



CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

**BRIEF ON THE TREATMENT OF INTELLECTUAL
PROPERTY IN THE DOHA WTO MINISTERIAL
DECLARATION: MANDATED NEGOTIATIONS
AND REVIEWS**

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I. INTRODUCTION

This brief provides some observations on the results of the fourth WTO Ministerial meeting at Doha, as they relate to issues of intellectual property and the TRIPS Agreement, in light of developing countries' concerns. Four texts will be analyzed in an integrated manner, including the Ministerial Declaration², the Decision on TRIPS and Public Health³, the Decision on Implementation Issues and Concerns⁴, and the Compilation of Outstanding Issues raised by Members⁵. All texts present opportunities and risks from a developing country perspective, and fail to adequately address a number of issues raised by developing countries in the Doha pre-negotiation phase. Furthermore, the need for rebalancing the TRIPS Agreement and to take into account the interests of developing countries remains to be undertaken in the new WTO work programme.

This brief will give some general comments of possible legal interpretations and will present the opportunities and risks in mandated negotiations and reviews for developing countries. It will also introduce some ideas on possible strategic options for the upcoming work programme on intellectual property and related issues. The brief will analyze all Ministerial texts and the mandated work in the TRIPS Council and in the Committee of Trade and Environment (CTE).

II. GENERAL COMMENTS ON POSSIBLE LEGAL INTERPRETATIONS.

A. The interpretation of the work programme on intellectual property and related issues must be comprehensive and interlinked.

Due to the horizontal effects of technology in our societies and its overall impact on trade and development, the work on intellectual property (IP) has been dispersed in different Ministerial texts and in specific parts of those texts. IP issues seemed to be politically sensitive to many developed countries during negotiations. In that sense, a great deal of resistance was found when proposals were presented by developing countries to rebalance the TRIPS Agreement in the Ministerial negotiations, generating particularly ambiguous references in the different texts.

Most of the major gains for developing countries are not found in the TRIPS text of the Ministerial Declaration, but in the stand-alone declaration on public health, in the Implementation Decision and in the List of Outstanding Implementation Issues. Some new interesting areas of work for developing countries also include the work programmes of the Committee for Trade and Development, the Committee on Trade and Environment (CTE) and the Working Group on Technology Transfer. Potential opportunities for developing countries must be read horizontally in order to assure real transfer of developing countries' interests in the future result of the negotiations. The Ministerial texts address many issues of different bodies with different political and legal roles. Without integrated interpretations and common actions, results for developing countries could be contradictory or useless.

² WT/MIN/(01)/DEC/W1 of the 14th of November 2001.

³ WT/MIN(01)/DEC/W/2 of the 14th of November 2001.

⁴ WT/MIN(01)/DEC/W/10 of the 14th of November 2001.

⁵ Job(01)/152/Rev.1 of 27 of October.

An integrated approach in the new ministerial context would mean:

- To unify political language with actual legal obligations. This will be needed in the case of the stand-alone declaration on TRIPS and Public Health.
- To have horizontal readings of the text on each issue. For example, services negotiations will be influenced by what happens in competition policy, investment, and transparency in government procurement. The context of other negotiations will have extraordinary effects on the future results.
- To identify interpretation links that enhance developing country opportunities and reduce potential risks. Links must be carefully crafted to promote desired results. Use of weak links might generate futile negotiation exercises.
- To emphasize on implementation issues in the negotiations to the maximum extent possible. Implementation issues must always be the first priority in negotiations. The existence of practical results in relation to implementation issues needs to be a precondition on further work. This would increase the chances of turning negotiations toward developing countries' interests.
- To use properly the content of the section of The Doha Ministerial Declaration on "the organization and management of the work programme". For example, the need for ensuring benefits for all countries should not only be implemented in lists of concessions, but in the legal framework as well (paragraph 49).

B. The language use in the declaration is of a political nature and legally ambiguous. The determination of the legal hierarchy of the mandates will be decisive in future results.

