of TRIPS-plus protection, even though they are entitled to claim such protection for their nationals. By contrast, an amendment of TRIPS binds all WTO Members. The WCT and WPPT may serve to illustrate this point. Those WTO Members that are parties to these treaties have to accord any TRIPS-plus IP protection deriving from the WIPO treaties to all other WTO Members, even those that are not parties to the WIPO treaties.[181] But those non-parties in their territories do not have to grant the same rights. If, by contrast, the higher levels of protection were agreed upon in an amendment to TRIPS, they would have to be complied with by all WTO Members.

4. WTO jurisprudence

So far, there have been no cases before a panel or the Appellate Body dealing specifically with Article 71.

5. Relationship with other international instruments

5.1 WTO Agreements

As mentioned above, Article X:6, WTO Agreement, refers to Article 71 in the context of simplified adoption procedures. Another WTO provision also dealing with

a considerable amount of time. In comparison, acceptance by the Ministerial Conference will be much speedier.

[181] Note that according to Article 5, the MFN obligation does not apply in the case of the WIPO treaties on acquisition or maintenance of IPRs. These encompass the Madrid Agreement (and Protocol) Concerning the International Registration of Marks, the Hague Agreement Concerning the International Deposit of Industrial Designs, the Patent Cooperation Treaty, the Trademark Registration Treaty and the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, and certain provisions of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration. The list of such agreements is not fixed, and new multilateral acquisition and maintenance agreements adopted under WIPO auspices would also qualify for national and MFN treatment exemption under Article 5 of the TRIPS Agreement. For details, see Chapter 4.

amendments is Article XXX of the GATT 1994, but it is limited to the trade in goods sector.

5.2 Other international instruments

As indicated above (Section 2.1), provisions on review and amendment are not particular to TRIPS, but also exist, *inter alia*, under the Paris and Berne Conventions. Since these Conventions have to be respected by all WTO Members (see Articles 2.1 and 9.1), any amendments to their texts are automatically binding, even for those Members not parties to the respective Convention. This does not apply vice versa, in that TRIPS amendments will not be binding on countries that are Paris/Berne Convention parties, but not WTO Members.

6. New developments

6.1 National laws

6.2 International instruments

In February 2000 the WTO General Council agreed that mandated reviews should address the trade and development impact on developing countries of the agreement concerned.[182] Even more importantly, at the 2001 Ministerial Conference at Doha, Members in the Ministerial Declaration referred to the Article 71.1 review as follows:

> "We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 [. . .], to examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by Members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension."[183]

By referring to the development dimension/impact, both of the above instruments make an important contribution to the clarification of the criteria according to

[182] WT/GC/M/53, paragraph 39.

[183] See para. 19 of the Ministerial Declaration of 14 November 2001, WTO document WT/MIN(01)/DEC/W/1. Article 7 of the TRIPS Agreement reads:
"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 the balance of rights and obligations."
Article 8 establishes the 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 economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
2. Appropriate measures, provided 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."

which TRIPS reviews under Article 71 should be undertaken. In addition, the Doha Declaration as quoted above obliges the Council to take into account the public policy objectives in Articles 7 and 8, i.e., *inter alia*, technological innovation and the transfer and dissemination of technology, the protection of public health and nutrition, the promotion of the public interest in sectors of vital importance to socio-economic and technological development, and the control of IPR abuses and other restrictive behaviour. This means that when reviewing national implementing legislation, compliance with TRIPS minimum standards shall not be considered an objective in itself, but rather a means of promoting the non-IP policy goals referred to above (see Section 7 below).

The Doha Declaration as cited above also contains some concrete proposals for topics to be examined under the Articles 27.3(b) and 71.1 reviews (i.e., with respect to the Convention on Biological Diversity, traditional knowledge and folklore, and other relevant new developments). Even though these topics are not expressly assigned to one particular review, Article 27.3(b) is the *lex specialis* in the area of biodiversity, traditional knowledge and folklore, whereas the "other relevant new developments" are a reference to the review under the third sentence of Article 71.1.

6.3 Regional and bilateral contexts

6.3.1 Regional

6.4 Proposals for review

There have been no proposals to review Article 71 itself.

