

**TRIPS AND DISPUTE SETTLEMENT
AT THE WTO:
THE TRIPS DISPUTES AND CURRENT ISSUES
UNDER TRIPS AND THE DSU**

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I. INTRODUCTION

The World Trade Organization (hereinafter WTO), established January 1, 1995, has 164 members,¹ representing 98% of the world's trade.² The Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter TRIPS) was enacted as a part of the agreement creating the WTO, the Uruguay Round of the General Agreement on Tariffs and Trade,³ which was the eighth round of the General Agreement on Tariffs and Trade⁴ (hereinafter GATT). Disputes between member nations under the WTO are resolved through the Dispute Settlement Understanding (hereinafter DSU) at the WTO.⁵ There have been forty-two WTO TRIPS disputes under the DSU at the time of this writing, with consultations

¹ *Members and Observers*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited July 20, 2021) [<https://perma.cc/W5XT-4U5J>].

² *The WTO*, WTO, https://www.wto.org/english/thewto_e/thewto_e.htm (last visited July 19, 2021) [<https://perma.cc/ELD2-MFGX>].

³ See generally Amelia Porges, *General Agreement on Tariffs and Trade: Multilateral Trade Negotiation Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, 33 Int'l Legal Materials 1125 (1994).

⁴ *The GATT years: from Havana to Marrakesh - GATT Trade Rounds*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm#rounds (last visited July 19, 2021) [<https://perma.cc/MWB8-CQDU>]. The first round in 1947 focused on tariffs and involved 23 member nations. The most recent Uruguay round, from 1986–1994, was the most comprehensive and focused on many areas including tariffs, non-tariffs, the creation of the WTO, services, intellectual property, agriculture, and dispute settlement, among others. See *id.*

⁵ Understanding on Rules and Procedures Concerning the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

requested from February 1996 through September 2019.⁶ There have been 606 total disputes at the WTO at the time of this writing;⁷ thus, about seven percent of the total disputes are TRIPS disputes.

There currently are issues involving TRIPS and the DSU at the WTO. Concerning TRIPS, discussions are ongoing concerning the waiver of COVID-19 vaccine patents.⁸ Also under TRIPS, the WTO agreed on June 29, 2021 to extend the TRIPS transition period for the least developed country (LDC) members for thirteen years until 2034,⁹ as the transition period for LDCs was set to expire on July 1, 2021. Under the DSU, the appellate body is at a standstill due to the lack of any appellate body judges.¹⁰ Only five TRIPS disputes have reached the appellate body level,¹¹ with the most recent on June 9, 2020, although a TRIPS panel report remains under appeal as of July 2020¹²

⁶ *Disputes by Agreement: Intellectual Property (TRIPS)*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm (last visited July 19, 2021) [<https://perma.cc/N235-KBZ4>].

⁷ *Chronological List of Disputes Cases*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited July 19, 2021) [<https://perma.cc/UEH5-7ZXH>]. As of June 24, 2021, there were 603 disputes, with over 350 rulings. *See id.*

⁸ *Members Approach Text-Based Discussions for an Urgent IP Response to COVID-19*, WTO (June 9, 2021), https://www.wto.org/english/news_e/news21_e/trip_09jun21_e.htm [<https://perma.cc/8B64-5SLF>].

⁹ *WTO Members Agree to extend TRIPS Transition Period for LDCs until July 1, 2034*, WTO (June 29, 2021), https://www.wto.org/english/news_e/news21_e/trip_30jun21_e.htm [<https://perma.cc/Z222-EHMM>].

¹⁰ *See infra* notes 301-321 and accompanying text.

¹¹ *See infra* notes 231-285 and accompanying text.

¹² Panel Report Under Appeal, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS567 (July 28, 2020).

due to the inability of the appellate body to meet for lack of members.¹³

This article examines the TRIPS and DSU agreements, the TRIPS Agreement disputes under the DSU including data on the TRIPS disputes, and the appellate body rulings on TRIPS at the time of this writing. This article also examines current issues involving TRIPS and the DSU, including the extension of LDC status of countries under TRIPS until 2034, the impasse at the appellate body of the DSB due to lack of appellate judges, and the possible COVID-19 vaccine patent waiver under TRIPS.

II. THE AGREEMENTS: TRIPS

The TRIPS Agreement is the first multinational intellectual property agreement linked to trade.¹⁴ Examining the TRIPS Agreement, the preamble recognizes private intellectual property rights, and emphasizes the importance of resolving intellectual property disputes in a multinational system.¹⁵ The least developed countries are recognized in the preamble as needing maximum flexibility in the implementation of laws and regulations, in order to

¹³ See *infra* notes 301-321 and accompanying text.

¹⁴ See generally Anne Hiaring, *Fish or Fowl? The Nature of WTO Dispute Resolution under TRIPS*, 12 Ann. Surv. Int'l & Compar. L. 269 (2006) (noting that, historically, intellectual property rights were not viewed as a means of promoting trade); Donald P. Harris, *TRIPS' Rebound: An Historic Analysis of How the TRIPS Agreement Can Ricochet back against the United States*, 25 Nw. J. Int'l L. & Bus. 99, 104 (2004) (highlighting the linkage of intellectual property rights to trade for the first time internationally as one of the most impactful requirements of the TRIPS agreement).

¹⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights preamble, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 401 [hereinafter TRIPS Agreement].

develop a strong technological base.¹⁶ Article 1 of TRIPS sets out the obligations under the agreement; specifically, Article 1.1 states that WTO member countries must implement and comply with TRIPS in their own legal systems.¹⁷ Two TRIPS disputes of the forty-two disputes in twenty-five years at the WTO have raised Article 1 claims, and three have raised claims involving Article 1.1.¹⁸ Disputes may raise multiple articles and even agreements in the claims.¹⁹

Article 2 of TRIPS recognizes other intellectual property conventions, and Article 2.1 states that member nations must comply with sections of the Paris Convention on industrial property.²⁰ Six TRIPS disputes at the WTO raise claims under Article 2, and six claims are also raised under Article 2.1.²¹

TRIPS Article 3 accords national treatment of intellectual property protection to members, and Article 3.1 specifically requires members to treat the nationals of other members as favorably as their own nationals with regard to intellectual property.²² Eleven TRIPS disputes raise claims under Article 3, and eleven claims are also raised under

¹⁶ *Id.*

¹⁷ TRIPS Agreement, *supra* note 15, art. 1.1. Countries may enact more stringent intellectual property rights. *Id.*

¹⁸ *Disputes by Agreement*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A26 (last visited July 19, 2021) [<https://perma.cc/WK3W-AKP5>].

¹⁹ *See id.*

²⁰ TRIPS Agreement, *supra* note 15, art. 2.1. Specifically, members should comply with articles 1-12 and 19 of the Paris Convention. *Id.* Further, nothing in TRIPS reduces obligations under the Paris Convention, Berne Convention, Rome Convention, or the Treaty on Intellectual Property in Respect of Integrated Circuits. *Id.* art. 2.2.

²¹ Disputes by agreement, *supra* note 18.

²² TRIPS Agreement, *supra* note 15, art. 3.1.

Article 3.1.²³ TRIPS Article 4 affords the most favored nation treatment to nationals of other members, when a Member grants intellectual property protection to nationals of any other country.²⁴ Nine claims in the forty-two TRIPS disputes arise under this article.²⁵

Article 7 provides the objective of intellectual property protection and enforcement as the promoting innovation in technology, and transferring such technological innovations.²⁶ One TRIPS dispute includes a claim under this article.²⁷ Article 8, regarding principles, stresses the importance of member nations protecting public health and nutrition and promoting sectors essential to socio-economic well-being and technology.²⁸ One TRIPS dispute raised a claim under this article.²⁹

Concerning copyright in general, seventeen claims in ten disputes³⁰ have arisen in TRIPS disputes thus far. Article 9 of TRIPS provides that provisions of the Berne Convention apply, and Article 9.1 specifies which provisions.³¹ Four TRIPS claims raise Article 9, and two claims raise Article 9.1.³² Three TRIPS claims³³ raise Article 10 concerns, stating that computer source code and object code may be protected as a literary work.³⁴ Article

²³ Disputes by agreement, *supra* note 18.

²⁴ TRIPS Agreement, *supra* note 15, art. 4.

²⁵ Disputes by agreement, *supra* note 18.

²⁶ TRIPS Agreement, *supra* note 15, art. 7.

²⁷ Disputes by agreement, *supra* note 15.

