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Occasional Paper 10

**Negotiating intellectual property:
Mandates and options in the Doha Work Programme**

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This occasional paper is an attempt to identify important mandates and options in the Doha work programme of the World Trade Organisation (WTO), the World Intellectual Property Organisation (WIPO), and bilateral and regional initiatives. It seeks to explore the main challenges facing developing countries, as well as ways in which they might pursue their interests. Its purpose is to serve as a guide for those interested in following the negotiations.

Negotiating intellectual property: Mandates and options in the Doha Work Programme

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Negotiating intellectual property: Mandates and options in the Doha Work Programme

Introduction

Developing countries face a range of different risks, challenges and opportunities related to intellectual property issues, and to patent rules in particular. Government representatives, both at the multilateral level and in capitals, are perhaps becoming more aware of the broader social context of rules on intellectual property protection, including their implications for issues such as food security, biological diversity and health. However, private interests, especially in developed countries, are continuing to push for higher and more restrictive levels of protection, and are varying the means and the organisational settings through which they are seeking to achieve this aim.

Developing country negotiators can endeavour to address this situation by being aware of new risks and challenges, and seeking to influence negotiations in these areas; however, they can also actively pursue recognition of their own concerns in the multilateral arena. In particular, the mandate given at the Doha Ministerial Conference for the current World Trade Organisation work programme provides important opportunities for them to do this. There is also a role for non-governmental organisations who are concerned about development to help these delegations, by providing relevant and well-researched information, raising awareness about new developments, and educating a wider public about some of the broader implications of patent protection.

I. The World Trade Organisation (WTO)

1. Mandated work areas ²

The [Doha Ministerial Declaration](#), agreed at the Fourth WTO Ministerial Conference in November 2001, sets out the next phase of work for the WTO. Several areas have implications for intellectual property protection and development: especially important are paragraphs 12, 19, 31 and 32. Developing countries need to ensure in particular that ‘implementation issues’ remain priorities: these are addressed in paragraph 12 of the main Declaration and in the separate [Decision](#) on this subject. Some deadlines for these issues have already been missed, such as those relating to work on special and differential treatment for developing countries.

Other negotiations such as those on agriculture may also contain important synergies with discussions on intellectual property, and paragraph 17 (on the [Ministerial Declaration on the TRIPS Agreement and Public Health](#)) must be borne in mind for implementation and technical assistance activities³. Developing countries can build on the experience and increased understanding they have gained during the review of article 27.3(b). They should co-ordinate in considering their negotiating strategy for this review, and for the wider review mandated in article 71.1.

2. Ministerial Declaration: text of the relevant paragraphs:

Paragraphs 12, 19, 31 and 32 of the Ministerial Declaration read as follows ⁴:

“12. *We attach the utmost importance to the implementation-related issues and concerns raised by Members and are determined to find appropriate solutions to them.*
In this connection,
and having regard to the General Council Decisions of 3 May and 15 December 2000,
we further adopt the Decision on Implementation-Related Issues and Concerns in document WT/MIN(01)/17
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.”

In paragraph 12 Members agree to negotiations on outstanding implementation issues, and that “in this regard” they shall proceed under two ‘tracks’. Either issues are to be addressed as part of another negotiating mandate identified in the Ministerial Declaration, or, where no such mandate exists, issues would be addressed by the relevant WTO body, which would report to the TNC by the end of 2002 for appropriate action. In the case of intellectual property, the relevant body in which these negotiations should take place would be the TRIPS Council. The mandate in paragraph 12 may be the most useful for developing countries: (see below under “Implementation Issues” for a more detailed analysis).

² For an excellent analysis of mandated work, see D. Vivas “Brief on the Treatment of Intellectual Property in the Doha WTO Ministerial Declaration: Mandated Negotiations and Reviews”, CIEL/South Centre.

³ Paragraph 6 of the TRIPS and Health Declaration is not analysed here, due to lack of space. Similarly, mandated work on geographical indications is not considered, as although some developing countries favour more rigorous intellectual property protection in this area, others are clearly opposed.

⁴ Paragraphs 12 and 19 are set out in this way here so the different elements can be more clearly distinguished.