7. Comments, including economic and social implications

As observed above, Article 71 serves the purpose of ensuring that national implementing legislation is in conformity with TRIPS, and that the TRIPS provisions themselves correspond to the actual needs and trends in trade-related IPRs. Article 71 is supposed to ensure the efficiency of the Agreement with respect to the attainment of its objectives. These objectives set the criteria according to which the Council for TRIPS examines national implementing legislation as well as possible amendments to TRIPS. The assessment of the current state of domestic laws and of TRIPS provisions, and consequently the possible need for changes, will vary according to what is considered the main objective of the Agreement. Developed country Members tend to emphasize the private property nature of IPRs, whereas developing country Members put more emphasis on the public policy objectives of the Agreement. The former position is partly supported by the TRIPS preamble that refers to the promotion of "effective and adequate protection" of IPRs. In addition, the provisions on substantive and procedural IPRs standards as spelled out in TRIPS are very detailed, whereas the public policy objectives are held in very general terms. In this vein, it has been observed that

> "The TRIPS Agreement was essentially conceived as a means of strengthening the control by titleholders over the protected technologies, and not with the objective of increasing the transfer and use of technology globally. The transfer of technology

> was not, in fact, a concern of TRIPS proponents, and the possible effects of the new protectionist standards on such transfer were never seriously considered during the negotiations."[184]

TRIPS is actually the result of a political compromise. In order to make the Agreement more acceptable to developing countries, some rather broad provisions on technology transfer and other public policy objectives were included in the Agreement.[185]

On the other hand, the broad formulation of these objectives provides Members with discretion as to the interpretation of the TRIPS disciplines. Also, the TRIPS objectives are recognized in the preamble as underlying the national systems for the protection of IP. Article 7 refers to certain societal benefits as objectives to be attained through the protection and enforcement of IPRs.[186] In addition to that, the Doha Ministerial Declaration has expressly stated that TRIPS reviews are to be guided by the objectives and principles in Articles 7 and 8,[187] taking full account of the development dimension. Finally, the General Council agreed that reviews should address the trade and development impact on developing countries of the agreement concerned (see above, Section 6.2).

In this vein, the review of the national implementing legislation and of the TRIPS provisions would have to be directed at assessing the suitability of those rules for the promotion of public policy goals as stipulated under Articles 7 and 8. Also, the review exercise should be conducted with a view to assessing the impact of IPR standards on the realization of non-IP development goals, seeking to reconcile possible collisions of interest between these two areas.

Thus, IPR standards in TRIPS should be conceived as a means for the promotion of non-IP public policy objectives, and not as running counter to them. As a result, any review under Article 71 should take account of both public policy goals and the protection of private rights. On the one hand, Members have to examine whether national implementing legislation complies with the TRIPS standards. On the other, the review will have to address the question of whether these standards leave sufficient leeway for the realization of certain non-IPR-related objectives.

Addressing the development dimension while reviewing TRIPS would include considering the implementation of TRIPS in key sectors of concern to developing countries, such as technology transfer,[188] measures to counter anti-competitive abuse of intellectual property rights under Article 40,[189] the digital environment,[190]

[184] See C. Correa, *Can the TRIPS Agreement Foster Technology Transfer to Developing Countries?* Draft of March 2003, submitted to a Conference at Duke University [hereinafter Correa, Draft].

[185] For an historical overview of the TRIPS negotiations and the position of developing countries, see UNCTAD-ICTSD Policy Discussion Paper, Part I, Chapter 2 ("The emergence of TRIPS"). For a detailed analysis of the public policy objectives of the TRIPS Agreement, see Chapter 6 (Articles 7 and 8 of this book).

[186] For the text of Article 7 see above, Section 6.2.

[187] For the text of Article 8, as well as the relevant part of the Doha Declaration, see above, Section 6.2. It should be noted that Articles 7 and 8 constitute the "object and purpose" of the Agreement for the purposes of its interpretation, according to Article 31 of the Vienna Convention on the Law of Treaties.

[188] See Chapter 34.

[189] See Chapter 29.

[190] See, Chapter 7.

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IPRs in traditional and indigenous contexts[191] and compulsory licensing.[192] It would also include consideration of extending the moratorium of the application to the Agreement of the non-violation complaint remedy[193] and a debate as to whether it is necessary to include general exceptions clauses in TRIPS.[194]

[191] See Chapter 21.

[192] See Chapter 25.

[193] See Chapter 32.

[194] See The South Centre, *Review of TRIPS Agreement under Article 71.1*, Occasional Papers No. 3 by M. Stilwell and C. Monagle, December 2000, also covering the other sectors referred to above.

38: Reservations

Article 72 Reservations
Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

1. Introduction: terminology, definition and scope

Article 72 provides that a Member may not enter a reservation to all or part of the Agreement without the consent of the other Members. A reservation is a statement by which a party to a treaty undertakes to modify its obligations when it becomes party to the treaty (see VCLT, Articles 2(d), 19–23). The allowance of reservations to TRIPS may have created a situation in which different rules applied to different Members. This would not be so different from the situation in which Members enter exceptions in GATS Schedules of Commitments. This is not the approach followed by TRIPS.