²⁸ TRIPS Agreement, *supra* note 15, art. 8.

²⁹ Disputes by agreement, *supra* note 18.

³⁰ *Index of dispute issues: Intellectual Property (Copyright)*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm (last visited July 19, 2021) [<https://perma.cc/WS3Y-QVXW>].

³¹ TRIPS Agreement, *supra* note 15, art. 9.1. Specifically, Articles 1-21 and the appendix apply, but Article 6*bis* of the Berne Convention does not. *Id.*

³² Disputes by agreement, *supra* note 18.

³³ *Id.*

³⁴ TRIPS Agreement, *supra* note 15, art. 10.

11, on rental rights,³⁵ is raised in two TRIPS disputes.³⁶ Article 12 provides the copyright term must extend at least 50 years, unless the term is based on the author's life,³⁷ and two TRIPS disputes cite this article.³⁸ Limitations to an author's exclusive rights are confined to special cases under Article 13,³⁹ and this section is raised twice in disputes.⁴⁰ Finally, concerning copyright, Article 14 protects rights to sound recordings and broadcasting organizations.⁴¹ Four claims of Article 14 issues have been raised in TRIPS disputes.⁴² Specifically, Article 14.3 protects broadcasting organizations,⁴³ and Article 14.6 discusses rights under the Rome and Berne Conventions.⁴⁴ One claim of each is raised in TRIPS disputes.⁴⁵

Concerning the TRIPS section on trademark, a total of nine trademark disputes⁴⁶ have had thirty-five trademark claims raised.⁴⁷ Article 15 on protectable trademark subject matter⁴⁸ has had two TRIPS dispute claims.⁴⁹ Article 15.1 states that a trademark is a "sign or any combination of signs, capable of distinguishing goods or

³⁵ *Id.* art. 11.

³⁶ Disputes by agreement, *supra* note 18.

³⁷ TRIPS Agreement, *supra* note 15, art. 12.

³⁸ Disputes by agreement, *supra* note 18.

³⁹ TRIPS Agreement, *supra* note 15, art. 15.

⁴⁰ Disputes by agreement, *supra* note 18.

⁴¹ TRIPS Agreement, *supra* note 15, art. 15.

⁴² Disputes by agreement, *supra* note 18.

⁴³ TRIPS Agreement, *supra* note 15, art. 14.3.

⁴⁴ *Id.* art. 14.6.

⁴⁵ Disputes by agreement, *supra* note 18.

⁴⁶ Index of disputes issues, *supra* note 30 (navigate to cases by clicking "Trademarks" under the "Intellectual Property" heading).

⁴⁷ Disputes by agreement, *supra* note 18.

⁴⁸ TRIPS Agreement, *supra* note 15, art. 15. Trademark protectable subject matter includes any sign, or combination of signs, to distinguish goods or services from those of another, including names, letters, numbers, and figurative elements. *Id.* at art. 15.1.

⁴⁹ Disputes by agreement, *supra* note 18.

services,” from others,⁵⁰ and this section has had one TRIPS dispute claim.⁵¹ Article 15.4 states that “[t]he nature of the goods or services” shouldn’t be an obstacle to trademark protection,⁵² this section has had five TRIPS dispute claims.⁵³ TRIPS Article 16 covers trademark rights conferred;⁵⁴ this section has four TRIPS dispute claims.⁵⁵ Article 16.1 grants the owner a trademark “the exclusive right to prevent all third parties . . . from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect which the trademark registered where such use would result in a likelihood of confusion.”⁵⁶ Eight TRIPS dispute claims have involved this section.⁵⁷ Article 16.3 states that the Paris Convention provision applies even if the goods or services involved are not similar, there may be a trademark violation if there is a connection indicated and the trademark owner would be damaged.⁵⁸ Two TRIPS dispute claims involved this section.⁵⁹ Article 17 allows member nations to make limited exceptions, such as a fair use exception for descriptive terms,⁶⁰ and there has been one TRIPS claim under this section.⁶¹ A trademark may be renewed indefinitely in seven year terms, under Article 18,⁶² which has had one claim.⁶³ Use of the trademark may

⁵⁰ TRIPS Agreement, *supra* note 15, art. 15.1. These signs may be a name, letter, numeral, figure, or combination of colors. *Id.*

⁵¹ Disputes by agreement, *supra* note 18.

⁵² TRIPS Agreement, *supra* note 15, art. 15.4.

⁵³ Disputes by agreement, *supra* note 18.

⁵⁴ TRIPS Agreement, *supra* note 15, art. 16.

⁵⁵ Disputes by agreement, *supra* note 18.

⁵⁶ TRIPS Agreement, *supra* note 15, art. 16.1.

⁵⁷ *Disputes by agreement, supra* note 18.

⁵⁸ *Id.* Art. 16.3.

⁵⁹ Disputes by agreement, *supra* note 18.

⁶⁰ TRIPS Agreement, *supra* note 15, art. 17.

⁶¹ Disputes by agreement, *supra* note 18.

⁶² TRIPS Agreement, *supra* note 15, art. 18.

⁶³ Disputes by agreement, *supra* note 18.

be required, and non-use for three years or more may cause a trademark to lapse under Article 19;⁶⁴ one dispute has involved this article.⁶⁵ Article 20 prohibits the use of the trademark from being “unjustifiably encumbered” by other requirements,⁶⁶ and nine claims involved this section,⁶⁷ which is more than any other trademark section.⁶⁸ Finally, member nations control licensing and assignment of trademarks under Article 21;⁶⁹ one dispute claim named this section.⁷⁰

Geographical indicators have had 17 claims in total in four TRIPS disputes.⁷¹ Article 22 on geographical indicators⁷² has been raised twice.⁷³ Article 22.1 states that a geographical indicator occurs when a quality or characteristic of a good is attributable to a territory, region or locality of a member nation;⁷⁴ one TRIPS dispute claim has referenced this subsection.⁷⁵ Article 22.2 states that member nations should protect against use of a geographical indicator in a way that is deceptive to the public;⁷⁶ two TRIPS disputes have raised this claim.⁷⁷ Four TRIPS claims⁷⁸ have also raised Article 22.2(b) which

⁶⁴ TRIPS Agreement, *supra* note 15, art. 19.

⁶⁵ Disputes by agreement, *supra* note 18.

⁶⁶ TRIPS Agreement, *supra* note 15, art. 20.

⁶⁷ Disputes by agreement, *supra* note 18.

⁶⁸ *See generally* Disputes by agreement, *supra* note 18

⁶⁹ TRIPS Agreement, *supra* note 15, art. 21. Compulsory licensing of trademark is not allowed. *Id.*

⁷⁰ Disputes by agreement, *supra* note 18

⁷¹ Index of disputes issues, *supra* note 30 (navigate to cases by clicking “Geographical Indications” under the “Intellectual Property” heading).

⁷² TRIPS Agreement, *supra* note 15, art. 22.

⁷³ Disputes by agreement, *supra* note 18

⁷⁴ *Id.* Art. 22.1.

⁷⁵ Disputes by agreement, *supra* note 18.

⁷⁶ TRIPS Agreement, *supra* note 15, art. 22.2.

⁷⁷ Disputes by agreement, *supra* note 18.

⁷⁸ *Id.*

holds that member nations should also protect against unfair competition under the Paris Convention.⁷⁹ TRIPS Article 24 states that member nations are to enter negotiations to increase protections of geographical indicators,⁸⁰ and two TRIPS claims reference this article.⁸¹ Members are not to reduce protection for geographic indicators in place at the entrance into the WTO under Article 24.3,⁸² and four TRIPS claims reference this section.⁸³ Finally, trademarks registered or applied for in good faith before the application of the TRIPS geographical indicators section or before a geographical indicator was protected within the “country of origin” shall not be prejudiced under Article 24.5;⁸⁴ two TRIPS claims referenced this section.⁸⁵

Industrial designs,⁸⁶ layout designs of integrated circuits,⁸⁷ and anti-competitive practices in license agreements⁸⁸ are covered under the TRIPS Agreement, and none have been raised in a TRIPS dispute.⁸⁹

Patent protection has resulted in eleven TRIPS disputes and thirty-two claims in these disputes.⁹⁰ Article 27 covers patentable subject matter, defined as inventions, both products and processes, which are new, inventive, and capable of industrial application.⁹¹ Ten TRIPS claims

⁷⁹ TRIPS Agreement, *supra* note 15, art. 22.2(b).

⁸⁰ TRIPS Agreement, *supra* note 15, art. 24.