“19. We instruct the Council for TRIPS,
in pursuing its work programme
including under the review of Article 27.3(b),
the review of the implementation of the TRIPS Agreement under Article 71.1
and the work foreseen pursuant to paragraph 12 of this Declaration,
to examine,
inter alia,
the relationship between the [TRIPS Agreement](#) and the [Convention on Biological Diversity](#),
the protection of traditional knowledge and folklore,
and other relevant new developments raised by Members pursuant to Article 71.1.
In undertaking this work,
the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the
TRIPS Agreement
and shall take fully into account the development dimension.”

An examination of issues of key concern to developing countries is therefore mandated as part of the work programme, including under the 27.3(b) review, the 71.1 review and as part of the negotiations foreseen in paragraph 12. However, paragraph 31 also mandates in clearer language ‘negotiations’:

“31. With a view to enhancing the mutual supportiveness of trade and environment, we 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;
- (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;
- (iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

We note that fisheries subsidies form part of the negotiations provided for in paragraph 28.”

By mandating negotiations on the relationship between “existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs)”, governments can arguably begin negotiations on the relationship between the TRIPS agreement and those agreements identified in paragraph 19: the Convention on Biological Diversity (CBD), and other agreements relevant to the protection of traditional knowledge and folklore; and “other relevant new developments raised by Members pursuant to Article 71.1”. It has been widely suggested that one of the most important recent ‘new developments’ that could be raised is the FAO [International Treaty on Plant Genetic Resources for Food and Agriculture](#).

Considerable debate on many of these issues has already taken place; however, the Committee on the Environment (CTE) is currently making quite slow progress on these issues, and has been debating at some length what might constitute a ‘multilateral environmental agreement’. Developing countries may consider that it is in their interests not to rush into negotiations on this area in the CTE, even though these issues are important concerns for them.

The mandate to begin negotiations on “procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status” has important implications for the admission of the secretariat of the CBD to the TRIPS Council, as an observer. Currently, this development is being blocked by the United States.

“32. We 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:

- (i) 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;
- (ii) the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights; and
- (iii) labelling requirements for environmental purposes.

Work on these issues should include the identification of any need to clarify relevant WTO rules. The Committee shall report to the Fifth Session of the Ministerial Conference, and make recommendations, where appropriate, with respect to future action, including the desirability of negotiations. The outcome of this work as well as the negotiations carried out under paragraph 31(i) and (ii) shall be compatible with the open and non-discriminatory nature of the multilateral trading system, shall not add to or diminish the rights and obligations of Members under existing WTO agreements, in particular the Agreement on the Application of Sanitary and Phytosanitary Measures, nor alter the balance of these rights and obligations, and will take into account the needs of developing and least-developed countries.”

The Committee on Trade and Environment is therefore explicitly instructed to give particular attention to TRIPS in paragraph 32(ii). This work should include identification of any need to clarify relevant WTO rules, and could lead to negotiations after the Fifth WTO Ministerial, depending on the recommendations of the Committee. Although not a mandate for negotiations, this potentially covers a wider remit than the negotiations foreseen in paragraph 31. An interpretative or clarificatory exercise would also have a different political dynamic from negotiations.

3. Decision on Implementation-Related Issues and Concerns

Some of the issues identified in the Decision relate directly to intellectual property issues, whereas others can be considered to be relevant despite containing no explicit reference to intellectual property. Two issues are explicitly considered in paragraph 11, ‘Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)’:

11.1 *The TRIPS Council is directed 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. It is agreed that, in the meantime, Members will not initiate such complaints under the TRIPS Agreement.*

11.2 *Reaffirming that the provisions of Article 66.2 of the TRIPS Agreement are mandatory, it is agreed that the TRIPS Council shall put in place a mechanism for ensuring the monitoring and full implementation of the obligations in question. To this end, developed-country Members shall submit prior to the end of 2002 detailed reports on the functioning in practice of the incentives provided to their enterprises for the transfer of technology in pursuance of their commitments under Article 66.2. These submissions shall be subject to a review in the TRIPS Council and information shall be updated by Members annually.*

The first paragraph is therefore an agreement to refrain from non-violation complaints; the second raises more immediate strategic issues for developing countries. Paragraph 11.2 (above) potentially gives developing countries considerable political leverage, in particular as TRIPS article 66.2 is one of those which is binding on developed countries, and which developing countries have often remarked is not being properly implemented. Developing countries also need to consider how to ensure the mechanism and the submissions foreseen will lead to practical outcomes. At the time of writing, it seems that only Canada and New Zealand have formally submitted reports on how they implement this article.