2. History of the provision

2.1 Situation pre-TRIPS

The Vienna Convention on the Law of Treaties expressly addresses reservations to treaties and their effect (see Articles 19–23). There is an extensive legal literature on the nature and effect of reservations,[195] and there are decisions of international tribunals that address them. Generally, a reservation to a treaty may be entered by a state adhering to it provided that the treaty does not expressly exclude this, or if this would be inconsistent with the object and purpose of the treaty. If other state parties to the treaty do not object to the reservation, it will take effect. If a party objects to a reservation, it does not take effect with respect to that party. The result for the adhering (i.e., reserving) party's treaty obligations in that situation will vary depending on the circumstances (see Article 21.3 of the VCLT).

[195] See generally, Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study (S. A. Riesenfeld & F. M. Abbott, eds. 1994: Martinus Nijhoff/Kluwer).

2.2 Negotiating history

There is no analogue to Article 72 in negotiating texts prior to the Brussels Ministerial Text of December 1990. Up through the Montreal Mid-Term Ministerial in 1988, developing countries on the whole had not accepted that TRIPS would be binding on all Members, and the question of reservations was not especially relevant until the decision to accept the concept of the single undertaking was made.[196] Throughout the TRIPS negotiating process, issues concerning permissible exceptions to obligations, and later on the issue of transitional arrangements, were discussed extensively. These discussions considered differences in developmental circumstances among prospective Members to the agreement. The prospect of differentiated obligation on a Member-by-Member basis does not appear to have been considered in any detail, though this would have been one way to take into account different developmental circumstances.

2.2.1 The Brussels Draft

The Brussels Ministerial Text[197] included a predecessor to Article 72 that would have permitted reservations under limited conditions:

> "Article 75: Reservations:
>
> A PARTY may only enter reservations in respect of any of the provisions of this Agreement at the time of entry into force of this Agreement for that PARTY and with the consent of the other PARTIES."

By referring to reservations in an affirmative way (that is, by indicating when Members may enter them), the Brussels Draft provision implied that Members at least contemplated the possibility of bargaining toward differentiated TRIPS commitments on a Member-by-Member basis. If the negotiating parties had bargained toward acceptable sets of reservations prior to the conclusion of TRIPS, the Agreement might ultimately have taken on a substantially different character than that ultimately achieved.[198] Article 75 of the Brussels Ministerial Text reflects the fact that the "single undertaking" concept embodied in the WTO Agreement was not settled as of late 1990.

2.2.2 The Dunkel Draft

The Dunkel Draft text of late 1991 amended the reservations clause of the Brussels Ministerial Text, substituting for it a "no reservations without consent" clause.[199]

[196] On the TRIPS Agreement negotiating process, see Silvia Ostry, *The Uruguay Round North-South Grand Bargain: Implications for future negotiations*, at 285; J. Michael Finger, *The Uruguay Round North-South bargain: Will the WTO get over it?*, at 301; Frederick M. Abbott, *The TRIPS-legality of measures taken to address public health crises: Responding to USTR-State-industry positions that undermine the WTO*, at 311, and; T.N. Srinivasan, *The TRIPS Agreement*, at 343, each in The Political Economy of International Trade: Essays in Honor of Robert E. Hudec (eds. D. Kennedy and J. Southwick 2002)(Cambridge University Press).

[197] Document MTN.TNC/W/35/Rev. 1 of 3 December 1990.

[198] TRIPS takes account of differences in the level of development among Members principally, though not exclusively, through its transition provisions (Articles 65, 66 and 70, see Chapters 33, 36).

[199] Recall the final text of Article 72, which provides: "Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members."

Though seemingly admitting for the possibility of reservations, the negative drafting of the Dunkel Draft and final TRIPS Agreement reservations text appeared to signal an important distinction between TRIPS and the GATT and GATS. Although neither the GATT nor GATS specifically provides for reservations, commitments on tariff bindings and services market access are made on a Member-by-Member basis, and these commitments are made in the context of individualized reciprocal negotiations. In practical effect, this is similar to the allowance of reservations. The WTO Agreement does not permit reservations to its own terms, and provides that "Reservations in respect of any of the provisions of the Multilateral Trade Agreements [including TRIPS] may only be made to the extent provided for in those Agreements" (Article XVI: 5, WTO Agreement).

3. Possible interpretations

> **Article 72 Reservations**
>
> Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

There is limited practical scope for interpretative disagreement as to the meaning of Article 72 precluding the entry of reservations absent the consent of the other Members. Under the VCLT and customary international law, reservations may only be entered upon adherence to a treaty.[200] No Member attempted to enter a reservation to TRIPS when the WTO Agreement was initially concluded. This leaves little possibility that an issue with respect to Article 72 might surface in connection with original WTO membership. An interpretive issue theoretically might arise upon accession of a new Member to the WTO.[201] However, as a practical matter this is unlikely because a new Member accedes to the WTO (and TRIPS Agreement) on the basis of an accession agreement (a Protocol of Accession), and this agreement is concluded by consensus (absent exceptional circumstances). If there were a consensus among Members as to a waiver or modification of a TRIPS Agreement obligation in an accession agreement, this would be the

[200] Article 19, VCLT. Technically, a reservation may be formulated "when signing, ratifying, accepting, approving or acceding to a treaty", *id*.