⁸¹ Disputes by agreement, *supra* note 18.

⁸² TRIPS Agreement, *supra* note 15, art. 24.3.

⁸³ Disputes by agreement, *supra* note 18.

⁸⁴ *Id.* Art. 24.5.

⁸⁵ Disputes by agreement, *supra* note 18.

⁸⁶ TRIPS Agreement, *supra* note 15, art. 25-26.

⁸⁷ *Id.* art. 35-38.

⁸⁸ *Id.* art. 40.

⁸⁹ *See generally* Disputes by agreement, *supra* note 18.

⁹⁰ *Id.*

⁹¹ TRIPS Agreement, *supra* note 15, art. 27. The member nation may not discriminate on the basis of the field or place of the invention, or whether the products are local or imported. *Id.* art. 27.1. Inventions

reference this section.⁹² Article 28 discusses the patent holder's rights,⁹³ and six claims reference this section.⁹⁴ Specifically, Article 28.1, referenced by one TRIPS claim,⁹⁵ gives the patent holder's exclusive rights.⁹⁶ Subsection (a) of this section states that no one else may make, use, offer to sell, sell, or import a patented product.⁹⁷ Subsection (b) of this section states that no one else may make, use, offer to sell, sell, or import a product made from a patented process.⁹⁸ Each of these subsections was raised in two TRIPS claims.⁹⁹ Patent holders may assign, transfer, or license a patent under Article 28.2,¹⁰⁰ and this section is referenced in four TRIPS claims.¹⁰¹ Article 31 covers other unauthorized use of the patent, such as governmental use,¹⁰² and is the subject of three TRIPS claims.¹⁰³ The patent term is twenty years from filing under Article 33,¹⁰⁴ and this section is raised in four TRIPS claims.¹⁰⁵

Protection of undisclosed information has resulted in a total of five TRIPS dispute claims in one TRIPS

may be excluded for the public order or morality or for environmental reasons. *Id.* art. 27.2. Diagnostic, therapeutic, and surgical methods may also be excluded. *Id.* art. 27.3(a).

⁹² Disputes by agreement, *supra* note 18.

⁹³ *Id.* art. 28.

⁹⁴ Disputes by agreement, *supra* note 18.

⁹⁵ *Id.*

⁹⁶ TRIPS Agreement, *supra* note 15, art. 28.1.

⁹⁷ *Id.* art. 28.1(a).

⁹⁸ *Id.* art. 28.1(b).

⁹⁹ Disputes by agreement, *supra* note 18.

¹⁰⁰ *Id.* art. 28.2.

¹⁰¹ Disputes by agreement, *supra* note 18.

¹⁰² TRIPS Agreement, *supra* note 15, art. 31.

¹⁰³ Disputes by agreement, *supra* note 18.

¹⁰⁴ TRIPS Agreement, *supra* note 15, art. 33.

¹⁰⁵ Disputes by agreement, *supra* note 18.

dispute.¹⁰⁶ Member nations should protect undisclosed information to prevent unfair competition according to Article 39 of TRIPS,¹⁰⁷ and one dispute claim references this section.¹⁰⁸ Secret information of commercial value should be protected under Article 39.2,¹⁰⁹ and this section is raised in four TRIPS disputes.¹¹⁰

Moving away from the substantive protections, Part 3 of TRIPS covers enforcement of intellectual property rights. Article 41 of TRIPS covers member nations' general obligations,¹¹¹ and eight TRIPS claims reference this section.¹¹² Under Article 41.1, member nations are to have effective intellectual property enforcement for the substantive protections that permits action against current or past infringement and deters future infringement.¹¹³ This section is mentioned in four TRIPS claims.¹¹⁴ Fair and equitable enforcement mechanisms that are not costly or onerous are required under Article 41.2,¹¹⁵ which is mentioned in two TRIPS claims.¹¹⁶ Member nations are obligated to provide an opportunity for judicial review of administrative rulings and the legal aspects of judicial hearings, except for acquittals in criminal cases, under Article 41.4,¹¹⁷ which is mentioned in one TRIPS claim.¹¹⁸

¹⁰⁶ Index of disputes issues, *supra* note 30 (navigate to cases by clicking “Undisclosed Information” under the “Intellectual Property” heading).

¹⁰⁷ TRIPS Agreement, *supra* note 15, art. 39.

Unfair competition is protected under the Paris Convention Article 10 bis. *Id.* at art. 39.1.

¹⁰⁸ Disputes by agreement, *supra* note 18.

¹⁰⁹ TRIPS Agreement, *supra* note 15, art. 39.2.

¹¹⁰ Disputes by agreement, *supra* note 18.

¹¹¹ TRIPS Agreement, *supra* note 15, art. 41.

¹¹² Disputes by agreement, *supra* note 18.

¹¹³ TRIPS Agreement, *supra* note 15, art. 41.1.

¹¹⁴ Disputes by agreement, *supra* note 18.

¹¹⁵ TRIPS Agreement, *supra* note 15, art. 41.2.

¹¹⁶ Disputes by agreement, *supra* note 18.

¹¹⁷ TRIPS Agreement, *supra* note 15, art. 41.4.

Article 42 on fair and equitable procedures¹¹⁹ was brought up in nine claims,¹²⁰ and Article 43 on evidence¹²¹ was brought up in two.¹²² Injunctions under Article 44¹²³ was brought up twice,¹²⁴ and Article 44.1¹²⁵ on preventing infringing goods from entering commerce was raised in one TRIPS claim.¹²⁶ Article 45 on damages¹²⁷ was raised twice,¹²⁸ and Article 46¹²⁹ on other remedies was raised three times.¹³⁰ The intellectual property holder may have the right under Article 47 to know the identity of the infringer,¹³¹ and this has been asserted in two TRIPS claims.¹³² Judicial authorities have the power to indemnify the defendant under Article 48,¹³³ raised in two TRIPS claims.¹³⁴ Administrative procedures must comply with TRIPS principles according to Article 49,¹³⁵ which was also raised in two TRIPS complaints.¹³⁶

Article 50 of TRIPS covers provisional measures,¹³⁷ and four TRIPS disputes reference this section.¹³⁸ One

¹¹⁸ Disputes by agreement, *supra* note 18.

¹¹⁹ TRIPS Agreement, *supra* note 15, art. 42.

¹²⁰ Disputes by agreement, *supra* note 18.

¹²¹ TRIPS Agreement, *supra* note 15, art. 43.

¹²² Disputes by agreement, *supra* note 18.

¹²³ TRIPS Agreement, *supra* note 15, art. 44.

¹²⁴ Disputes by agreement, *supra* note 18.

¹²⁵ TRIPS Agreement, *supra* note 15, art. 44.1.

¹²⁶ *Disputes by agreement, supra* note 18.

¹²⁷ TRIPS Agreement, *supra* note 15, art. 45.

¹²⁸ Disputes by agreement, *supra* note 18.

¹²⁹ *Id.* art. 46.

¹³⁰ Disputes by agreement, *supra* note 18.

¹³¹ TRIPS Agreement, *supra* note 15, art. 47.

¹³² Disputes by agreement, *supra* note 18.

¹³³ TRIPS Agreement, *supra* note 15, art. 48.

¹³⁴ Disputes by agreement, *supra* note 18.

¹³⁵ TRIPS Agreement, *supra* note 15, art. 49.

¹³⁶ Disputes by agreement, *supra* note 18.

¹³⁷ TRIPS Agreement, *supra* note 15, art. 50.

¹³⁸ Disputes by agreement, *supra* note 18.

TRIPS dispute brought by Brazil against the European Union over generic drugs referenced numerous enforcement sections and subsections.¹³⁹ This dispute references Article 50.3 on the judicial authorities' right to require evidence,¹⁴⁰ Article 50.7 on the judicial authorities' right to afford compensation,¹⁴¹ Article 50.8 on the conformity of administrative hearings with the TRIPS rules,¹⁴² Article 51 on suspension of release by customs authorities,¹⁴³ Article 53.1 on security and equivalent assurance to protect the defendant,¹⁴⁴ Article 53.2 on the release of security,¹⁴⁵ Article 54 on notice of suspension of the release of goods,¹⁴⁶ Article 55 on the duration of suspension,¹⁴⁷ Article 58 on ex officio action,¹⁴⁸ and Article 59 on remedies.¹⁴⁹

TRIPS Article 61 covers criminal actions and states that member nations shall provide for criminal actions at least for trademark counterfeiting or copyright piracy of a commercial nature,¹⁵⁰ and seven member nations have raised this as a claim in a TRIPS dispute.¹⁵¹

Article 62 requires reasonable formalities and procedures by member nations,¹⁵² and was referenced in

¹³⁹ Request for Consultations by Brazil, *European Union and a Member State – Seizure of Generic Drugs in Transit*, WTO Doc. WT/DS 409/1 (May 19, 2010).