The language of the Ministerial texts is not uniform, and it varies according to the political context and objectives behind each particular paragraph. The type of actions listed in the Ministerial Declaration include among others: *"the work shall be guided, we agree on negotiations, we adopt, to examine, we agree to an examination, shall be improved, shall be clarified, shall be addressed ... as a matter of priority, to give particular attention, to consider, will exercise particular consideration, we urge, we instruct"* etc. Some time the texts use two verbs jointly. Example *"does and should"* or *"can and should"*. Each of these verbs has its particular legal implications and effects.

In the first post Doha meetings, discussions might be directed to recall mandates that are important to each particular country or groups of countries. It will be of fundamental importance for developing countries not only to put emphasis on the content of the new mandates but also to look at their legal hierarchy when compared to others. Many developed countries are already preparing their own classification and their position on the legal hierarchy of all mandates in order to promote those that are appealing for them and to disregard the ones that undermine their interest. In this sense it will be essential for developing countries to identify their priorities and analyze carefully the strength of the mandates that support that list.

C. The work programme on implementation related issues could have dual or multiple interpretations.

The text of the paragraph 12 states:

*"...we further adopt the Decision on Implementation-Related Issues and Concerns in document WT/MIN(01)/W/10 to address a number of implementation problems faced by Members. **We agree that negotiations on outstanding implementation issues shall be an integral part of the Work Programme we are establishing, and that agreements reached at an early stage in these negotiations shall be treated in accordance with the provisions of paragraph 47 below. In this regard, we shall proceed as follows: (a) where we provide a specific negotiating mandate in this Declaration, the relevant implementation issues shall be addressed under that mandate; (b) the other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies, which shall report to the Trade Negotiations Committee, established under paragraph 46 below, by the end of 2002 for appropriate action.**"* (boldface added).

The text on implementation will prove to be very controversial. Paragraph. 12, can be interpreted at least in two manners:

Possible Interpretation A. All implementation issues are under negotiation. Issues that relate to a specific negotiation mandate of the Declaration must be addressed under that mandate. If the outstanding issue does not relate to a specific negotiation (example, textile concerns), negotiations must be addressed as a matter of priority to the relevant body (textile monitoring body), which shall report to the Negotiations Committee. This interpretation is supported by the following arguments:

- The express declaration of members agreeing on negotiations on outstanding implementation issues in paragraph 12,
- The pre Doha negotiating debate established a division between implementation issues the could be address immediately (contained now in the Decision on Implementation issues) and issues that would need amendments of the existing Uruguay round text (contained in the Compilation of Implementation Issues. The existence of division was the one of the main argument of developed countries for not addressing all implementation issues in directly the Implementation Decision and the creation a compilation of outstanding implementation issues.
- The fact that the results of these negotiations shall be reported to the Trade Negotiations Committee, which is the main institutional body that will carry out the negotiation process in the WTO.

Possible Interpretation B. Not all implementation issues are subject to negotiations. Only those issues that relate to a specific negotiation mandate of the Declaration must be addressed under that mandate. Other outstanding issues will be addressed as a matter of priority in the relevant body, which shall report to the Negotiations Committee.

III. IDENTIFICATION OF OPPORTUNITIES FOR DEVELOPING COUNTRIES IN THE MANDATED NEGOTIATIONS AND REVIEWS.

The Doha Ministerial texts address in principle many issues of interest for developing countries. Sometimes, the treatment of IP issues does not correspond to the importance given by developing countries to a particular issue, but to the willingness of developed countries to

address them. This section will present the main opportunities coming from the Doha Ministerial text to developing countries accordingly to the legal hierarchy of the mandates. In that sense we can classify the mandates in the following groups: immediate decisions, negotiations, text clarification, solution seeking, examinations, and best endeavor clauses.