[201] A question might arise whether the consent of the other Members to a reservation must take place by some affirmative act, or might be tacit or passive (i.e., by lack of formal objection to a reservation). Article 72 does not specify the form by which acceptance of other Members must take place, and there is room to argue that the lack of an objection by any of the other Members to a reservation could constitute its acceptance. Article 20(1) of the VCLT provides that if a treaty allows for a particular reservation, no acceptance is required by other parties. Otherwise, acceptance is required. In general (unless the treaty provides otherwise) acceptance will be presumed if the party does not object within 12 months following notification (Article 20(5), VCLT). Article 20(5) of the VCLT makes clear that a reservation must be "notified" to other Members for it to be subject to tacit or passive acceptance, and Article 23(1) indicates that a reservation must be in written form. Since it must be "notified" as a reservation in written form, it is unlikely that a reservation made by an acceding Member could be inadvertently accepted by other Members by failing to object to it.

substantive equivalent of a reservation with the consent of the other Members. It seems doubtful that such a waiver or modification would be legally framed as a "reservation" but, if it was, the consent of the other Members would be present and an interpretive issue would not arise.[202] It is difficult to foresee the context in which an acceding Member might propose to modify the terms of TRIPS by entering a reservation outside its Protocol of Accession.

4. WTO jurisprudence

There have been no WTO disputes on Article 72.

5. Relationship with other international instruments

5.1 WTO Agreements

The WTO Agreement provides at Article XVI:5:

> "5. No reservations may be made in respect of any provision of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements. Reservations in respect of a provision of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement."

Article 72, pursuant to Article XVI:5 of the WTO Agreement, governs the extent to which reservations may be entered in respect of TRIPS.

5.2 Other international instruments

The Vienna Convention on the Law of Treaties prescribes rules regarding reservations at Articles 19–23.

6. New developments

6.1 Proposals for review

No proposals have been made to review Article 72.

7. Comments, including economic and social implications

TRIPS does not permit reservations absent the consent of the Members. The same rules generally apply to all Members. Transitional mechanisms are intended to ease potential economic and social dislocations. TRIPS negotiators might have

[202] The question might be asked whether consent of the "other Members" means "all" of the other Members, or might mean only "some" or "a few" of the other Members. If negotiators had intended that a limited number of Members might among themselves agree on a reservation, this might better have been made explicit. There might have been reference to a reservation accepted by "another Member". The consequences of such an individuated arrangement (e.g., from an MFN standpoint) might have been addressed. Absent some persuasive evidence that negotiators intended a fairly dramatic break with the general application of the TRIPS Agreement, there is little reason to suggest that less than all Members might accept a reservation as among themselves.

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taken another approach and allowed each Member to negotiate its own intellectual property commitments based on its particular situation. If negotiators had followed this alternative approach, they probably would not have employed the legal formula of allowing reservations. More likely they would have adopted schedules of commitments along the lines of the GATS. Article 72 is significant largely for confirming the single undertaking approach adopted in TRIPS.

39: Security Exceptions

Article 73 Security Exceptions

Nothing in this Agreement shall be construed:

(a) to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent a Member from taking any action which it considers necessary for the protection of its essential security interests;

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent a Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

1. Introduction: terminology, definition and scope

Although there is a relatively widespread tendency among scholars to perceive international trade law as a concept differing from the classical idea of state sovereignty and to regard national security, borders and territory as state interests difficult to reconcile with liberalization of markets,[203] the provision of Article 73, almost identical to Article XXI of the GATT and Article XIV *bis* of the GATS, proves that these traditional state interests continue to be a major concern of WTO Members.[204]

[203] See, for instance, D.M. McRae, *The Contribution of International Trade Law to the Development of International Law*, Collected Courses of The Hague Academy of International Law, 1996, v. 260, pp. 99–238, at pp. 130–131.

[204] For a more detailed analysis as to whether international trade law challenges the existing paradigm of public international law, see Mariano Garcia-Rubio, *On the Application of Customary Rules of State Responsibility by the WTO Dispute Settlement Organs – A General International Law Perspective* – Geneva, Studies and Working Papers, Graduate Institute of International Studies, 2000, p. 100, particularly Chapter 1 [in the following: Garcia-Rubio].