¹⁴⁰ TRIPS Agreement, *supra* note 15, art. 50.3.

¹⁴¹ *Id.* art. 50.7.

¹⁴² *Id.* art. 50.8.

¹⁴³ *Id.* art. 51.

¹⁴⁴ *Id.* art. 53.1.

¹⁴⁵ *Id.* art. 53.2.

¹⁴⁶ *Id.* art. 54.

¹⁴⁷ *Id.* art. 55.

¹⁴⁸ *Id.* art. 58.

¹⁴⁹ *Id.* art. 59.

¹⁵⁰ *Id.* art. 61.

¹⁵¹ Disputes by agreement, *supra* note 18.

¹⁵² TRIPS Agreement, *supra* note 15, art. 62.

two TRIPS dispute claims.¹⁵³ Article 63 on transparency¹⁵⁴ was cited in six TRIPS claims.¹⁵⁵ Article 63.1 – which covers laws, regulations, judicial rulings, and administrative proceedings being made public¹⁵⁶ – was referenced twice in TRIP dispute claims.¹⁵⁷ Article 63.3 was also referenced twice¹⁵⁸ and requires members to provide such information to each other upon written request.¹⁵⁹

Article 65 on transitional arrangements¹⁶⁰ was cited in fifteen claims of the TRIPS disputes.¹⁶¹ Article 65.1 stating that the TRIPS provisions weren't in force until one year after the WTO Agreement¹⁶² was referenced twice,¹⁶³ and Article 65.5 stating that changes in a member nation's laws during the transition period don't result in lesser coverage¹⁶⁴ was referenced once.¹⁶⁵

Finally, Article 70 on protection of existing subject matter¹⁶⁶ was cited in ten TRIPS disputes.¹⁶⁷ Article 70.2 on copyrighted works previously protected under the Berne Convention¹⁶⁸ was referenced once.¹⁶⁹ Article 70.8 on pharmaceutical and agricultural products patents¹⁷⁰ was

¹⁵³ Disputes by agreement, *supra* note 18.

¹⁵⁴ TRIPS Agreement, *supra* note 15, art. 63.

¹⁵⁵ Disputes by agreement, *supra* note 18.

¹⁵⁶ TRIPS Agreement, *supra* note 15, art. 63.1.

¹⁵⁷ Disputes by agreement, *supra* note 18.

¹⁵⁸ *Id.*

¹⁵⁹ TRIPS Agreement, *supra* note 15, art. 63.3.

¹⁶⁰ *Id.* art. 65.

¹⁶¹ Disputes by Agreement, *supra* note 18.

¹⁶² *Id.* art. 65.1.

¹⁶³ Disputes by agreement, *supra* note 18.

¹⁶⁴ TRIPS Agreement, *supra* note 15, art. 65.5.

¹⁶⁵ Disputes by agreement, *supra* note 18.

¹⁶⁶ TRIPS Agreement, *supra* note 15, art. 70.

¹⁶⁷ Disputes by agreement, *supra* note 18.

¹⁶⁸ TRIPS Agreement, *supra* note 15, art. 70.2.

¹⁶⁹ Disputes by agreement, *supra* note 18.

¹⁷⁰ TRIPS Agreement, *supra* note 15, art. 70.8.

referenced once.¹⁷¹ Article 70.9 on marketing rights to pharmaceutical and agricultural products¹⁷² was also referenced once.¹⁷³

III. THE AGREEMENTS: DISPUTE SETTLEMENT UNDERSTANDING

The World Trade Organization Agreement established the Dispute Resolution Understanding which created a Dispute Settlement Body (DSB)¹⁷⁴ to administer rules of covered agreements, including TRIPS.¹⁷⁵ “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.”¹⁷⁶ The DSB may not add to or reduce the rights granted under the covered agreements, including TRIPS.¹⁷⁷ Further, prompt settlement of disputes is essential to the functioning of the WTO.¹⁷⁸

WTO dispute resolution is country member or members versus country member or members;¹⁷⁹ there are no individual or business parties involved. The first step in the dispute resolution process at the WTO is for the country bringing a claim to request consultations with the DSB.¹⁸⁰ The dispute should be attempted to be resolved by consultations¹⁸¹, which are confidential.¹⁸² Other member

¹⁷¹ Disputes by agreement, *supra* note 18.

¹⁷² TRIPS Agreement, *supra* note 15, art. 70.9.

¹⁷³ Disputes by agreement, *supra* note 18.

¹⁷⁴ DSU, *supra* note 5, art. 2.1; *see generally* Sue Ann Mota, *The World Trade Organization: An Analysis of Disputes*, 25 N. Car. J. Int'l. L. and Comm. Regul. 75 (1999).

¹⁷⁵ TRIPS Agreement, *supra* note 15, art. 64.

¹⁷⁶ DSU, *supra* note 5, art. 3.2.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* art. 3.3.

¹⁷⁹ DSU, *supra* note 5, art. 1.1

¹⁸⁰ DSU, *supra* note 5, art. 4.4.

¹⁸¹ *Id.* art. 4.5, art 4.3 (stating that the answering country should respond within 10 days and enter into consultations within 30 days),

nations with a “substantial trade interest” may join the consultations.¹⁸³ During consultations, special attention should be given to concerns of developing countries,¹⁸⁴ and special considerations are given to least-developed country members(LDCs).¹⁸⁵ “Particular consideration” should be given to LDCs, and member nations should exercise restraint in bringing disputes against LDCs or asking for remedies or concessions against them.¹⁸⁶ In a dispute involving a LDC which does not end at consultations, upon request of the LDC, mediation and conciliation could be attempted before a panel is composed.¹⁸⁷ There have been no WTO disputes involving LDCs thus far.¹⁸⁸ Eight of the forty-two TRIPS disputes thus far have ended at the consultation level.¹⁸⁹

Mutually agreed solutions are the preferable manner of resolving disputes,¹⁹⁰ and such solutions should be communicated to the DSB.¹⁹¹ Fourteen of the forty-two TRIPS disputes have been withdrawn due to a mutually agreed solution.¹⁹²

If the matter is not resolved in sixty days, or if the parties state within the sixty days that the matter isn't

art. 4.8 (stating that if the matter is urgent, consultations should be started within 20 days).

¹⁸² *Id.* art. 4.6.

¹⁸³ *Id.* art. 4.11.

¹⁸⁴ *Id.* art. 4.10.

¹⁸⁵ *Id.* art. 24.1.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* art. 24.2.

¹⁸⁸ *Developing countries in WTO dispute settlement*, WTO, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s1p1_e.htm (last visited July 19, 2021) [<https://perma.cc/XP3D-RRNP>].

¹⁸⁹ Disputes by agreement, *supra* note 18.

¹⁹⁰ DSU, *supra* note 5, art. 3.7.

¹⁹¹ *Id.* art. 3.6.

¹⁹² Disputes by agreement, *supra* note 18.

resolved, the country bringing the dispute may request a panel¹⁹³ in writing.¹⁹⁴ The DSB should establish a panel at the latest at the DSB meeting after the panel request has appeared on the DSB’s agenda, unless the DSB agrees not to establish a panel.¹⁹⁵ One TRIPS dispute brought in 2019 has a panel established but not composed; one TRIPS dispute has a panel approved.¹⁹⁶

Qualified independent panelists¹⁹⁷ may not be citizens of a country involved in the dispute.¹⁹⁸ The three members of the panel¹⁹⁹ are nominated by the parties to the dispute, and should be opposed only for compelling reasons.²⁰⁰ The panelists serve as individuals and not as representatives of their government or organization.²⁰¹ A developing nation may request that there is a panelist from another developing nation.²⁰² When more than one nation requests a panel on the same issue, a single panel should be formed, if feasible.²⁰³ Interests of third parties should be “fully taken into account.”²⁰⁴

The objective panel²⁰⁵ should develop a timetable²⁰⁶ with deadlines.²⁰⁷ If the parties don’t achieve a mutually

¹⁹³ DSU, *supra* note 5, art. 4.7.

¹⁹⁴ *Id.* art. 6.2.

