

Members to continue discussion on proposal for temporary IP waiver in response to COVID-19

At the meeting of the Council on Trade-Related Aspects of Intellectual Property Rights (TRIPS) on 10 December, WTO members agreed to continue discussion on a proposal by India and South Africa for a temporary waiver of certain TRIPS obligations in response to COVID-19. A status report will be submitted to the General Council meeting on 16-17 December indicating the current lack of consensus on this issue and highlighting the common goal shared by members of providing access to high-quality, safe, efficacious and affordable vaccines and medicines for all.

The proposal ([IP/C/W669 \(https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q://IP/C/W669.pdf&Open=True\)](https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q://IP/C/W669.pdf&Open=True)) was initially submitted by South Africa and India on 2 October and has since been co-sponsored by the delegations of Kenya, Eswatini, Pakistan, Mozambique and Bolivia. The document calls for a waiver for all WTO members of certain provisions of the TRIPS Agreement in relation to the "prevention, containment or treatment" of COVID-19. According to the proponents, the objective is to avoid barriers to the timely access to affordable medical products including vaccines and medicines or to scaling-up of research, development, manufacturing and supply of essential medical products.

The waiver would cover obligations in four sections of the [TRIPS Agreement \(https://www.wto.org/english/docs_e/legal_e/27-trips_04_e.html\)](https://www.wto.org/english/docs_e/legal_e/27-trips_04_e.html) – Section 1 on copyright and related rights, Section 4 on industrial designs, Section 5 on patents and Section 7 on the protection of undisclosed information. It would last for a specific number of years, to be agreed by the General Council, and until widespread vaccination is in place globally and the majority of the world's population is immune. Members would review the waiver annually until termination.

Inclusive and comprehensive discussions on the waiver proposal were first held at the TRIPS Council on 15-16 October and subsequently at informal meetings on 20 November and 3 December. In those meetings, members exchanged views, sought clarifications and provided information on a number of questions relative to the functioning and impact of the requested waiver but did not reach a consensus. Members also held intense consultations among themselves and with the chair of the TRIPS Council, Ambassador Xolelwa Mlumbi-Peter of South Africa, in order to seek common ground.

As a result of the consultations, the chair proposed that the TRIPS Council provide a neutral and factual communication to the General Council reflecting the state of play of discussions and the absence of consensus on the waiver proposal in the TRIPS Council at this time. The communication would indicate that the TRIPS Council has not yet completed its consideration of the waiver request and may not be able to do so within the 90 days stipulated. Therefore, it would propose that the TRIPS Council continues its consideration of the waiver request and reports back to the General Council as stipulated in Article IX:3 of the Marrakesh Agreement.

As per WTO rules, waivers concerning WTO agreements must be submitted initially to the relevant Council which has 90 days to submit a report to the Ministerial Conference or, in its absence as is the case this year, to the General Council. Given that this proposal was initially submitted on 2 October, the 90-day time-period expires on 31 December 2020 and the next meeting of the General Council will be the last before the end of the year.

In the meantime, the chair encouraged delegations to continue to engage with each other and to seek common ground with regards the waiver request, including in relation to scope and substance in order to achieve the common objective shared by all WTO members.

Members agreed on continued consideration of the proposal in future TRIPS Council meetings but offered no indication of changes in their well-known positions. The proponents argued that IP protection hindered the urgent scale-up of vaccine production and reiterated that many countries – especially developing countries – may face institutional and legal difficulties when using TRIPS flexibilities, which they saw as a cumbersome process for the import and export of pharmaceutical products. A number of developing and developed country members reiterated their opposition to the waiver proposal, noting that there is no concrete indication that intellectual property rights (IPRs) have been a genuine barrier to accessing COVID-19 related medicines and technologies, and that IP was only one aspect of many that affected the manufacture and distribution of the new vaccines.

In a separate communication, four members (Australia, Canada, Chile and Mexico) noted this issue merits further reflection and significant consideration by the TRIPS Council, in order to identify any specific and concrete IP-related challenges faced by WTO members in addressing COVID-19. A series of questions were posed by these members with the aim of enriching the upcoming discussion. Proponents were asked to cite examples of where IP challenges have impeded or prevented local production or manufacturing and the timely procurement of COVID-19 diagnostics, equipment, therapeutics or vaccines, and of when and how they were not able to complete processes toward the issuance of compulsory licences under Article 31 of the TRIPS Agreement in relation to COVID-19. Clarification was also required on how the proponents would envisage giving effect to the waiver under members' domestic IP legal regimes.

Next steps

The next formal meeting of the TRIPS Council is scheduled for 10-11 March 2021. In order to allow for further consideration of the waiver request in the more immediate future, the chair proposed to consider meeting in January and early February to advance discussions.

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