

Doha Round of Negotiations on TRIPS

The State of Play



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The Doha Ministerial Declaration stressed on the significance of implementation and interpretation of Trade-Related Aspect of Intellectual Property Rights (TRIPS) which is consistent with public health and the provision of due importance to access to medicine, and research and development in the field. The declaration further stipulates that the WTO (World Trade Organisation) Members agree to negotiations regarding establishment of a multilateral system of notification and registration of geographical indication of wines and spirits by the fifth session of the Ministerial Conference in Hong Kong in December 2005. The Declaration instructs the WTO Council for TRIPS to carry on the work programme of review which involves examination of the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore and other relevant new developments. While some progress has been made since the Doha Round on some of the issues related to intellectual property, a number of issues are unresolved.

TRIPS and Public Health

The relationship between the TRIPS and public health was first discussed in the year 2001 in the WTO Council for TRIPS, which after a protracted discussion culminated in the adoption of the Doha Declaration on TRIPS and Public Health of November 14, 2001 (WT/MIN (01)/DEC/2). It stated that the TRIPS Agreement should not prevent measures by WTO Members to protect public health. A waiver in August 2003 addressed the problems that countries with insufficient or no pharmaceutical manufacturing capacity were facing in making use of compulsory licensing. On December 6, 2005, an amendment to the TRIPS Agreement was made for the implementation of the August 2003 waiver. Article 31(f) of the TRIPS Agreement said that production under compulsory licensing must be predominantly for the domestic market.

Geographical Indications

Like any other intellectual property, GIs (geographical indications) are also sought by the producers. Article 22 and Article 23 of the TRIPS Agreement provide for the levels of protection for GIs, Article 24 talks about the exception of GIs from protection. Two issues that are debated under the Doha mandate are related to higher level of protection for GIs. They are: a) a multilateral register for wines and spirits, and b) extension of a higher (Article 23) level of protection beyond that provided for wines and spirits.

The negotiations on creating a multilateral system for notifying and registering GIs for wines and spirits take place in the Special Session of the WTO Council for TRIPS. There are mainly three proposals:

- *European Union's (EU) proposal:* It put forward that when a geographical indication is registered, this would create a 'rebuttable presumption' that the term is to be protected in the other WTO members except in a country which has lodged reservation within a specified period of time. It also states that a reservation would be on a permitted ground such as when a particular name becomes too generic or when it does not fit the definition of a geographical indication. Thus, the EU proposal calls for an amendment to the TRIPS Agreement.
- *Joint proposal:* This proposal by 14 WTO Members specifies the setting up of a voluntary system where notified GIs will be registered in a database. Members could choose whether to participate. If they do so then they would need to consult the database when taking decisions on protection in their countries. Non-participating Members would not be obliged to consult the database. Thus, this proposal does not call for any amendment to the TRIPS Agreement.
- *Hong Kong, China's proposal:* It proposes that a registered term would enjoy a more limited 'presumption' than under the EU proposal, and only in those countries choosing to participate

in the system. It means that it is a compromise of both the above-stated proposals.

The key questions include what would be the legal effect within Member countries, what extent should the effect apply to countries not participating in the system, and what would be the administrative and financial costs for governments and whether they will outweigh the possible benefits. Opinions are strongly held on both the sides and there is no consensus on any of the issues till date.

Article 22 of the TRIPS Agreement covers geographical indications for all the products. The issue is whether to expand the higher level of protection (Article 23 currently provides GI to wines and spirits) to other products. A paragraph in the Doha Ministerial Declaration attaches utmost importance to this issue. Also by confirming it to be an implementation issue the negotiations on GI extension became an integral part of the Doha Work Programme.

There is no built-in negotiating mandate in the TRIPS Agreement; only a review of GIs Section of the TRIPS Agreement is mandated. In this review, developing countries wanted to extend a higher level of protection to goods of their export interest. The WTO Members are deeply divided on the mandate and there are two groups. It is noteworthy to understand that the basic idea behind seeking extension of the Article 23 type of protection to other specific products is to use GIs to promote the export of valuable products and prevent their misappropriation.