¹⁹⁵ *Id.* art. 6.1.

¹⁹⁶ Disputes by agreement, *supra* note 18.

¹⁹⁷ DSU, *supra* note 5, art. 8.1.

¹⁹⁸ *Id.* art. 8.3.

¹⁹⁹ *Id.* art. 8.5.

²⁰⁰ *Id.* art. 8.6.

²⁰¹ *Id.* art. 8.9.

²⁰² *Id.* art. 8.10.

²⁰³ *Id.* art 9.1 (stating that if separate panels are convened on the same issue, the same panelists should serve on the separate panels, if feasible), art. 9.2.

²⁰⁴ *Id.* at 10.1 (stating that if interested third parties have the right to be heard and make submissions), art. 10.2.

²⁰⁵ *Id.* art. 11.

²⁰⁶ *Id.* art. 12.4.

²⁰⁷ *Id.* art. 12.5.

satisfactory solution, the panel should issue its report, with findings of fact, application of relevant provisions of the WTO Agreement, and the basis of any recommendation.²⁰⁸ “The panel may suspend its work at any time,” but if it suspends for more than twelve months, the authority for the panel lapses.²⁰⁹ Two TRIPS disputes in twenty-five years have had the authorization for a panel lapse.²¹⁰

Panel deliberations are confidential and panelist opinions are anonymous.²¹¹ Member nations have at least twenty days to review a distributed final panel report.²¹² Within sixty days, the report will be considered by the Dispute Resolution Body for approval, unless there is consensus not to approve or a party has notified its intent to appeal.²¹³ Only issues of law and in the panel report and interpretations of the law by the panel may be appealed.²¹⁴

A standing seven person appellate body serves in rotating panels of three,²¹⁵ for four year terms.²¹⁶ Like at the panel level, deliberations are confidential²¹⁷ and opinions are anonymous.²¹⁸

²⁰⁸ *Id.* art. 12.7. If the panel can't issue its report in six months, or three months in an urgent matter, it should inform the DSB of the reason for the delay and when the report will be issued, *id.* at art. 12.9.

²⁰⁹ *Id.* art. 12.12.

²¹⁰ See Disputes by Agreement, *supra* note 18.

²¹¹ DSU, *supra* note 5, art. 14.

²¹² *Id.* at art. 16.1. Member countries with objections should give their objections and reasons for them at least ten days prior to the meeting the report will be considered, *id.* at art. 16.2.

²¹³ *Id.* art. 16.4. Only parties, not third parties, may appeal, *id.* at art. 17.4.

²¹⁴ *Id.* art. 17.6.

²¹⁵ *Id.* art. 17.1.

²¹⁶ *Id.* art. 17.2. The appellate body member may serve for two four year terms, maximum, *id.*

²¹⁷ *Id.* art. 17.10.

²¹⁸ *Id.* art. 17.11. No ex parte conversations may be held with the panel or appellate body, *id.* art. 18.1.

If a circulated appellate body report isn't adopted within thirty days, it is considered to be adopted by consensus by the DSB.²¹⁹ Four TRIPS disputes have had reports adopted with no further action needed,²²⁰ and two TRIPS disputes in a joined appellate body report have had no recommendation to the DSB because the panel report finding no TRIPS violation was upheld.²²¹ If a panel or appellate body concludes that a party is out of conformity with a covered agreement such as TRIPS, it shall recommend that the country bring its laws into conformity.²²² One TRIPS dispute has had an appellate body report adopted with a recommendation to bring laws into conformity.²²³

At a DSB meeting within 30 days of the panel or appellate body report, the party is to inform the DSB of its intent to comply with the ruling and recommendation, and if this can't be done immediately, it should comply within a reasonable time.²²⁴ Eight parties in TRIPS disputes have notified that implementation of reports has occurred, after a panel or appellate body report.²²⁵

If rulings and recommendations are not implemented within a reasonable time, temporary concessions and voluntary compensation may be assessed.²²⁶ If a party requests the suspension of

²¹⁹ *Id.* art. 17.14.

²²⁰ *See* Disputes by Agreement, *supra* note 18.

²²¹ Appellate Body Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications, and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS435/AB/R; WT/DS441/AB/R (adopted June 9, 2020).

²²² DSU, *supra* note 5, art. 19.1.

²²³ *See* Disputes by agreement, *supra* note 18.

²²⁴ DSU, *supra* note 5, art. 21.3.

²²⁵ Disputes by agreement, *supra* note 18.

²²⁶ *Id.* art. 22.1.

concessions or other obligations in the same sector,²²⁷ the reasons must be stated.²²⁸ One TRIPS dispute has resulted in a request to retaliate after a panel report.²²⁹

Article 23 of the Understanding on Rules and Procedures Concerning the Settlement of Disputes states that when member nations have disputes under the covered agreements or under the objectives under the covered agreements, they shall abide by the rules and procedures under the WTO Agreement.²³⁰

IV. THE TRIPS DISPUTES

Since its inception, twenty of the forty-two TRIPS disputes, nearly half, were brought in the first five years, from 1995 to 1999.²³¹ Five additional TRIPS disputes were brought from 2000 to 2004 (with no TRIPS disputes brought in 2004, 2005, or 2006).²³² Two TRIPS disputes were brought from 2005-2009, the five year block with the least disputes.²³³ Seven TRIPS disputes were brought from 2010-2014 (with no TRIPS disputes brought in 2014, 2015, or 2016), and eight TRIPS disputes were brought from 2015 through the end of 2019.²³⁴

²²⁷ *Id.* art. 22.3(e). For TRIPS, the sector is part 2, sections 1-7, or the obligations under parts 3 or 4, *id.* 22.3(f)(iii).

²²⁸ *Id.* art. 22.3(e).

²²⁹ See Disputes by agreement, *supra* note 18.

²³⁰ See generally Siqing Li, Comment, *Convergence of WTO Dispute Settlement and Investor-State Arbitration: A Closer Look at Umbrella Clauses*, 19 Chi. J. Int'l L. 189, 191 (2018); Jennifer Hillman, *Conflicts between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO – What Should WTO Do*, 42 Cornell Int'l L. J. 193, 196-97 (2009).

²³¹ See Disputes by agreement, *supra* note 18; See generally Sue Ann Mota, *TRIPS: Five Years of Disputes at the WTO*, 17 Arizona J. of Int'l & Comp. L. 533 (2000).

²³² Disputes by agreement, *supra* note 18.

²³³ *Id.*

²³⁴ See Disputes by agreement, *supra* note 18.

In twenty-five years of TRIPS disputes, the United States brought the dispute eighteen times, out of the forty-two,²³⁵ or about 43% of the time. The EU brought five TRIPS disputes. Qatar brought four, Brazil brought two, and Canada, Australia, India, the Ukraine, Honduras, the Dominican Republic, Cuba, Indonesia, and Korea each brought one TRIPS dispute.²³⁶ The European Union has had seven TRIPS disputes brought against it, followed by five against Australia, four each against the U.S. and China, three against Japan, two each against Canada, Argentina, India, and Saudi Arabia, and one each against Pakistan, Portugal, Indonesia, Ireland, Denmark, Sweden, Greece, Brazil, the United Arab Emirates, Bahrain, and Turkey.²³⁷

In the first five years of the WTO, the U.S. brought fourteen of the twenty TRIPS disputes.²³⁸ The E.U. brought five, and Canada brought one.²³⁹ The E.U. had four disputes brought against it, and the U.S., Canada, and India each had two.²⁴⁰ In the first ten years, 1995-2004, the U.S. brought sixteen of the twenty-five TRIPS disputes, and the E.U. brought six.²⁴¹ In this time period, the E.U. had five of the twenty-five TRIPS disputes brought against it, and the U.S. had four.²⁴² In the third five years of the WTO, 2005-2009, there were only two TRIPS disputes, one each against China brought by the U.S. and the E.U.²⁴³ In the fourth five years of the WTO, 2010-2014, the U.S. was not involved in any TRIPS disputes.²⁴⁴ Two disputes were brought against the E.U. during this time, and Qatar

²³⁵ See Disputes by agreement, *supra* note 18.

