



## WTO MC13: TRIPS Issues and Technology Transfer

By Viviana Muñoz Tellez & Nirmalya Syam\*

### ABSTRACT

This Policy Brief discusses issues concerning trade, intellectual property, and technology transfer that are most relevant for consideration at the 13th World Trade Organization (WTO) Ministerial Conference (MC13) in February 2024 and inclusion in its outcomes.

The following recommendations are proposed:

- TRIPS non-violation and situation complaints: MC13 Decision on the scope and modalities of non-violation and situation complaints under the Agreement on Trade related Aspects of Intellectual Property Rights (TRIPS). A second option is to extend the moratorium.
- TRIPS, diagnostics and therapeutics for COVID-19: MC13 Decision that extends the MC12 TRIPS waiver Decision (only applicable to vaccines) to diagnostics and therapeutics
- Relationship between TRIPS and the Convention on Biological Diversity: to be addressed in the MC13 Outcome Document
- Follow up to the MC12 Declaration on the WTO Response to the COVID-19 Pandemic and Preparedness for Future Pandemics: to be addressed in the MC13 Outcome Document
- Relationship of trade and technology transfer: include in the MC13 Outcome Document to reinvigorate and give direction to the Working Group on Trade and Technology Transfer (WGTTT) and increase attention in all relevant bodies on how the WTO can promote technology transfer

**KEYWORDS:** WTO, MC13, TRIPS, non-violation and situation complaints, moratorium, COVID-19, patents, TRIPS waiver, pandemic, CBD, disclosure, genetic resources, traditional knowledge, technology transfer, WGTTT

*Le présent Rapport sur les Politiques examine les questions relatives au commerce, aux droits de propriété intellectuelle et au transfert de technologie qui doivent, en raison de leur pertinence, être examinées lors de la 13e Conférence ministérielle de l'Organisation mondiale du commerce (OMC) prévue en février 2024 et incluses dans ses résultats.*

*Les recommandations suivantes sont proposées :*

\* Viviana Muñoz Tellez is Programme Coordinator and Nirmalya Syam is Senior Programme Officer of the Health, Intellectual Property and Biodiversity Programme (HIPB) of the South Centre.

### KEY MESSAGES

- There is no consensus on the scope and modalities of non-violation and situation complaints applied to the WTO TRIPS Agreement.
- The WTO has delayed action to waive TRIPS Article 31(f) export restrictions for the production and distribution of patented diagnostics and therapeutics for COVID-19.
- There is need to ensure the mutual supportiveness in the implementation of the TRIPS Agreement and the Convention on Biological Diversity.
- It is urgent for the WTO to define effective actions towards enhancing the dissemination and transfer of technology.

- Non-violation de l'Accord sur les ADPIC et plaintes en situation de non-violation: Décision de la 13<sup>e</sup> Conférence ministérielle (CM13) sur le champ d'application et les modalités d'introduction des plaintes en situation de non-violation dans le cadre de l'Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce (ADPIC). Une deuxième option consiste à prolonger le moratoire.

- ADPIC et produits de diagnostic et thérapeutiques de la COVID-19: Décision de la CM13 visant à étendre la décision prise à la douzième Conférence ministérielle (CM12) relative à la dérogation à l'Accord concernant les produits de diagnostic et thérapeutiques (dérogation qui se limite exclusivement aux vaccins) de la COVID-19.

- Relation entre l'ADPIC et la Convention sur la diversité biologique: cette question devra être abordée dans le document final de la CM13.

- Suivi de la déclaration ministérielle sur la réponse de l'OMC à la pandémie de COVID-19 et la préparation aux futures pandémies : cette question devra être abordée dans le document final de la CM13.

- Relation entre le commerce et le transfert de technologie : cette question doit être incluse dans le document final de la CM13 afin de relancer et d'orienter les travaux du Groupe de travail du commerce et du transfert de technologie et attirer davantage l'attention des organes concernés sur la manière dont l'OMC peut promouvoir le transfert de technologie.

**MOTS-CLÉS:** OMC, CM13, ADPIC, plaintes pour non-violation et situation, moratoire, COVID-19, brevets, dérogation ADPIC, pandémie, CDB, divulgation, ressources génétiques, savoirs traditionnels, transfert de technologie, WGTTT

En este Informe sobre Políticas se examinan las cuestiones relativas al comercio, la propiedad intelectual y la transferencia de tecnología más relevantes para su consideración en la 13.<sup>a</sup> Conferencia Ministerial (CM13) de la Organización Mundial del Comercio (OMC), que se celebrará en febrero de 2024, y su inclusión en el Documento Final de la misma.