Proposal in favour of Article 23 extension	Proposal against Article 23 extension
<p>The protection under Article 23 of the TRIPS Agreement shall apply to geographical indications for all products.</p> <p>The exceptions contained in Article 24 of the TRIPS Agreement shall apply <i>mutatis mutandis</i> – that is, to all the necessary changes made hereby.</p> <p>The multilateral register to be established shall be open for geographical indications for all products.</p>	<p>The benefits of such extension would accrue mainly to those WTO Members which have many products protected under a formal registration system on geographical indications. The burden would fall on those Members with few GI-protected products.</p> <p>Article 22 provides sufficient protection but has not been used by the demandeurs.</p> <p>Extension would involve substantial costs.</p>

Biodiversity, Traditional Knowledge and Folklore

Article 27 of the TRIPS Agreement spells out which inventions are eligible for patenting, and what can be excluded from being patented. Inventions that can be patented include both products and processes and should generally cover all kinds of technology. However, Article 27.3(b) allows members to exclude some kinds of inventions from patenting and reads as- “Members may exclude from patentability: – Plants and animals, essentially biological processes for their production. Members shall not exclude microorganisms, non-biological and microbiological processes, members shall protect plant varieties by patents or by an effective *sui-generis* system or by any combination thereof.”

Review under Article 27.3(b) began in 1999. At Doha WTO’s TRIPS Council received a clear mandate to discuss CBD (Convention on Biological Diversity), TK (Traditional Knowledge) and folklore.

The discussion in the WTO Council for TRIPS has gone into considerable detail with a number of ways and ideas being put forward to deal with this complex issue. Nevertheless, there are mainly two issues, which are currently under discussion:

- Compatibility between TRIPS and CBD (Convention on Biological Diversity); and
- How to implement TRIPS and CBD in a mutually supportive way so as to achieve agreed objectives on access and benefit sharing?

India, Sri Lanka and many other developing countries have been raising these issues in the TRIPS Council for several years. Three proposals have emerged:

- *Disclosure as a TRIPS obligation:* A number of developing countries propose to amend the TRIPS Agreement and have submitted that an applicant for a patent, who uses genetic resources and/or traditional knowledge associated with that, shall as a condition (disclosure requirements) for acquiring patent rights provide the following:
 - ✓ Evidence of source and country of origin of the biological resource and/or associated traditional knowledge used in the invention;
 - ✓ Evidence of prior informed consent under the relevant national regime; and
 - ✓ Evidence of ‘fair and equitable’ benefit sharing under the relevant national regime.
- *Disclosure through World Intellectual Property Organisation:* Switzerland proposed the amendment of the regulations of WIPO’s Patent Cooperation Treaty, which will ensure that the

domestic laws will ask inventors to disclose the source of genetic resources and traditional knowledge when they apply for patents. EU's stand on this issue is a proposal which states that all patent applicants disclose the source or origin of genetic material, with legal consequences of not fulfilling this requirement lying outside the scope of patent law.

- *Use of national legislation:* The United States is of the view that the objectives on access to genetic resources and on benefit sharing under the CBD can be best attained through national legislation and through contractual arrangements based on national legislation. This may include the commitment to disclose any commercial application of genetic resources or traditional knowledge.

Non-violation Complaints

The third main issue which is currently been debated is related to non-violation complaints (Article 64.2 of the TRIPS Agreement). Non-violation complaints are legal actions provided under Article XIII (b) and (c) of GATT 1994. The provision allows the WTO Members to bring disputes to the WTO, which are based on the loss of an expected benefit caused by another Member's action, even if such action does not constitute violation of a WTO law.

However, for the time being it was agreed by the WTO Members to not use the non-violation complaints under the TRIPS Agreement. Article 64.2 was last for the first five years of the WTO (1995-99). It has been extended since then. Also there was discussion on whether non-violation complaints should be allowed in the TRIPS as such and if so, to what extent and how

they could be incorporated in the WTO's dispute settlement procedures.

The Doha Declaration also directs the WTO Council for TRIPS to make recommendations to the Cancun Ministerial conference and till then the WTO Members have agreed to restrain themselves from resorting to non-violation complaints.

In May 2003, the Chairperson of the WTO Council for TRIPS listed four possibilities for a recommendation:

- Completely banning the non-violation complaints in the TRIPS Agreement,
- Allowing the complaints to be handled under the WTO's dispute settlement rules as is applicable for goods and service cases,
- Allowing non-violation complaints but subject to special modalities (that is, ways of dealing with them), and
- Extending the moratorium.

In response, most members favoured banning non-violation complaints completely, or extending the moratorium. However, no consensus was reached.

Conclusion

It is clear that the negotiations on most of the contentious issues have not progressed much. Differing stands on wines and spirits are being discussed in the Special Session of the TRIPS Council, while the extension issue is being discussed in the TRIPS Council. A Special Group chaired by a Deputy Director-General of the WTO is discussing the TRIPS-CBD interface. Some discussions have also been taken place in the green room under the category of horizontal issues, but there is not much of a change in positions by different Members.

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