²³⁶ *Id.*

²³⁷ See *id.*

²³⁸ See *id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

brought four of the eight TRIPS disputes.²⁴⁵ The E.U. brought two, and the U.S. and Korea each brought one.²⁴⁶ China and Saudi Arabia each had two TRIPS disputes brought against it in the last five years, and the United Arab Emirates, Bahrain, Turkey, and Japan each had one TRIPS dispute brought against it.²⁴⁷

It is of interest that of the forty-two TRIPS disputes,²⁴⁸ only five have resulted in appellate body reports out of 160 appellate body reports;²⁴⁹ the first three occurred in the first ten years of dispute resolution at the WTO, and the last two in a joint report on June 9, 2020. Two of these disputes were brought by the United States, and the third was brought against the United States.²⁵⁰ Two disputes, the ones brought by the U.S., involved patents, and the third, the one against the U.S., involved trademark.²⁵¹ The most recent two disputes reaching the appellate body, were brought by the Dominican Republic and Honduras against Australia, and also involved trademark, in the context of plain packaging requirements for cigarettes.²⁵²

The first TRIPS dispute resulting in an appellate body report was brought by the U.S. against India over patent protection for pharmaceutical and agricultural products. The U.S. requested consultations in 1996, alleging that India lacked patent protection for pharmaceutical and agricultural chemical products as

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *See id.*

²⁴⁸ *See id.*

²⁴⁹ *See Appellate Body Reports*, WTO, https://www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm (last visited July 20, 2021) [<https://perma.cc/4KMY-WKF2>].

²⁵⁰ *See id.*

²⁵¹ *See id.*

²⁵² Appellate Body Report, *supra* note 207.

required under the TRIPS Agreement.²⁵³ In 1997, a panel agreed with the U.S.,²⁵⁴ and held that India violated TRIPS article 70²⁵⁵ for failure to establish a formal system to permit patent application filings for these products; violated TRIPS article 70.9²⁵⁶ for failure to publish and to notify about the mechanism it failed to establish; and violated TRIPS article 70.8²⁵⁷ for failure to establish a system to grant exclusive marketing rights. India appealed, and the Appellate Body in 1997 upheld the conclusions of the panel that India both failed to establish a means to adequately protect patent applications for pharmaceutical and agricultural chemical products during the transition period as well as India failed to provide a mechanism to preserve exclusive marketing rights,²⁵⁸ and the Appellate Body recommended that India bring its patent laws into conformity with TRIPS.²⁵⁹ In a status report in 1999, India notified that it brought its laws into conformity.²⁶⁰ This is the only TRIPS dispute brought in the first five years of the WTO to go to the appellate level.

²⁵³ Request for Consultation by the United States, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc. WT/DS50/1 (July 6, 1996).

²⁵⁴ Panel Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc. WT/DS50/R (adopted Sept. 5, 1997).

²⁵⁵ TRIPS Agreement, *supra* note 15, art. 70.

²⁵⁶ *Id.* art. 70.9.

²⁵⁷ *Id.* art. 70.8(a).

²⁵⁸ Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc. WT/DS50AB/R (adopted Dec. 19, 1997) (reversing on the panel's alternative conclusion that India violated TRIPS art. 63).

²⁵⁹ *Id.* ¶ 98.

²⁶⁰ Status Report by India – Addendum, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc. WT/DS79/6 (April 16, 1999), (noting the status report is also for a sister dispute brought by the E.U. against India for the same violations).

The second TRIPS dispute to reach the Appellate Body was also brought by the U.S., on a patent issue, but against Canada, over its patent term. Consultations were requested in 1999,²⁶¹ and a panel²⁶² and an appellate body ruled against Canada in 2000.²⁶³ Canada's Patent Act had a seventeen year term for patents in existence and filed before October 1, 1989; the patent term after that date was twenty years, which is in accordance with the TRIPS Agreement. The U.S. argued that the pre-October 1, 1989 Canadian patents don't get a full twenty years as required by TRIPS, and the panel²⁶⁴ and appellate body agreed.²⁶⁵ Articles 33²⁶⁶ and 70.2²⁶⁷ of the TRIPS Agreement were violated by Canada, and the Appellate Body report recommended that Canada bring its Patent Act into conformity.²⁶⁸ Canada agreed, but when the U.S. and Canada could not agree on what was a reasonable time to implement this ruling, an arbitrator in 2001 set the term of implementation at ten months from the date of adoption of the reports.²⁶⁹

²⁶¹ Request for Consultation by the United States, *Canada- Term of Patent Protection*, WTO Doc. WT/DS170/1 (May 6, 1999). The U.S. alleged that Canada violated sections 33, 65, and 70 of TRIPS. The U.S. alleged that Canada violated sections 33, 65, and 70 of TRIPS. *Id.*

²⁶² Panel Report, *Canada – Term of Patent Protection*, WTO Doc. WT/DS170/R (adopted Oct. 12, 2000).

²⁶³ Appellate Body Report, *Canada – Term of Patent Protection*, WTO Doc. WT/DS170/AB/R (adopted Oct. 12, 2000).

²⁶⁴ Panel Report, *Canada – Term of Patent Protection*, WTO Doc. WT/DS170/R (adopted May 5, 2000).

²⁶⁵ Appellate Body Report, *Canada – Term of Patent Protection*, WTO Doc. WT/DS170/AB/R ¶ 201 (adopted Sept. 18, 2000).

²⁶⁶ TRIPS Agreement, *supra* note 15, art. 33.

²⁶⁷ TRIPS Agreement, *supra* note 15, art. 70.2.

²⁶⁸ Term of Patent Protection, *supra* note 264, ¶ 103.

²⁶⁹ Award of the Arbitrator, *Canada – Term of Patent Protection*, WTO Doc. WT/DS170/10 ¶ 35 (Feb. 28, 2001).

In the third TRIPS dispute to reach the Appellate Body level, the European Communities requested consultations in 1999²⁷⁰ over section 211 of the U.S. Omnibus Appropriations Act,²⁷¹ citing violations of sixteen sections and subsections of TRIPS.²⁷² Section 211 states that no trademark, “trade name, or commercial name that is the same as or substantially similar to a mark, trade name, or commercial name” which was confiscated will be recognized or enforced, unless the original owner or successor in interest expressly consents.²⁷³ A panel in 2001 held that most of Section 211 is either consistent with, or not inconsistent with, TRIPS.²⁷⁴ The Appellate Body in 2002, however, disagreed, holding that section 211 was inconsistent with TRIPS.²⁷⁵ Trade names must be protected by member nations,²⁷⁶ and not recognizing intellectual property rights in one country, which affect another WTO country, violates the TRIPS Agreement.²⁷⁷ In 2016, the U.S. notified the WTO that legislation has

²⁷⁰ Request for Consultations, *United States – Section 211 Omnibus Appropriation Act of 1998*, WT/DS176/1 (July 15, 1999).

²⁷¹ Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1999).

²⁷² TRIPS Agreement, *supra* note 13 art. 2, 2.1, 3, 3.1, 4, 15, 16.1, 17, 18, 19, 10, 21, 41, 42, 62.

²⁷³ Omnibus Act of 1999, *supra* note 246.

²⁷⁴ Panel Report, *United States – Section 211 Omnibus Appropriation Act of 1998*, WTO Doc. WT/DS176/R para. 9.1 (adopted Aug. 6 2001). Section 211(a)(2) was inconsistent with TRIPS; *Id.*

²⁷⁵ Appellate Body Report, *United States – Section 211 Omnibus Appropriation Act of 1998*, WTO Doc. WT/DS176/AB/R (adopted Jan. 2, 2002).

²⁷⁶ *Id.* ¶ 341.

²⁷⁷ *Id.* ¶¶ 362-3 The appellate body was not ruling on confiscation or expropriation of intellectual property within a member nation which did not affect other member nations. *Id.* ¶362.

been introduced in the 114th Congress and that the U.S. will continue to work on a resolution.²⁷⁸

The fourth and fifth TRIPS disputes resulting in an appellate body report resulted in a joint appellate body report on June 9, 2020,²⁷⁹ after the Appellate Body was unable to function due to lack of members. These two disputes are both against Australia over certain measures concerning trademark, geographical indications, and other plain packaging requirements for tobacco products.²⁸⁰ Honduras requested consultations in April of 2012,²⁸¹ and the Dominican Republic requested consultations in July of 2012.²⁸² Panel reports circulated in 2018²⁸³ found that the

²⁷⁸ Status Report, *United States – Section 211 Omnibus Appropriation Act of 1998*, WTO Doc. WT/DS176/11/Add.156 (Jan. 15, 2016).

²⁷⁹ Appellate Body Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications, and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS435/AB/R; WT/DS441/AB/R (adopted June 9, 2020) (Appellate panelists Shree Servansing, whose term expired in 2018, and Ujal Bhatia and Thomas Graham, whose terms expired December 20, 2019).

