



CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

**PRELIMINARY COMMENTS ON TRIPS-RELATED ASPECTS
OF FIRST DRAFT MINISTERIAL DECLARATION AND FIRST
DRAFT DECISION ON IMPLEMENTATION: IMPLICATIONS
FOR DEVELOPING COUNTRIES
(TEXTS OF SEPTEMBER 2001)**

**BY
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TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. MINISTERIAL DECLARATION.....	1
1. GENERAL OBSERVATIONS	1
2. TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS	1
3. TRADE AND TRANSFER OF TECHNOLOGY	2
4. COMMITTEES OF TRADE AND DEVELOPMENT AND TRADE AND ENVIRONMENT	3
II. IMPLEMENTATION DECISION.....	3
ANNEX I.....	5
ANNEX II.....	5
ANNEX III.....	6
ANNEX IV	7

I. INTRODUCTIONⁱ

The note provides some preliminary observations on the draft Ministerial Declaration and draft Implementation Decision, as they relate to issues of intellectual property and the TRIPS Agreement. Both drafts raise concerns from a developing country perspective, and fail to adequately address a number of issues raised by developing countries in the TRIPS Council. Furthermore, the drafts fail to reflect the many developing country contributions and proposals, and ignore the overarching need to rebalance the TRIPS Agreement. The text below deals first with the Ministerial Declaration, then with the Implementation Decision.

II. MINISTERIAL DECLARATION

1. *General Observations*

Before offering some specific comments on the intellectual property-related sections of the draft, we make the following two general points about the Ministerial Declaration.

First, the draft text avoids carefully the use of the words “round”, substituting it by “work program”. The proposals are presented as part of a single undertaking, according to paragraph 36, which states “when the results of the negotiations in all areas have been established, a special session of the Ministerial Conference will be held to take decisions regarding the adoption and implementation of those results”. Nevertheless, the single undertaking principle is weakened by paragraph 38, which states “agreements reached at an early stage may be implemented on a provisional or definitive basis”. The effect of this provision is unclear, but may conceivably allow powerful governments to gain an early harvest on issues that interest them, reducing the possibility of a balanced packaged of final results (e.g. recall the stand-still in e-commerce).

Second, public health concerns are *not* covered in this draft. If health issues are to be addressed in a separate declaration, then presumably some cross-reference should be made in this declaration.

The draft Declaration has three main sections relevant to intellectual property, entitled: *Trade-Related Aspects of Intellectual Property Rights* (paragraphs 14 to 17); *Trade and Transfer of Technology* (paragraphs 32); and *Organization and Management of the Work Programme* (paragraphs 36 to 42).

2. *Trade-Related Aspects of Intellectual Property Rights*

This section of the draft text addresses TRIPS-related issues using a very generalized “political” approach, rather than according a legal hierarchy of issues (as was done in Seattle, and has been done in the TRIPS Council Agenda). It includes some text that could be welcomed by developing countries, including references to the Convention on Biological Diversity, the protection of traditional knowledge and, implicitly, the use of Articles 7 and 8 and the development dimension as a guide for work in the TRIPS Council. Nevertheless, the draft also raises a number of concerns, including the following:

- The references to negotiations on geographical indications are unclear. Paragraph 14's mandate "to complete negotiations on the establishment of a multilateral system for notification and registration of geographical indications for wines and spirits", orders finalization of the Article 23.4 negotiations, and seems to place on the same level the legal mandates for negotiation on wines (Article 23.4) and spirits (the Singapore Ministerial declaration). Paragraph 15 leaves open the issue of whether the TRIPS Council shall examine issues related to possible negotiations, or negotiate, the extension of protection of geographical indications to additional product areas. This reflects a divergence of views among WTO Members, both developed and developing countries. It is unclear whether the paragraph 17 establishes a deadline for the establishment of the multilateral system.
- Paragraph 16 of the draft fails to explicitly identify the mandates – such as the Article 27.3(b) review – that are important to developing countries. Two specific concerns arise. First, it fails to differentiate between specific elements of the TRIPS work-program. For example, it ignores the specific mandates and content of the Article 27.3(b) and Article 71.1 reviews, and seems to blend these into one comprehensive approach. It also conflates examinations (e.g. of non-violation complaints in Article 64.3) and reviews (Articles 27.3b and 71.1), and fails to identify the periods for mandated reviews and examinations. The effect of this is unclear, but may undermine the specific focus of the reviews. Second, paragraph 16 could be interpreted as giving the TRIPS Council a stronger mandate on issues of interest to the North ("keeping the TRIPS Agreement abreast of new technological and other developments"), than to those of the South ("give due attention to ... the protection of traditional knowledge").ⁱⁱ In addition, the explicit reference to "technological ... developments" is more specific than the Article 71.1 language, which refers to "any relevant new developments". Is this a hidden mandate to address biotechnology and e-commerce? Third, paragraph 16 fails to raise many issues discussed in the TRIPS Council. For example, it fails to address the definition of microorganisms, *sui generis* systems, and other issues raised as part of the Chair's list of issues.
- The text is unclear about the mandate given to the TRIPS Council for future work. According to paragraph 17, "the TRIPS Council shall report on the progress of its work set out above to the General Council at the end of 2002 and submit a final report to the Fifth Session of the Ministerial Conference, which shall decide on further action". The implications of the term "final report" are unclear. It may imply that the issues identified in paragraph 16 (including those that fall within the Article 27.3(b) review) must be "finalized" by the Fifth Session of the Ministerial Conference. The term final report, however, does not identify the need for recommendations. Would the issuance of a "final report" (e.g. just stating facts, not recommendations) make it more difficult for developing countries to keep alive their relevant issues?