Se proponen las siguientes recomendaciones:

- Reclamaciones sin infracción y por otras situaciones bajo los ADPIC: Decisión de la CM13 que aborde el alcance y las modalidades de las reclamaciones no basadas en una infracción y las reclamaciones en casos en los que exista otra situación en el marco del Acuerdo sobre los Aspectos de los Derechos de Propiedad Intelectual relacionados con el Comercio (ADPIC). Una segunda opción es prorrogar la moratoria.

- ADPIC, diagnóstico y terapéutica para COVID-19: Decisión de la CM13 que amplíe la Decisión de la CM12 de exención de los ADPIC (sólo aplicable a las vacunas) al diagnóstico y la terapéutica.

- Relación entre los ADPIC y el Convenio sobre la Diversidad Biológica: se abordará en el Documento Final de la CM13.

- Seguimiento de la Declaración de la CM12 sobre la respuesta de la OMC a la pandemia de COVID-19 y preparación para futuras pandemias: se abordará en el documento final de la CM13.

- Relación entre comercio y transferencia de tecnología: incluir en el Documento Final de la CM13 la revitalización y orientación del Grupo de Trabajo sobre Comercio y Transferencia de Tecnología (WGTTT) y aumentar la atención en todos los órganos pertinentes sobre cómo la OMC puede promover la transferencia de tecnología.

**PALABRAS CLAVES:** OMC, CM13, ADPIC, reclamaciones por no violación y por situación, moratoria, COVID-19, patentes, exención ADPIC, pandemia, CDB, divulgación, recursos genéticos, conocimientos tradicionales, transferencia de tecnología, WGTTT

## I. Background

The World Trade Organization (WTO) Thirteenth Ministerial Conference (MC13) will take place from 26 to 29 February 2024 in Abu Dhabi, United Arab Emirates. The previous Twelfth Ministerial Conference (MC12) was held in June 2022.<sup>1</sup> The Ministerial Conference is the main decision-making body of the WTO. In the intervals between meetings of the Ministerial Conference, the General Council conducts the functions of the Ministerial Conference. This includes follow-up and implementation of the decisions of the previous Ministerial Conferences.

The WTO Ministerial Conferences have regularly made decisions or declarations, as adopted by Ministers, on selected issues concerning the Agreement on Trade related Aspects of Intellectual Property Rights (TRIPS), and on the relationship of trade and technology transfer. Developing countries have increased their contributions and engagement in negotiations on TRIPS and technology transfer issues – measured by the number of new proposals and co-sponsorship. Nevertheless, the scope of their participation remains constrained, due to factors that include limited staff and coordination challenges. Moreover, their submissions have not received the requisite level of attention and earnest consideration from other WTO Members. Efforts should be made to enhance the full consideration of submissions by developing countries on these matters by the WTO Membership.

This Policy Brief discusses selected TRIPS and trade and technology transfer issues within the scope of the WTO, and makes recommendations for their consideration and inclusion in the MC13 outcomes.

There are other TRIPS issues that the MC13 could potentially address that are not discussed in this note. These include those relating to Article 23.4, Article 24.1, Article 27.3(b) and Article 71.1, for which the negotiation mandate arises from the TRIPS Agreement.<sup>2</sup>

## II. TRIPS Issues for MC13

### II.1 TRIPS non-violation and situation complaints

One of the unique features of the dispute settlement mechanism of the WTO is the possibility for members to dispute a trade-related measure under a covered WTO agreement, even if the measure does not violate the obligations under the agreement, on the grounds of nullification or impairment of the benefit that a member would have reasonably expected to arise under a covered agree-

<sup>1</sup> See WTO MC12 Outcome Document, available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W16R1.pdf&Open=True>.

<sup>2</sup> For a comprehensive analysis of all TRIPS issues see South Centre, "Matrix of Key Issues in the WTO TRIPS Council", June 2023. Available from <https://www.southcentre.int/wp-content/uploads/2023/07/TRIPS-Matrix-June-2023-rev2.pdf>.

ment. Such complaints are known as ‘non-violation or situation complaints’.

Article XXIII (1) of the General Agreement on Tariffs and Trade (GATT), further developed in article 26 of the WTO Dispute Settlement Understanding, provides for the following grounds and procedure for starting a dispute in the WTO:

“If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

(a) the failure of another contracting party to carry out its obligations under this Agreement,

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.”

However, Article XXIII(1) (b) and (c) of GATT – non-violation complaints and situation complaints – are currently not applicable to the TRIPS Agreement. Article 64.2 of TRIPS states that, “Subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement.” Article 64.3 further states that during this time period “... the Council for TRIPS shall examine the scope and modalities for complaints of the type provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 made pursuant to this Agreement and submit its recommendations to the Ministerial Conference for approval. Any decision of the Ministerial Conference to approve such recommendations or to extend the period in paragraph 2 shall be made only by consensus, and approved recommendations shall be effective for all Members without further formal acceptance process.”