²⁸⁰ Request for Consultation, *Australia – Certain Measures Concerning Trademarks, Geographical Indications, and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS441 (April 4, 2012) [hereinafter *Dominican Republic Request*]; Request for Consultation, *Australia – Certain Measures Concerning Trademarks, Geographical Indications, and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS435 (April 4, 2012) [hereinafter *Honduras Request*].

²⁸¹ Honduras Request, *supra* note 280.

²⁸² Dominican Republic Request, *supra* note 280.

²⁸³ Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications, and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS441/R; WT/DS441/R; WT/DS458/R; WT/DS467/R (adopted June 28, 2018) The panels did not find Australia's measures inconsistent with TRIPS or the Paris Convention. The Dominican

two countries bringing the disputes had not proven that Australia’s plain packaging rules for tobacco violated the TRIPS Agreement or the Paris Convention. On appeal, the joint Appellate Body report held that the two countries bringing the dispute had not proven that the panel erred in its conclusions.²⁸⁴ Accordingly, the Appellate Body upheld the panel report and made no recommendation to the DSB.²⁸⁵

Thus, in the five disputes resulting in appellate body reports, three countries were successful in their claims, all within the first decade of TRIPS, and the last two were unsuccessful in 2020.

V. CURRENT ISSUES WITH TRIPS AND THE DSU

A. *Least Developed Nations and TRIPS Extension*

Least developed countries were given an extension of the transition period under the original TRIPS Agreement until July 1, 2013, or until they ceased being a least developed country, whichever occurred first.²⁸⁶ This was extended until July 1, 2021, and on June 29, 2021, was extended thirteen years until 2034.²⁸⁷ There are no WTO

Republic and Honduras appealed; the appeals were joined. The appellate body reports were circulated on June 9, 2020. *Id.*

²⁸⁴ Appellate Body Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications, and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/AB/R; WT/DS441/AB/R (circulated June 9, 2020).

²⁸⁵ *Id.* at 232.

²⁸⁶ TRIPS Agreement, *supra* note 15 at art. 66.1.2.1. This exemption excepted articles 3, 4, and 5; Appellate Body Report, *Australia – Certain Measures Concerning Trademarks*, *supra* note 259 at 232.

²⁸⁷ WTO, WTO Members Agree to Extend TRIPS Transition Period for LDCs until 1 July, 2034, June 29, 2021, *available at* WTO | 2021 News items - WTO members agree to extend TRIPS transition period for

definitions of developed or developing countries.²⁸⁸ Members or potential members state what level of development they are, which isn't automatically accepted by the WTO. Currently, there are thirty-five least-developed country members of the WTO,²⁸⁹ with eight more least-developed member nations requesting entry.²⁹⁰ The WTO Council for TRIPS in 2015 extended the transition period for least developed countries concerning certain obligations for pharmaceutical products until 2033.²⁹¹

B. COVID-19 Vaccine Patent Waiver

A current issue under TRIPS is whether there should be a COVID-19 vaccine patent waiver. At the June

LDCs until 1 July 2034 (last visited July 22, 2021) [<https://perma.cc/6WNH-5A55>].

²⁸⁸ *Understanding the WTO, Least Developed Countries*, WTO (last visited July 22, 2021), https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm

[<https://perma.cc/6C95-ECR8>].

²⁸⁹ *Id.* The LDCs are Afghanistan, Angola, Bangladesh, Benin, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Congo, Djibouti, Gambia, Guinea, Guinea Bissau, Haiti, Lao, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Senegal, Sierra Leone, Solomon Islands, Tanzania, Togo, Uganda, Yemen, and Zambia. *Id.*

²⁹⁰ *Id.* The least developed countries requesting entry are Bhutan, Comoros, Ethiopia, Sao Tome and Principe, Somalia, South Sudan, Sudan, and Timor-Leste. *Id.*

²⁹¹ WTO Council for TRIPS, *Extension of the Transition Period Under Article 66.1 of the TRIPS Under Article 66.1 of the TRIPS Agreement for Least Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products*, WTO (last visited July 22, 2021), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?CatalogueIdList=228924,135697,117294,75909,77445,11737,50512,1530,12953,20730&CurrentCatalogueIdIndex=1 [<https://perma.cc/5GF3-CDCC>].

2021 Council for TRIPS meeting,²⁹² a coalition of over sixty delegations brought a proposal for a waiver for at least three years related to the prevention, treatment, and containment of COVID-19.²⁹³ Katherine Tai, U.S. Trade Representative since March 2021 stated in May 2021 that the Biden Administration supports a COVID-19 vaccine patent waiver at the WTO.²⁹⁴ COVID-19 vaccine patent holder Moderna has pledged not to enforce its patent rights against vaccine manufacturers during the pandemic.²⁹⁵

The European Union proposed in June 2021 a three-prong approach to provide equitable access to COVID-19 vaccines: “trade facilitation and disciplines on export restrictions,” expanding production including pledges by vaccine developers and producers, and TRIPS flexibility on compulsory licenses.²⁹⁶ The TRIPS Agreement allows for compulsory licenses if there have been efforts for a reasonable time period to get a license on reasonable commercial terms, but this requirement to try to get a license for a reasonable time period may be waived in times of national emergency, extreme urgency, or a public non-

²⁹² Members Approach, *supra* note 8.

²⁹³ Council for Trade-Related Aspects of Intellectual Prop. Rights, *Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19*, ¶¶ 1-2, WTO Doc. IP/C/W/669/Rev.1, annex (May 25, 2021).

²⁹⁴ *Statement from Ambassador Katherine Tai on the Covid-19 TRIPS Waiver*, OFF. OF U.S. TRADE REP. (May 5, 2021), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/statement-ambassador-katherine-tai-covid-19-trips-waiver> [<https://perma.cc/WV4Y-UH87>].

²⁹⁵ *Statement by Moderna on Intellectual Property Matters During the COVID-19 Pandemic*, MODERNA (Oct. 8, 2020, 6:39 AM EDT), <https://investors.modernatx.com/news-releases/news-release-details/statement-moderna-intellectual-property-matters-during-covid-19> [<https://perma.cc/5DSQ-2B3U>].

²⁹⁶ Council for Trade-Related Aspects of Intellectual Prop. Rights, *Urgent Trade Policy Responses to the COVID-19 Crisis: Intellectual Property*, ¶ 4, WTO Doc. IP/C/W/680 (June 4, 2021).

commercial use.²⁹⁷ The compulsory license is to be used “predominantly” for the domestic market in the country using the compulsory license.²⁹⁸

The compulsory license provision has come up in one dispute at the WTO.²⁹⁹ The United States raised the issue of failure to provide safeguards for granting a compulsory license, among other claims, in a dispute brought against Argentina in 2000 which was settled or terminated in 2002.³⁰⁰

C. *Appellate Body Standstill Due to No Appellate Body Panelists*

The WTO at the time of this writing is at an impasse concerning appointments of panelists to the appellate body. The United States Trade Representative stated in 2018 that for more than fifteen years and during many administrations, there have been serious concerns by the U.S. and other member nations about the WTO appellate body’s disregard for WTO rules in many areas.³⁰¹ Unless these concerns were addressed, the United States was not going to participate in the process of filling appellate body vacancies.³⁰² The Biden Administration also has not agreed to appoint new appellate body panelists.³⁰³

²⁹⁷ TRIPS Agreement, *supra* note 14, art. 31(b).

²⁹⁸ *Id.* art. 31(f).

²⁹⁹ Request for Consultations by the United States, *Argentina–Certain Measures on the Protection of Patents and Test Data*, WTO Doc. WT/DS196/1 (June 6, 2000).

³⁰⁰ *Id.*

³⁰¹ OFF. OF THE U.S. TRADE REP., 2019 TRADE POLICY AGENDA AND 2018 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENT PROGRAM, 148 (2019).