The Decision on Implementation-Related Issues and Concerns also contains other paragraphs that may be considered relevant, even though they do not fall directly under the section on intellectual property. For example, paragraph 12.1 under ‘cross-cutting issues’ addresses the question of special and differential treatment for developing countries. It instructs the Committee on Trade and Development:

- (i) *to identify those special and differential treatment provisions that are already mandatory in nature and those that are non-binding in character, to consider the legal and practical implications for developed and developing Members of converting special and differential treatment measures into mandatory provisions, to identify those that Members consider should be made mandatory, and to report to the General Council with clear recommendations for a decision by July 2002;*
- (ii) *to examine additional ways in which special and differential treatment provisions can be made more effective, to consider ways, including improved information flows, in which developing countries, in particular the least-developed countries, may be assisted to make best use of special and differential treatment provisions, and to report to the General Council with clear recommendations for a decision by July 2002; and*
- (iii) *to consider, in the context of the work programme adopted at the Fourth Session of the Ministerial Conference, how special and differential treatment may be incorporated into the architecture of WTO rules.*

The work of the Committee on Trade and Development in this regard shall take fully into consideration previous work undertaken as noted in WT/COMTD/W/77/Rev.1. It will also be without prejudice to work in respect of implementation of WTO Agreements in the General Council and in other Councils and Committees.

Annex III of document [TN/CTD/3](#) gives agreement-specific details of the results of work by July. On TRIPS, it notes the following:

Agreement & Article / Paragraph	Number of Proposals	Proponent(s)	Document Reference
(TRIPS) articles 65, 66.1, 70.8 & 70.9	1	African Group	TN/CTD/W/3/Rev.1 and TN/CTD/W/3/Rev.2
(TRIPS) articles 7, 8 & 66.2	1	African Group	TN/CTD/W/3/Rev.1 and TN/CTD/W/3/Rev.2
(TRIPS) article 66.1	1	LDCs	TN/CTD/W/4/Add.1
(TRIPS) article 67	1	LDCs	TN/CTD/W/4/Add.1

The July meeting recommended that the General Council approve an extension, until 31.12.02, of the July 2002 deadline for “clear recommendations for decision”. Developing countries are disappointed that developed countries failed the initial deadline, which has both substantive and symbolic importance for them. It is possible that, especially if other important deadlines are missed, developing countries will respond to what they perceive as bad faith on the part of their colleagues, and begin to postpone other negotiation or implementation deadlines for issues on which developed countries are *demandeurs*.

Paragraph 13 of the Decision, entitled ‘Outstanding Implementation Issues’, is also important. In this, the Ministerial Conference:

Agrees that outstanding implementation issues be addressed in accordance with paragraph 12 of the Ministerial Declaration (WT/MIN(01)/DEC/1).

A footnote to the heading ‘Outstanding Implementation Issues’ states: “A list of these issues is compiled in document [Job\(01\)/152/Rev.1](#)⁵.” Amongst the issues listed in this document, the following relate directly to TRIPS:

⁵ This document is not available officially on the WTO website, but it can be accessed on the ICTSD website: http://www.ictsd.org/ministerial/doha/docs/imp_iss.pdf

...

Tiret 87

In the light of provisions contained in Articles 23 and 24 of the TRIPS Agreement, additional protection for geographical indications shall be extended for products other than wines and spirits.

Tiret 88

A clear understanding in the interim that patents inconsistent with Article 15 of the CBD shall not be granted.

Tiret 91

The period given for implementation of the provisions of Article 27.3(b) shall be five years from the date the review is completed.

Tiret 93

The transitional period for developing countries provided for in Article 65.2 shall be extended.

Proposal by Least-Developed Countries, 22 October 2001

The General Council agrees that the transition period for LDCs shall be extended so long as they retain the status of an LDC.

Tiret 94

Articles 7 and 8 of the TRIPS Agreement to be operationalized by providing for transfer of technology on fair and mutually advantageous terms.

Tiret 95

[Article 27.3(b) to be amended in light of the provisions of the Convention on Biological Diversity and the International Undertaking. Also, clarify artificial distinctions between biological and microbiological organisms and process; ensure the continuation of the traditional farming practices including the right to save, exchange and save seeds, and sell their harvest; and prevent anti-competitive practices which will threaten food sovereignty of people in developing countries, as permitted by Article 31 of the TRIPS Agreement.] [Article 27.3(b) should be amended to take into account the Convention on Biological Diversity and the International Undertaking on Plant Genetic Resources. The amendments should clarify and satisfactorily resolve the analytical distinctions between biological and micro-biological organisms and processed; that all living organisms and their parts cannot be patented; and those natural processes that produce living organisms should not be patentable. The amendments should ensure the protection of innovations of indigenous and local farming communities; the continuation of traditional farming processes including the right to use, exchange and save seeds, and promote food security.]