A. Immediate Decisions:

The Declaration on TRIPS Agreement and Public Health (DTPH) is one the most important Ministerial texts for developing countries. This text has mainly a political nature. Nevertheless, two important goals were achieved. First, The DTPH gives more space for flexible interpretations of the TRIPS in relation to health issues. This space for interpretation reduces the effect of bilateral pressures and the risk of potential disputes linked to the TRIPS and the implementation of national health policies. Second, according to this declaration, *“least-developed country Members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections until 1 January 2016”*. This decision will allow these countries to take the necessary steps for improving health conditions in their respective territories and to implement policies designed to create a national pharmaceutical sector that can respond to their health needs.

Another immediate decision at Doha according the decision on Implementation issues and concerns was made in relation to the non-initiation of non-violation complaints until recommendations on the modalities and scope are presented to the fifth Ministerial. This decision will permit all countries interested in a deeper debate on the feasibility of having non-violation in the TRIPS Agreement to present their views.

B. Negotiation mandates:

Several negotiation mandates of convenience for developing countries were approved.

B.1. Implementation issues. In general terms all issues contained in the Implementation Decision and in the outstanding list of issues imply opportunities for developing countries. The ambiguity of paragraph 12 of the Ministerial Declaration will be used to promote or to avoid negotiations, depending of the interest of a particular member. In principle, developing countries must affirm that all implementation issues listed in the implementations texts are under negotiation and are a full part of the work programme. The main opportunity that the implementation list of issues brings to developing countries is the possibility of a focused negotiation without taking the risk of including many issues that could reduce the existing space for movement in the TRIPS Agreement.

The list of implementation issues under negotiation includes the following:

- The examination of the scope and modalities for the application of non violation complaints. (Article 64.2 of the TRIPS Agreement).
- Implementation of mechanisms for enforcement and monitoring developed countries obligations to provide incentives to their enterprises in order to generate technology transfer (Article 66.2).
- Negotiations to extend protection of geographical indications to other products than wines and spirits. (According to articles 23 y 24 of the TRIPS Agreement).

- Interim suspension of granting patents that do not fulfill article 15 of the Convention on biological diversity (CBD).
- No implementation of the provisions of article 27.3b until five years has passed since its review.
- Extension of the implementation period of the TRIPS Agreement for least developed countries.
- Operationalization of articles 7 and 8 of the TRIPS Agreement.
- Clarification that no patents should be granted on life.
- Amendment of article 27.3b in the light of the principles of the CBD and the international undertaking, as well as several issues linked to farmers rights, food security, patentability of life, and protection of indigenous innovations. There are two options in relation to this point. Both options are still under brackets, which means that it has not yet been decided if they are part of the implementation list.

B.2. Declaration on the TRIPS Agreement and public health. The work in relation to public health has not been finished in the WTO. According to this declaration, members “*recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement*”. In this context, the Council for TRIPS was instructed “*to find an expeditious solution to this problem and to report to the General Council before the end of 2002.*”

C. Review and Examination mandates

According to the Ministerial text, paragraph.19, the TRIPS council is instructed to pursue its work programme under article 27.3b, article 71.1, and paragraph 12 of the Ministerial Declaration “*to examine, inter alia, the relationship with the Convention of Biological Diversity and the protection of traditional knowledge...*”. The text permits developing countries to focus the review process on two points of interest to them:

C.1. The examination of the relation between TRIPS and the CBD. This examination is presented as a neutral exercise. The text does not identify the need for review of the TRIPS Agreement in light of the CBD; it orders the analysis of its relation with the TRIPS Agreement. The countries’ positions on the relation between TRIPS and the CBD are quite clear. On one hand, according to the US, Canada, Australia, there is no conflict between these two international instruments. On the other hand, for most developing countries there are several conflicting features between TRIPS and CBD that need to be addressed in order to achieve the objectives and principles of the CBD.

The examination of the relation between TRIPS and CBD must be read together with the section on Trade and Environment of the Ministerial Declaration, paragraph 31 and 32.