³⁰² *Id.*

³⁰³ Hye Jin Lee, *The Challenges That Lie Ahead of the WTO and Its New Chief*, COLUM. J. OF TRANSNAT’L L: THE BULL. (Apr. 15, 2021)

In December 2019, the WTO’s Dispute Resolution Body (hereinafter DRB) had only one remaining appellate body panelist³⁰⁴ and thus was unable to continue hearing appeals in the requisite three person panels.³⁰⁵ Since then, the last panelist completed her term in 2020.³⁰⁶

The United States calls the WTO an “important institution,” and the U.S. states that it has a strong track record of building coalitions, brining non-conforming countries into compliance, advancing transparency, and reducing the need to resort to dispute resolution.³⁰⁷ The U.S., however, has grown increasingly concerned about the activist approach taken by the appellate body at the WTO on substantive and procedural issues.³⁰⁸ “Appellate Body reports, like those of any other judicial and arbitral body, are not all uniformly sound and perfectly reasoned.”³⁰⁹ Other members such as the E.U. also share some concerns.³¹⁰ One hundred nineteen member countries in December of 2019 issued a joint call to fill appellate body vacancies, but the U.S. has stated that fundamental

<https://www.jtl.columbia.edu/bulletin-blog/wto-and-its-new-chief>
[<https://perma.cc/X2AH-M222>].

³⁰⁴ *Appellate Body Members*, WTO TRADE TOPICS, https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm [<https://perma.cc/M6E9-UA5B>] (last visited July 19, 2021) (stating that the term of the last remaining appellate body member expired in November of 2020).

³⁰⁵ DSU, *supra* note 5, art. 17.1.

³⁰⁶ WTO TRADE TOPICS, *supra* note 304.

³⁰⁷ OFF. OF THE U.S. TRADE REP., 2018 TRADE POLICY AGENDA AND 2019 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENT PROGRAM, 28 (2018).

³⁰⁸ *Id.*

³⁰⁹ Padideh Ala’i, *The Vital Role of the WTO Appellate Body in the Promotion of Rule of Law and International Cooperation: A Case Study*, 44 Yale J. Int’l L. Online *86, *94 (2019).

³¹⁰ CATHLEEN D. CIMINO-ISAACS & RACHEL F. FEFER, CONG. RSCH. SERV., WORLD TRADE ORGANIZATION: OVERVIEW AND FUTURE DIRECTION 48 (2020).

problems still exist and thus reforms are needed³¹¹ before appellate panelists can be confirmed.

These concerns include: timeliness in completing appeals under the DSU Agreement,³¹² appellate body panelists staying on after the end of their term to complete appeals,³¹³ overreach by appellate panelists who overturn questions of fact when they are to review only questions of law, issuance of advisory opinions, elevating certain prior appellate rulings to create near precedent, and going beyond the text of the agreements.³¹⁴ Reforms have been proposed,³¹⁵ including those by New Zealand's WTO Representative Walker, who in 2019 made proposals. These proposals include: to make the appellate body adhere to the ninety-day deadline on filing appellate body reports, to make appellate body panelists leave at the end of their second term, to treat facts as such, to use prior decisions only as necessary, to raise only issues brought forth by the parties, not to issue advisory opinions, and to adhere to the WTO substantive rules.³¹⁶ Further, an oversight committee should be established and audits conducted, according to

³¹¹ *Members urge continued engagement on resolving Appellate Body issues*, WTO: NEWS (Dec. 18, 2019) https://www.wto.org/english/news_e/news19_e/dsb_18dec19_e.htm [<https://perma.cc/JWX3-U68D>].

³¹² DSU, *supra* note 5 art. 20.

³¹³ *See, e.g.*, WTO Appellate Body, *supra* note 284, ¶ 1.24. (issuing on June 9, 2020 even though the appellate body was shut down in December of 2019 with one panelist left).

³¹⁴ Jennifer Hillman, *A Reset of the World Trade Organization's Appellate Body*, COUNCIL ON FOREIGN REL. (Jan. 14, 2020), <https://www.cfr.org/report/reset-world-trade-organizations-appellate-body> [<https://perma.cc/HEQ6-CAXZ>].

³¹⁵ BRANDON J. MURRILL, CONG. RSCH. SERV., LSB10385, THE WTO'S APPELLATE BODY LOSES ITS QUORUM: IS THIS THE BEGINNING OF THE END FOR THE "RULES-BASED TRADING SYSTEM"? 2 (2019).

³¹⁶ Hillman, *supra* note 314.

Walker.³¹⁷ Finally, not just appellate body members but also staff should be limited to eight year terms.³¹⁸

Until necessary reforms are implemented, member countries may resort to bilateral and regional trade agreements.³¹⁹ The European Union has established a multiparty interim appeal arbitration arrangement.³²⁰ While not the topic of this article, parties may use mediation or arbitration.³²¹

VI. CONCLUSION

The forty-two TRIPS disputes since inception have resulted in only five appellate body reports, two brought by the United States successfully, and one brought against the United States successfully, still awaiting full implementation.³²² Disputes brought by Honduras and the Dominican Republic against Australia were not successful and resulted in a joint appellate body report issued on June 9, 2020 even though the term of panelists had expired.³²³

All new dispute resolution appeals at the WTO halted in December 2019 because the terms of the appellate

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ MURRILL, *supra* note 315, at 3 (stating that the U.S. is a party to fourteen free trade agreements).

³²⁰ JANA TITIEVSKAIA, EUR. PARL. RSCH. SERV., INTERNATIONAL TRADE DISPUTE SETTLEMENT: WTO APPELLATE BODY CRISIS AND THE MULTIPARTY INTERIM APPEAL ARRANGEMENT 1 (2021) (stating that the U.S. has also criticized the MPIA).

³²¹ See Jennifer Mills, *Alternative Dispute Resolution in International Intellectual Property Disputes*, 11 OHIO ST. J. ON DISP. RES. 227, 227-28 (1996) (offering the example of the WIPO providing intellectual property alternative dispute resolution); *Resolving IP Disputes Through Mediation and Arbitration*, WIPO MAGAZINE (Apr. 2006), https://www.wipo.int/wipo_magazine/en/2006/02/article_0008.html [<https://perma.cc/BWE6-LE6T>].

³²² See *supra* notes 231-285 and accompanying text.

³²³ WTO Appellate Body, *supra* note 284, ¶¶ 1.14, .24.

body panelists expired,³²⁴ and three panelists are required.³²⁵ Since the overall appeal rate is 68%³²⁶ and appeals are at a standstill at the time of this writing, WTO dispute resolution, including the TRIPS disputes, is stymied until a resolution to this impasse is found. Reforms in the system could and should be implemented³²⁷ to overcome the current barriers, and these reforms could make the WTO's dispute resolution system stronger and more trustworthy.

At the time of this writing, another TRIPS issue is the patents on the COVID-19 vaccine, and there are several suggested routes to get the COVID-19 vaccines to the world. Some countries, including the U.S.,³²⁸ want a complete waiver. Other WTO members such as the EU suggest using compulsory license.³²⁹ A compulsory license might be the easier and quicker route of the two approaches because WTO documents do not need to be changed.³³⁰ Under either waiver or compulsory license, there remains the problem of COVID-19 vaccine manufacture and technical requirements which are quite complex. Having the patent license or the waiver is necessary but not sufficient to develop a COVID-19 vaccine effectively and efficiently. "The manufacturing step is very unusual and tricky," and there are few organizations with the expertise

³²⁴ WTO: NEWS, *supra* note 311.

³²⁵ DSU, *supra* note 5 at art. 17.1.

³²⁶ Joost Pauwelyn & Weiwei Zhang, *Busier than Ever? A Data-Driven Assessment and Forecast of WTO Caseload*, 21 J. INT'L. ECON. L. 461, 473 (2018).

³²⁷ See *supra* notes 307-311 and accompanying text.

³²⁸ Tai, *supra* note 294.

³²⁹ Council for TRIPS, *supra* note 296 ¶ 4.

³³⁰ See Dina Halajian, *Inadequacy of TRIPS & the Compulsory License: Why Broad Compulsory Licensing is Not a Viable Solution to the Access Medicine Problem*, 38 BROOK. J. INT'L L. 1191, 1198 (2013).

and scale to make the mRNA vaccines.³³¹ So while least developed countries have a patent waiver until 2034, it is unlikely that the vaccines could be produced in least developed countries.³³² While there is an urgent and dire need for COVID-19 vaccines worldwide due to the pandemic and variants, perhaps the best option currently is for existing successful COVID-19 patent holders and manufacturers to produce and distribute at full scale pending any different resolution. This route retains the incentive to innovate in future pandemics and emergencies.

³³¹ Anthony King, *Why manufacturing Covid vaccines at scale is hard*, CHEMISTRY WORLD: NEWS (Mar. 23, 2021), <https://www.chemistryworld.com/news/why-manufacturing-covid-vaccines-at-scale-is-hard/4013429.article> [https://perma.cc/3GLV-RYMU].

³³² *Supra*, note 330.