Proposal by Least-Developed Countries, 22 October 2001

The General Council agrees that the review process should clarify that all living organisms, including plants, animals and parts of plants and animals, including gene sequences, and biological and other natural processes for the production of plants, animals and their parts, shall not be granted patents.

Evidently, there is negotiated text in the Ministerial Declaration which addresses to some extent some of the concerns raised in Job(01)/152/Rev.1. However, other issues identified in this section are only marginally addressed in the Declaration, or are not addressed at all. In either case, nothing should obscure the decision which Ministers took in paragraph 13 of the Decision on Implementation-Related Issues and Concerns on this matter. By requiring that these issues be addressed in accordance with paragraph 12 of the Ministerial Declaration, Ministers ensured that negotiations would take place on these issues as “*an integral part of the Work Programme*”. Depending on whether a specific negotiating mandate was set out in the Declaration, issues would be negotiated under track (a) or track (b). Developing countries need to consider how to make best use of the mandate in paragraph 13 of the Decision on Implementation-Related Issues and Concerns, and ideally should do so before the end of 2002.

Paragraph 14 of the Decision, entitled ‘Final Provisions’, may also be considered relevant; this:

“Requests the Director-General, consistent with paragraphs 38 to 43 of the Ministerial Declaration (WT/MIN(01)/DEC/1), to ensure that WTO technical assistance focuses, on a priority basis, on assisting developing countries to implement existing WTO obligations as well as on increasing their capacity to participate more effectively in future multilateral trade negotiations. In carrying out this mandate, the WTO Secretariat should cooperate more closely with international and regional intergovernmental organisations so as to increase efficiency and synergies and avoid duplication of programmes.”

There has been considerable discussion of the appropriateness of WTO (and WIPO) technical assistance, and of ways to ensure that this enables all countries to implement their obligations with regard to existing flexibilities. Indeed, TRIPS article 1 states “Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice”. Paragraph 14 is potentially a source of political capital for developing countries, and the issue will now be how this paragraph is implemented in the Secretariat’s technical assistance and capacity-building programmes. One test of its success may be the level of increased participation of non-resident WTO Members.

There is a need to look carefully at the Decision, to see when deadlines come into effect: this is important as it affects the political economy of negotiations, depending on whether issues are ‘self-standing’, or are for consideration as part of a package to be agreed at the next Ministerial.

4. Lessons from the review of TRIPS article 27.3(b)

Developing country negotiators have acquired confidence and issue-specific knowledge, through a period of increasing public awareness and support, since the beginning of the article 27.3(b) review in the TRIPS Council. Simultaneously, there has been a growing understanding of the complexity of this issue, and the fast-moving nature of developments in the commercial world – particularly in the sphere of biotechnology – relevant to public policy decisions in this area. The review can be seen as having moved through a series of distinct stages.

Initially, debate focussed on whether the ‘review’ meant a substantive review of the article, or whether it meant a review of whether countries were meeting their implementation commitments in this area. Developing countries successfully argued that the review was an assessment of the article itself, and raised a wide range of questions in connection with their concerns about implementation.

Secondly, developing countries themselves became increasingly aware of different national options for implementation of the article. Several countries drafted laws or model laws, parliamentary debate took place, and in some countries new laws were passed which, although TRIPS-compatible, safeguarded important rights of farmers, traditional communities, consumers, and other interest groups. In particular, India’s *sui generis*⁶ legislation on plant variety protection was a landmark in this respect. Other important developments included the drafting of the OAU Model Law, and national legislation passed in Kenya and in Andean countries. In the latter case, this was in particular a response to growing concerns about the rights of indigenous communities, the implications of TRIPS article 27.3(b), and the relationship between TRIPS and the CBD.

In the TRIPS Council itself, several delegations submitted key proposals, which helped define the debate and establish clear developing country demands. In particular, India and Brazil submitted papers; however, the African Group demand that there should be no patents on life not only contributed to the TRIPS Council debate, but also resonated with the concerns of campaign groups and the media, and helped raise awareness amongst a wider public. The debate in the TRIPS Council became more clearly structured following the Chairman’s decision to divide the discussion into six issue areas.