According to paragraph 31, Ministers “*agree to negotiations, without prejudging their outcome, on:*”

- (i) “*the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;*”

In paragraph 32, the Ministers “*instruct the Committee on Trade and Environment, in pursuing work on all items on its agenda within its current terms of reference, to give particular attention to:*”

- (ii) “*the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development;*”
- (iii) “*the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights,*”

In the CTE, several developing country members have promoted the need to transfer the objectives and principles of the CBD into the relevant WTO Agreements. Amongst these are the principles of prior and informed consent and the need for benefit sharing from the use of genetic resources and TK. In this context, Members have presented their national experiences on the implementation of the CBD but have failed to reach any agreement on recommendations for future action. The current Ministerial draft aims to give special attention to the relationship between MEAs and the WTO. However, there is no guarantee that this “special attention” will finally result in any real recommendations for re-negotiation, and even less, that such recommendations would be taken into account.

The CTE has also gotten a new “advisory role” in the new WTO work programme. This advisory role is implemented through two possible ways:

- (i) The CTE, in undertaking its work, can, according to paragraph 32 of the Ministerial Declaration, identify the “*need to clarify relevant WTO rules.. and report and make recommendations to the Fifth Ministerial Conference including desirability⁶ issues.*” This first way is limited by the fact that the outcome must be compatible with the principles of non-discrimination, and rights and obligations can not be added or dismissed.
- (ii) The CTE can under certain circumstances influence the discussions of the Trade Negotiation Committee (TNC). The CTE can, according to paragraph 51 of the Ministerial declaration, “*identify and debate environmental aspects of the negotiations in order to help to achieve the objective of sustainable development*”.

C.2. The protection of traditional knowledge. This sentence, if compared with the CBD language, gives more maneuvering space to developing countries. First, it identifies the need for “protecting” traditional knowledge (TK) and not only to analyze its content or relation with the TRIPS Agreement. Second, TK is not directly cover by the TRIPS agreement. Finding ways to protect TK can open the door for discussing the recognition of alternatives systems of innovation and to test the applicably of the existing ones.

The discussions currently being held on Genetic Resources, Traditional Knowledge and Folklore in WIPO could have a decisive effect in what happens in the mandated reviews of TRIPS. Many developing country members proposed to initiate work in WIPO because of the need for a study phase before initiating the design and the negotiations of an international framework to protect traditional knowledge. For many developed countries the work in the area of TK in the TRIPS Council should be limited to follow up WIPO discussions.

⁶ Desirability is usually understood as the “will and need” for negotiations.

C.3. Political guidance in the reviews. A very positive aspect of the Ministerial Declaration is that *“the work programme of the TRIPS Council shall be guided by the objectives and principles set out in articles 7 and 8 of the TRIPS agreement and should take into account the development dimension”*. This is the type of political language that has to be linked with the existing obligations when reviewing the TRIPS agreement. The principles and objectives of the political approach can help to orient the content of the agenda to areas of interest for developing countries.

III IDENTIFICATION OF RISKS FOR DEVELOPING COUNTRIES IN THE MANDATED NEGOTIATIONS AND REVIEWS

A. Negotiation mandates

A.1. The multilateral register for wines and spirits. According to the Ministerial Declaration, paragraph 18, members have agreed to *“negotiations for the establishment of a multilateral system of notification and registration of geographical indications by the Fifth Session of the Ministerial Conference”*. Not many developing countries have potential economic interest in raising the standards of GI protection nor have many registered geographical indications (GIs) in relation to wines and spirits. Nevertheless the design and establishment of a multilateral system for wines and spirits will create an important precedent in relation to the protection of GIs at the multilateral level. It is almost certain that any agreed procedural rules on international notification and registration of wines and spirits will be difficult to modify in case the level of protection to other products is raised in the near future. Therefore, any proposed legal structure should be carefully examined in order to avoid the approval of procedural frameworks that could increase imbalances in existing rights and obligations.

