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APPLICATION OF THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS) IN RELATION TO PATENTS AND TRADEMARKS, IN VENEZUELA

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Venezuela has been a Member of the World Trade Organization (WTO) since its beginning, when the Marrakesh Agreement which created the WTO came into force¹. That Agreement has several annexes, one of which is the Agreement on Trade-Related Aspects of Intellectual Property Rights, hereinafter identified as the "TRIPS Agreement".

Article 1.1 of that agreement provides that "Members shall apply the provisions of this Agreement", which implies that all Members have an obligation, not merely the option, to apply the TRIPS Agreement.

However, the Venezuelan authority on intellectual property issues, namely the Autonomous Intellectual Property Service (SAPI for its acronym in Spanish) has not been applying the TRIPS Agreement with respect to trademarks and inventions, based on the following argumentation:

"Although the Industrial Property Law is outdated, it is not in total contradiction with international standards relating to the subject matter. It does not cover certain aspects of the international agreements signed by the Republic in this area. It should be noted that, as regards to the applicability of TRIPS and the Paris Convention of 1883, such rules could not be applied directly in the substantive aspects of trademarks and patents for inventions, since there is no law that has recast the text of those rules and there is no legal provision ordering the renvoi for their application for the regulation of substantive aspects of trademarks and inventions. While the Marrakesh Agreement, the Paris Convention and Article 98 of the Constitution of the Bolivarian Republic of Venezuela provide for the duty to implement these treaties, this means that the Venezuelan State must issue a law that develops such international regulations (since such treaties

¹ The Approving Law of the Marrakesh Agreement was published in the Official Gazette of the Republic of Venezuela N° 4.829 Extraordinary of 29 December 1994.

are programmatic), but the direct application of the provisions of those treaties in substantive and adjective aspects of trademarks and inventions is not possible”^{2,3}

This interpretation from SAPI prevented the application of the provisions of the TRIPS Agreement in Venezuela with respect to trademarks and patents, in clear violation of the provisions of that Agreement and of the Approving Law of the Marrakesh Agreement, which ordered its application by adopting Article 1 of the TRIPS Agreement. This interpretation also contradicts the doctrine set out in several judgments of the Venezuelan Supreme Court of Justice on the application of treaties, with force of law, under their corresponding Approving Law.

We note, however, that this interpretation was not uniform for all areas of intellectual property covered by the TRIPS Agreement. Thus, in the case of appellations of origin, SAPI expressed:

“The International treaties signed by the Republic are: The Paris Union Convention for the Protection of Industrial Property, the Agreement on Trade-Related Aspects of Intellectual Property Rights (...); as well as the Southern Common Market Regional Integration Treaty (MERCOSUR) and its protocol for harmonizing industrial property rules in MERCOSUR; which ... provide protection to, and order Member States to give protection to the figure of Appellations of Origin, which is covered by the character of constitutional legality in accordance with the content of article 153 of the Constitution of the Bolivarian Republic of Venezuela, which requires that the rules adopted under integration agreements be considered an integral part of the current legal order and of direct and preferential application to domestic legislation”⁴

In other words, as regards trademarks and patents, SAPI maintained that a law (in addition to the Approving Law of the Marrakesh Agreement) was necessary to apply the provisions of the TRIPS Agreement, while the Approving Law of the Protocol of Accession of the Bolivarian Republic of Venezuela to Mercosur was sufficient for appellations of origin, without requiring another law. SAPI also argued that in Mercosur exists the "Protocol on Harmonization of Industrial Property Standards", which would be "... integral part of the current legal order and of direct and preferential application to domestic legislation", as it is a provision approved under an economic integration agreement. It is surprising that SAPI has maintained such an interpretation on appellations of origin and has not extended it to trademarks, given that the correct name of the Protocol referred to in those Decisions is "Protocol on Harmonization of Intellectual Property Standards in MERCOSUR, on Trademarks, Indications of Origin and Appellations of Origin"⁵ and that Article 2 of that Protocol provides that "State Parties undertake to observe the rules and principles of the Paris Convention for the Protection of Industrial Property (Stockholm Act 1967) and the Agreement on Trade-Related

² Industrial Property Bulletin N° 497. Decision dated 5 November 2008.

³ Bold are ours.

⁴ Industrial Property Bulletin N° 538, Decisions 238 and 239 dated 10 November 2016.

⁵ Decision of the Mercosur/CMC/DEC Common Market Council of 08/95 of 5 August 1995.

Aspects of Intellectual Property (1994), annexed to the Agreement on the Establishment of the World Trade Organization (1994)."

However, on October 1st 2020, SAPI published its Official Notice N° DG-09-2020, informing that as from that date "... the substantive and adjective rules for obtaining and defending rights that are more favorable to those administered, contained in the TRIPS Agreement, will be applied directly...", and therefore "... interested parties may invoke those provisions in the applications made to this Autonomous Service, as well as those of other international agreements on the subject to which TRIPS refers and which have also been incorporated into the domestic order by the corresponding approving law."

The SAPI states that it made that decision because article 23 of the Constitution "... orders the immediate and direct application in the domestic order of international treaties relating to human rights, where they contain more favorable rules on their enjoyment and exercise to those provided for in the Constitution itself and the laws", and because intellectual property rights are human rights, "because they aim at the encouragement and protection of creations , in accordance with Article 98 of the Constitution".

We welcome this rectification of SAPI, which expresses the recognition of at least two elements that were not present in some of the SAPI's decisions, namely that intellectual property rights are human rights, and that accordingly, the provisions of the TRIPS Agreement must be applied in Venezuela, with constitutional hierarchy and prevailing, "... in the domestic order, to the extent that they contain rules on their enjoyment and exercise more favorable than those established in this Constitution and in the laws of the Republic...", and that "... are of immediate and direct application by the courts and other bodies of the public administration"⁶

This rectification implies that from now on, the cornerstone of the Venezuelan legal order as regards the protection of intellectual property rights will be the TRIPS Agreement, while the Industrial Property Law of 1956, which have been the main law on these issues since the effects of Venezuela's exit from the Andean Community ended, remains only in a subsidiary role. Venezuela's exit from the Andean Community meant the termination of the application of Decision 486 and other rules of the Andean legal order, which were consistent with TRIPS.

Based on this decision of SAPI, we must expect significant changes in favor of greater protection of intellectual property rights in Venezuela, in different areas related to trademarks and patents, including the patenting of pharmaceuticals, food and beverages and the possibility of registering three-dimensional marks and collective marks.

This is undoubtedly an important step in improving the protection of intellectual property rights in Venezuela, which should take us, to the extent that the TRIPS rules actually apply, to the minimum level of protection required of WTO Members.

⁶ Both quotations from article 23 of the Constitution.

Clearly, there is still a long way to go to achieve levels of protection of these rights which would allow Venezuela to differentiate from other WTO Members which also apply the minimum standard (TRIPS), and therefore, to encourage investments by companies where goods protected by intellectual property rights are among their most important assets. That is a path which must be traveled towards the recovery of the Venezuelan economy.

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