The debate was given a new momentum as delegations became increasingly aware of the relevance of the CBD and the International Treaty of the FAO. As a result of the persistent concern about and attention

⁶ ‘of its own kind’; alternative.

to these issues, developing countries were successful in getting them formally recognised in the mandate of the Doha Ministerial Declaration, as a focus for examination and arguably for negotiations (see above).

5. Key public interest provisions and exceptions

Most developing countries have long considered the TRIPS agreement to be unbalanced: it was negotiated in a way that failed to take account of their legitimate needs and concerns, and contains provisions and obligations which in many ways are entirely inappropriate to the development priorities of many of them (the requirement for a 20-year patent term, for example). However, the strategic thinking which led ultimately to the Ministerial Declaration on the TRIPS Agreement and Public Health was new and important in one major respect: rather than solely focussing on the injustices and inappropriate provisions in TRIPS, developing countries recognised that the agreement also contained important clauses that reflected their concerns (such as articles 7 and 8 on the objectives and principles, for example). This thinking led to their negotiating position that “Nothing in the TRIPS Agreement shall prevent countries from taking measures to protect public health”.

It is possible that developing countries have not yet fully explored the potential of this approach. The TRIPS agreement contains numerous provisions that directly reflect the concerns of developing countries at the time of the Uruguay Round, and which remain relevant today. Other provisions are statements of ‘constructive ambiguity’, or exceptions to general obligations. Although there are many such provisions, the following are perhaps worth highlighting as being of particular note⁷:

Article 1: this notes that Members shall be free to determine the appropriate method of implementing the provisions of TRIPS within their own legal system and practice.

Article 7 and 8, on the objectives and principles of the agreement. Developing countries have already emphasised the importance of these two provisions. Article 7 states that:

“The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations”.

Article 8 notes that Members may “adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development”.

Article 27. Paragraph 1 of this article sets important minimum conditions for the grant of a patent (that it be new, involve an inventive step and be capable of industrial application). Paragraph 2 may further be relevant to the review of article 27.3(b):

“Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law”.

Furthermore, both article 27.3 (a) and (b) contain important exceptions to patentability, which should be borne in mind by developing country policy-makers.

Article 30. This article, entitled ‘exceptions to rights conferred’ has already been considered in the discussion of a possible solution to paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health.

⁷ For a more comprehensive list, see “*Agreement on Trade-Related Aspects of Intellectual Property: Public Interest Provisions and Objectives, and Exceptions to Private Rights*”. J Hepburn, 2002.

Article 31. In particular, paragraphs (b) and (k), which deal with exceptions to obligations to obtain authorisation from the right-holder, and anti-competitive practices.

Article 40. On the control of anti-competitive practices in contractual licences.

Article 63.4. On transparency – Members are not obliged, among other things, to disclose confidential information that would be contrary to the public interest.

Article 66.2, on incentives for technology transfer to LDCs. See comments above.

Article 65: as noted above, the possibility of extending transition periods for developing countries is raised in Job(01)/152/Rev.1. This issue should therefore be addressed in the negotiations foreseen in paragraph 12, as agreed in paragraph 13 of the Decision on Implementation-Related Issues and Concerns.

Article 73, ‘Security exceptions’. It has been suggested that, for example, the public health problems facing many countries are such that they present a significant threat to their national security.

Developing country negotiators are already drawing attention to the implications of several of these provisions; in the case of others, perhaps, their potential may not have yet been fully exploited. Policy-makers and planners in capital also need to be aware of some of the flexibilities contained in the agreement, so as to be able to take advantage of these.

6. TRIPS review under article 71.1

Article 71.1 states:

The Council for TRIPS shall review the implementation of this Agreement after the expiration of the transitional period referred to in paragraph 2 of Article 65. The Council shall, having regard to the experience gained in its implementation, review it two years after that date, and at identical intervals thereafter. The Council may also undertake reviews in the light of any relevant new developments which might warrant modification or amendment of this Agreement.

The substance of the article therefore involves two elements: the biennial review of the implementation of the Agreement; and the possibility that the TRIPS Council also undertake reviews in the light of certain relevant new developments.