3. Trade and Transfer of Technology

Paragraph 32 establishes a mandate for the General Council to "consider the most appropriate institutional arrangements" for an examination of the relationship between trade and transfer of technology. While the mandate notes the need to *increase flows* of technology to developing countries, it falls short of the joint developing country

proposal for a horizontal working group on technology transfer. Moreover, it would delay until the Fifth Ministerial (2 years) simply making recommendations on the most appropriate institutional arrangement for addressing this issue. Developing countries may wish to push to strengthen this text to reflect their technology transfer proposals.

4. *Committees of Trade and Development and Trade and Environment*

The Committees of Trade and Development and Trade and Environment would have, according to paragraph 41, an “advisory” role within their respective mandate. The role also includes identification and debate on development and environmental aspects. It also recalls the WTO objective of sustainable development, opening the door for producing advice on issues related to the CBD. Nevertheless, it remains unclear how the recommendations of these Committees would be taken into account as a practical matter.

II. IMPLEMENTATION DECISION

The text of the Ministerial Declaration must be read in conjunction with the Implementation Decision. The text of Implementation Decision recognizes some immediate actions, and offers several recommendations to the Ministers based on proposals to be addressed during the WTO’s future work program as provided in the draft ministerial decision. Many of these are just recognition of the progress already made in several WTO bodies.

The implementation text is poor in content, and limited in scope. Only two points address implementation of the TRIPS Agreement: one relates to Article 66.2, and the other to the definition of scope and modalities of the non-violations complaints. Also the draft lacks immediate concessions to rebalance the TRIPS Agreement. In addition to these comments, we have the following two specific comments:

- This draft fails to examine the implementation of the TRIPS Agreements technology transfer objectives as set out in Article 7. It’s only reference to technology transfer, relates to Article 66.2. In the section of immediate action (Annex I point 9 - which is more a section on medium-term tasks), there is an obligation to submit information on measures implementing Article 66.2. These submissions shall be subject to a new review. The result of that review will help to establish an illustrative list of incentives for technology transfer for least developing countries (no decision is made in relation to extending this benefit to developing countries). This exercise is a good start for least developing countries. Together with some technical support, it can build some pressure on developed countries to assume their obligations. Also to have an illustrative list could help to make the obligation of Article 66.2 more enforceable. The exercise could be complemented with an upcoming UNCTAD expert meeting to identify useful incentives for fulfilling the purposes of Article 66.2. While beneficial to least developed countries, however, measures for operationalizing Article 66.2 do not necessarily assist other developing countries with technology transfer.
- In Annex II point 7, Ministers are asked to call for a continuation of the examination of scope and modalities of the non-violation claims and to make recommendation to

the Fifth Ministerial Conference. It also includes a moratorium for not initiating those complaints during this period (2 years). This text does not address the developing countries underlying concern that non-violations should not apply to the TRIPS Agreement, but rather perpetuates the potential for its future application. In this sense a more permanent solution should be encouraged.

ANNEX I

TRIPS' DRAFT OF WTO MINISTERIAL DECLARATION FOR DOHA

September 2001

TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTSⁱⁱⁱ

14. We agree to complete negotiations on the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits.

15. We agree [that the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS Council) shall examine issues related to possible negotiations on][to negotiate] the extension of the protection of geographical indications provided for in Article 23 to additional product areas.