B. Review and Examination mandates.

B.1. New Developments. There is not a definition of what is considered to be a “new development”. This wording comes from article 71.1 of TRIPS and in principle both developing countries and developed countries can define from their own perspective what is considered to be new developments. The ministerial Declaration instructs the TRIPS Council *“to examine.... , inter alia,any new development raised by Members pursuant to Article 71.1.* This implies that only new developments presented by members will be taken into account. Issues raised by members pursuant article 71.1 include the protection of traditional and intellectual property issues related to e-commerce and the Internet. In relation to the later group of issue, the main political objective is to transfer the WIPO’s Copyright Treaty and the Treaty on Performances and Phonograms.

Other types of new developments that could be of interest to developed countries include:

- Biotechnology issues. A discussion in this area could imply the elimination of the exceptions to patentability and the patentability of biological discoveries.
- Patents on new business procedures. The idea behind this issue will be to redefine the inventiveness step and industrial application standards. This type of discussion is already occurring in the Standing Committee on Patents in WIPO.

- Establishment of renewed enforcement mechanisms and *ex officio* actions for the protection of intellectual property titleholders.

A possible list of issues of interest for developing countries could include among others:

- Further development of article 40 of the TRIPS Agreement so as to establish guidelines on the relation between competition policy and intellectual property rights.
- Revisit technology transfer obligations under article 66.2 for the inclusion of developing countries.
- Review excessive rights given to patent holders.
- Review of special and differential treatment clauses in TRIPS.
- Elimination of non-violation complaints.

The review of article 71.1 can be bring risk and opportunities for developing countries. Risks in the sense that article 71.1 does not have a specific focus in its review and can bring TRIPS plus proposals in many areas of intellectual property. This situation is already happening in the negotiations of the Free Trade Area of the Americas and in the negotiations of the Substantive Patent Law treaty in WIPO. It can also bring opportunities if developing countries are proactive and design a common agenda for article 71.1. Several years ago, article 27.3b review was initially seen as a negative exercise by many developing countries but it has turned out to be of crucial utility for developing countries objectives.

IV. SOME STRATEGIC OPTIONS FOR DEVELOPING COUNTRIES.

In conclusion some strategic options can be introduced in order to facilitate discussions among developing countries on TRIPS issues.

- A. ***Prioritize issues of relevance for developing countries.*** Developing countries do not have enough political strength to introduce more than two or three issues at the same time to the TRIPS Council. A common list of priority issues could help to avoid exhausting negotiation exercises.
- B. ***Identify issues that are offensive or defensive in nature according to the TRIPS mandates in the Ministerial Declaration and other Ministerial documents.*** Examples are:
 - a. Incorporation of CBD objectives into the TRIPS, Protection of traditional knowledge, operationalisation of articles 7 and 8 of can be seen as active issues.
 - b. The examination of the scope and modalities for the application of non-violation complaints and a final decision to not apply such complaints to the TRIPS Agreement could be seen as a defensive issue.
- C. ***Promote the interpretation that all outstanding implementations issues are under negotiation.*** A focused negotiation on issues of interest for developing countries might be the only way for rebalancing the current text of the TRIPS Agreement.
- D. ***Identify interlinked interpretations that are useful to developing countries objectives.*** Even if the operative language in the Ministerial declaration text is not very useful, the political language could be a strong wedge to force discussions in the desired direction.

- E. *Seek links with the work in the CTE in relation to genetic resources and traditional knowledge issues.* The “advisory” role of the CTE could be a door for promoting a wide biodiversity agenda for revising the TRIPS and relevant WTO agreements.
- F. *Bear always in mind that for national trade authorities intellectual property issues are not the most important ones.* National Trade authorities will always have many other items in at the top of the negotiation agenda. Actions to expose national trade authorities to intellectual property issues that are being discussed in the WTO will be necessary to increase the possibilities of success.