Developing country negotiators, and other commentators, have noted a number of strategic issues associated with this review. On the one hand, developing countries are concerned that developed countries might try to use this review to push for still higher levels of protection. There is evidence to suggest that developed countries would try to do this, the most recent example perhaps being the tendency of countries in the North to push for the most restrictive possible solution to paragraph 6 of the Doha Declaration on health. Other examples include the TRIPS-plus language being proposed in WIPO negotiations for a Substantive Draft Patent Law Treaty, or in the FTAA negotiations, and other regional and bilateral free trade agreements. However, others have underlined the need for developing countries to take a ‘pro-active’ negotiating stance, and to seek positively to address their concerns in an organised and strategic manner.

The mandate outlined in article 71.1 arguably presents a clear opportunity for developing countries to try to seek a full-scale reform of TRIPS, if they wished to do so. However, there is a need to consider whether the strategies adopted hitherto have been more effective, i.e. the establishment of national *sui generis* systems as a means to implement obligations on plant variety protection, and the drive towards favourable interpretation of disputed provisions. In part, these strategies have been a conscious response to explicit concern noted above, that amendment of the agreement would be an opportunity for developed countries to seek still higher levels of protection.

There may be, however, aspects of the TRIPS agreement that concern developing countries and cannot easily be addressed using the strategies used hitherto (favourable interpretation, etc). In particular, many developing countries may feel that the requirement for a twenty-year patent term, set out in article 33, is incompatible with their national development needs and objectives. It may be very difficult to achieve recognition for the problems faced with the implementation of this article in any way other than a full-scale review of implementation of the agreement, such as is provided for under article 71.1. Developing countries could try to demand a full assessment of the development impact of the TRIPS agreement, therefore, but would need carefully to consider their options and the relative merits and risks associated with different approaches before doing so.

There has been some discussion about the gap between the demand for stronger levels of patent protection and the lack of concrete evidence about whether this would contribute to development. It is worth bearing in mind that some initiatives have in fact sought to find evidence that might help governments to move beyond rhetoric and towards action based on empirical findings. In particular, the UK Commission on Intellectual Property Rights explicitly sought an evidence-based approach in their work. The UNCTAD-ICTSD project has also tried to work on this basis. Finally, WIPO has been mandated to study the potential impact, in developing countries, of the proposed International Patent System: although this has not yet been carried out, developing countries have requested that the study be conducted immediately (see below), and there is a possibility that this could lead to empirical information about the impact of patent protection.

II. The World Intellectual Property Organisation (WIPO)

Three areas of WIPO work may be considered as being particularly relevant to discussions of intellectual property protection (especially patent protection) and development. These are: the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore; the WIPO Patent Agenda; and WIPO technical assistance work. In addition, it may be useful to consider the extent to which synergies may exist between work being carried out in WIPO and the negotiations at the WTO: for example, whether similar topics are under discussion, or even whether or not the same government delegates are participating in meetings at both organisations.

1. Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore

For example, topics under discussion at the WIPO Intergovernmental Committee are similar to those mandated in paragraph 19 of the Doha Ministerial Declaration. At the July session of the Committee, governments debated establishing a database of national and regional clauses and practices concerning access to genetic resources and benefit-sharing. They discussed whether existing intellectual property systems or *sui generis* systems would be better suited to the protection of traditional knowledge. Also considered were the definition of terms, the legitimacy of the WIPO process, and the need to ensure participation from indigenous communities. Developing countries emphasised the need for WIPO co-operation with the CBD, FAO and WTO. Delegates held different views over the objectives of the Intergovernmental Committee: in particular, whether it seeks to ensure greater harmonisation, stronger protection of traditional knowledge, or sustainable use. There is a need to consider the relationship of the discussions in this committee with those occurring elsewhere. Developing countries need to be clear about the objectives they wish to pursue in different organisations, and the strategy for achieving those aims.

2. WIPO Patent Agenda

The 'WIPO Patent Agenda' refers to the initiative to establish an International Patent System (IPS), to speed up international patent harmonisation. The IPS is also intended to co-ordinate existing WIPO activities, i.e. the Patent Law Treaty (which involves the harmonisation of patent office formalities for the administration of patent applications); Patent Co-operation Treaty reform (which involves streamlining the search and examinations procedure); and the Draft Substantive Patent Law Treaty (SPLT) (which, in harmonising substantive patent laws, may eventually establish a fixed set of rules on what can be patented, and under what conditions).