16. We instruct the TRIPS Council, in pursuing its work programme, to give due attention to the relationship between the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the Convention on Biological Diversity, the protection of traditional knowledge, non-violation complaints, and keeping the TRIPS Agreement abreast of new technological and other developments. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles of the TRIPS Agreement and shall take fully into account the development dimension.

17. The TRIPS Council shall report on the progress of its work set out above to the General Council at the end of 2002 and submit a final report to the Fifth Session of the Ministerial Conference, which shall decide on further action.

ANNEX II

TECHNOLOGY TRANSFER DRAFT OF THE WTO MINISTERIAL DECLARATION FOR DOHA

September 2001

TRADE AND TRANSFER OF TECHNOLOGY

32. We agree to an examination, under the auspices of the General Council, of the relationship between trade and transfer of technology, and of any possible recommendations on steps that might be taken within the mandate of the WTO to increase flows of technology to developing countries. We instruct the General Council to consider the most appropriate institutional arrangements for handling this examination and to report on progress to the Fifth Session of the Ministerial Conference.

ANNEX III

ORGANIZATIONAL PRINCIPLES DRAFT OF THE WTO

MINISTERIAL DECLARATION FOR DOHA

September 2001

ORGANIZATION AND MANAGEMENT OF THE WORK PROGRAMME

36. The negotiations to be pursued under the terms of this Declaration shall be concluded not later than The Fifth Session of the Ministerial Conference will take stock of progress in the negotiations, provide any necessary political guidance, and take any decisions as necessary. When the results of the negotiations in all areas have been established, a Special Session of the Ministerial Conference will be held to take decisions regarding the adoption and implementation of those results.

37. The overall conduct of the negotiations shall be supervised by a Trade Negotiations Committee under the authority of the General Council. The Trade Negotiations Committee shall hold its first meeting not later than It shall establish appropriate negotiating mechanisms as required and supervise the progress of the negotiations.

38. The conduct, conclusion and entry into force of the outcome of the negotiations shall, with the exception of those related to the amendment of the Dispute Settlement Understanding, be treated as parts of a single undertaking. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis. Early agreements shall be taken into account in assessing the overall balance of the negotiations.

39. Negotiations shall be open to:

- (i) all Members of the WTO;
- (ii) States and separate customs territories that inform Members, at a regular meeting of the General Council, of their intention to negotiate the terms of their membership and for whom an accession working party is established.

Decisions on the outcomes of the negotiations shall be taken only by WTO Members.

40. The negotiations shall be conducted in a transparent manner among participants, in order to facilitate the effective participation of all. They shall be conducted with a view to ensuring benefits to all participants and to achieving an overall balance in the outcome of the negotiations.

41. The Committee on Trade and Development and the Committee on Trade and Environment will, within their respective mandates, each act as a forum to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected in the negotiations.

42. The Work Programme as a whole must evolve in a balanced and forward-looking manner which responds to the diverse challenges faced by Members. Those elements which do not involve negotiations are also accorded a high priority. They will be pursued under the overall supervision of the General Council, which shall report on progress to the Fifth Session of the Ministerial Conference.

ANNEX IV

TRIPS IMPLEMENTATION DRAFT OF THE WTO MINISTERIAL DECLARATION FOR DOHA

September 2001

7. TRIPS Agreement

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"The Ministerial Conference directs the TRIPS Council to continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 and make recommendations to the Fifth Session of the Ministerial Conference. The Ministerial Conference agrees that Members, in the meantime, will not initiate such complaints."

ⁱ The views expressed are those of the authors and do not necessary reflect those of CIEL, South Centre or The Rockefeller Foundation.

ⁱⁱ The Ministerial Declaration only includes language requiring the TRIPS Council to give "due attention" on areas where developing countries have manifested interest. This language is weak; "due attention" in the minds of some powerful WTO Members means "very little". By contrast, in areas of less importance to developing countries, the stronger obligation exists of "keeping" the TRIPS agreement "abreast" (meaning "along side" or "side by side" according to the Oxford English Dictionary) with the new technological developments (e.g. internet, biotechnology, and new business procedures) and other developments (e.g. any new WIPO treaty).

ⁱⁱⁱ *It is proposed that the issue of the relationship between intellectual property and [access to medicines][public health] be addressed in a separate declaration.*