It is possible to see developing countries as facing a set of strategic choices with regard to the WIPO Patent Agenda. In its most simple form, this choice can be expressed as follows: developing countries can seek to ignore the process entirely, and remain critical; they can seek to become involved in the process and influence it, so that the outcome ultimately reflects their interests; and, thirdly, they could seek to set up an alternative set of standards, an alternative system.

Arguably, the position taken by developing countries hitherto has been more nuanced than this, however. At the WIPO General Assembly this year, developing countries actively intervened in three main ways. Firstly, they drew attention to the fact that a study on the likely impact of the International Patent System in their countries had already been mandated, and has not yet been carried out. Developing country delegates questioned why this was the case, requested that the study be carried out as a matter of priority, and indicated that it would not be possible to continue work towards the IPS until this had been carried out. Secondly, developing countries recalled the need for a balanced approach. Thirdly, they required that due recognition be given to their special and differential needs, and the development context.

Actual negotiations on a Draft Substantive Patent Law Treaty have been taking place since 1998 in the Standing Committee on the Law of Patents. This is due to meet from 25 to 29 November 2002. The draft

treaty in its latest form is available on the WIPO website, as part of the background documentation for this meeting: <http://www.wipo.int/scp/en/>. Although developing countries may have a range of concerns associated with the initiative as a whole, including its object and purpose, two specific areas in the negotiations might also be worth highlighting, as developing country demands are not currently reflected in the draft text. These are draft article 2, *General Principles and Exceptions*, and draft article 12, on *Conditions of Patentability*.

Draft article 2 only contains one ‘exception’ provision, which is a security exception. This currently reads:

“Nothing in this Treaty and the Regulations shall limit the freedom of a Contracting Party to take any action it deems necessary for the preservation of essential security interests.”

In the May session of the Committee, developing countries proposed inclusion of the text:

“Nothing in this Treaty of Regulations shall limit the freedom of Contracting Parties to protect public health, nutrition and the environment or to take any other action it deems necessary to promote the public interest in sectors of vital importance to its socio-economic, scientific and technological development”.

The proposed text was ‘strongly opposed’ by Germany, Ireland, Japan and the USA, as was another proposed clause amending the security exception by adding *“or to comply with international obligations, including those relating to the protection of genetic resources, biological diversities, traditional knowledge and the environment”*.

Draft article 12 was the subject of considerable debate at the May meeting of the Committee. Under discussion were a range of issues that have come up under the review of TRIPS article 27.3(b) in the WTO; however, certain developed countries argued that the exceptions in TRIPS should not be included in the draft Treaty, such as the exceptions for plants and animals (USA). Developed countries, supported by non-governmental organisations representing industry, also favoured provisions that might permit the patenting of business methods and biotechnological ‘inventions’. The discussion indicated that governments were contemplating ‘TRIPS-plus’ levels of protection, despite the concerns that have already been expressed in the TRIPS article 27.3(b) review, relating to the possible patenting of plants and animals, genetic discoveries, and ambiguous and possibly meaningless terms such as ‘micro-organisms’ and ‘essentially non-biological processes’.

3. Technical assistance

Developing country delegates have regularly expressed concern over the nature of the technical assistance they have received from WIPO. It is argued that this assistance is not given in a suitably impartial manner, with regard to the development needs and priorities of the country concerned, but rather expresses a particular ideological perspective, more in line with industry views than with developing countries’ expressed concerns. Often, it is argued that WIPO automatically promotes high levels of intellectual property protection as a matter of course, with little attention to whether or not this would benefit the country in question. WIPO has been particularly criticised for its role in the formulation of the ‘Bangui Accord’, in the West African region, amongst other examples. Developing countries have sought to express their concerns about these tendencies, and have suggested, for example, that WIPO technical assistance might include advice on how to implement the Doha Declaration on the TRIPS Agreement and Public Health. More attention could be given to the flexibilities that are open to developing countries, and to the wider balance of private and public interests in society.

Part of the solution may be for WIPO to build a greater element of inter-agency consultation into its technical assistance programmes. Many developing country delegates have remarked that part of the problem is the tendency for many patent office officials to favour increased levels of patent protection without a full awareness of the wider social ramifications of such policies. Broader and more comprehensive involvement of decision-makers in other Ministries may help address this.

III. Bilateral and regional initiatives

Developed countries are continuing to push for higher and more rigorous requirements in the field of intellectual property, and especially patent protection. This tendency is particularly evident in bilateral and regional trade negotiations, which often take place between grossly unequal partners. Unlike in the WTO, in these negotiations developing countries are less able to work together to achieve common development goals. Bilateral negotiations in particular are open to abuse by the more powerful partner, who may seek to dictate terms by threatening trade sanctions or the withdrawal of existing unilateral preferences, or through threats linked to other unrelated political issues, or through packages of preferential developmental aid⁸. Developing countries may also be subjected to these and other forms of pressure in negotiations at the WTO: however, because they can seek to present common positions and demands in the multilateral system, and because the negotiations are protected through a certain degree of formality, developing countries still tend to be more vulnerable in bilateral deals.

The stated negotiating objectives of developed countries give a valuable insight into their goals. USTR has just announced that it plans to begin negotiations towards a “Southern African Free Trade and Development Agreement (SAFTDA)”, with South Africa, Botswana, Lesotho, Namibia and Swaziland. It is also currently requesting authority from the House and Senate for bilateral or regional negotiations with Central America, Chile, Morocco and Singapore. In the field of intellectual property rights, the stated objectives for these last four are as follows:

“- Seek to establish standards that build on the foundations established in the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPs Agreement) and other international property agreements, such as the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty, and the Patent Cooperation Treaty.

- In other areas, such as patent protection and protection of undisclosed information, seek to have [country] apply levels of protection and practices more in line with U.S. law and practices, including appropriate flexibility.

- Seek to strengthen [country]’s procedures to enforce intellectual property rights, such as by ensuring that [country]’s authorities seize suspected pirated and counterfeit goods, equipment used to make such goods or to transmit pirated goods, and documentary evidence. Seek to strengthen measures in [country] that provide for compensation for right holders for infringements of intellectual property rights and to provide for criminal penalties under [country]’s law that are sufficient to have a deterrent effect on piracy and counterfeiting.”

In the case of Chile and Singapore, an additional paragraph 2 also is included:

“- Seek to enhance the level of [country]’s protection for intellectual property rights beyond TRIPS in new areas of technology, such as internet service provide liability.”

In the case of Singapore only, this paragraph ends with the following clause:

“and seek commitments from Singapore to develop laws and enforcement mechanisms to eliminate optimal disk piracy.”

Negotiations therefore aim ‘at TRIPS-plus’ levels of protection, as well as addressing areas related to the internet and new technologies.

The US also uses the ‘Super 301’ review to list those countries considered to be in infringement of their obligations; as well as science and technology treaties, Bilateral Investment Treaties and ‘technical assistance’ to help countries draft laws on intellectual property. It is also pursuing negotiations on the Free Trade Area of the Americas (FTAA), and is requiring full TRIPS implementation as a condition of WTO accession for 30 candidate countries.

⁸ See ‘The work of USTR: Intellectual Property’, for example: <http://www.ustr.gov/sectors/ustrwork.shtml>

Developing country negotiators, and also non-governmental organisations that are working on development issues, need to try to formulate effective strategies to address the serious and often very difficult specific problems raised by bilateral and regional negotiations. It is important, in particular, to remain aware of new policy directions and objectives, as well as to try to keep track of the organisations or countries in which these are being pursued. There is a need for capital based officials, experts and civil society groups to be involved in the international policy debate, and for mutual supportiveness and policy coherence to be fostered between areas of concern. Discussion about the development implications of intellectual property could involve customs, courts, prosecutors and police, and senior political officials. There is a need to deepen understanding of the development dimensions of trade policy choices, and for well-researched information to be made more widely available to both specialists and non-specialists. It is also particularly important that broad and well-informed debate about intellectual property takes place in developed countries: this, perhaps, is ultimately the best way to promote serious long-term reform of current trade policy in this area.

Looking ahead:

Developing countries need to be aware of new issues and challenges associated with intellectual property protection – for example, issues surrounding use of the internet and digital technologies, rules on data protection, and the development of biotechnology. There may be a role for non-governmental organisations who are working on development issues to help negotiators learn about these new challenges, and help them to deal effectively with the issues they raise.

However, developing countries also need to continue to address actively their established priorities and concerns, and to build on the progress made to date in this respect. As noted above, developing countries have been successful in establishing opportunities to further their interests, both in WIPO and the WTO. At the moment, it seems that they have been more successful recently in the latter than in the former in this respect. The mandated work programme in the WTO, in particular, does seem to offer concrete opportunities for developing countries to address their concerns, while in WIPO there is a need for developing country delegates to co-operate in building clearer strategic directions.