However, there was not much discussion on the scope and modalities of non-violation and situation complaints under TRIPS from 1995-2000 as mandated under article 64.2. Since the 2001 Doha Ministerial Conference, the Ministerial Conferences have periodically extended a moratorium on the initiation of non-violation and situation complaints under TRIPS. The Twelfth Ministerial Conference further extended the moratorium till the 13th Mi-

nisterial Conference with a mandate to 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 13th Ministerial Conference.” This examination, however, did not take place.

Nevertheless, discussions on the scope and modalities regarding non-violation and situation complaints under TRIPS have remained inconclusive despite the issue being on the agenda of the TRIPS Council for more than two decades.<sup>3</sup> Broadly, two distinct views have been articulated by WTO Members in the discussions on this issue from the outset. On the one hand, the proponents, comprising the United States and Switzerland, of the application of non-violation and situation complaints to TRIPS disputes, consider such complaints to be automatically applicable on expiry of the moratorium, guided by the provisions of Article 26 of the Dispute Settlement Understanding. This would mean that such complaints would be applicable even in the absence of a consensus on the scope and modalities. On the other hand, the majority of WTO Members, including both developing and developed countries, consider it inappropriate to apply non-violation and situation complaints to TRIPS and have expressed the need for further extension of the moratorium unless a consensus is reached on the issue of the scope and modalities for their application to TRIPS issues.

In this context, the 13th WTO Ministerial Conference will have to decide on the adoption of the scope and modalities for non-violation and situation complaints under TRIPS, or the extension of the moratorium on initiating such complaints.

Since no discussion on scope and modalities of non-violation and situation complaints has taken place in the TRIPS Council since the 12th Ministerial Conference, currently there is no consensus among WTO Members on the same. It should be noted that article 64.3 of TRIPS requires that any decision on scope and modalities of non-violation and situation complaints must be adopted by consensus.

### **Recommendations**

In view of the inability of the WTO Members to reach consensus on the scope and modalities of non-violation and situation complaints over 29 years since the adoption of the TRIPS Agreement, it would be pertinent for the WTO Ministerial Conference to adopt a decision making such complaints inadmissible under TRIPS. In the alternative, the Ministerial Conference will have to extend the current moratorium until the 14th Ministerial Conference.

<sup>3</sup> Nirmalya Syam, *Non-violation and Situation Complaints under the TRIPS Agreement: Implications for Developing Countries*, Research Paper, No.109 (Geneva, South Centre, 2020). Available from <https://www.southcentre.int/wp-content/uploads/2020/05/Rp-109.pdf>.

Developed country members have used the extension of the moratorium on non-violation and situation complaints under TRIPS as a leverage to trade off against another moratorium on customs duties on electronic transmissions (e-commerce moratorium). The Ministerial Conferences have continuously extended a moratorium restraining WTO Members from imposing customs duties on electronic transmissions, while the scope of what is covered by this moratorium is still contested, as there is no agreement on what “transmissions” includes. Taxing electronic transmissions, which have grown phenomenally in recent years with the expansion of e-commerce, can be a source of substantial revenue generation for governments, and it is also a sector that countries are keen to promote.<sup>4</sup> A number of developing countries would like to see the moratorium end.

However, the linkage between the e-commerce moratorium and the TRIPS non-violation and situation complaints moratorium is merely a strategic link and not a legal one. Hence, negotiation on the TRIPS non-violation and situation complaints moratorium and the electronic commerce transmissions moratorium should be de-linked to consider each separately on their own merit.

Importantly, the absence of a TRIPS non-violation and situation complaints moratorium, if an extension of the same is not agreed upon, will not imply that such complaints become available under TRIPS. This is because the scope and modalities of such complaints have not been developed and adopted by consensus. In the absence of a moratorium, interested WTO Members may eventually file a non-violation or situation complaint under TRIPS, but it should be dismissed as the scope and modalities of such complaints have not been agreed upon. It is also worth noting that in the history of the GATT and the WTO such complaints have been very rarely articulated and deemed admissible.<sup>5</sup>

## II.2 Extension of MC12 Decision on TRIPS to diagnostics and therapeutics for COVID-19

Developing country Members advanced a proposal for a temporary TRIPS waiver scale up of manufacturing and supply of COVID-19 medical products, document [IP/C/W/669/Rev.1](#). Following prolonged negotiations, the MC12 on 17 June 2022 adopted Ministerial Decision [WT/L/1141](#), waiving the obligation under article 31(f) that a compulsory licensing authorization must be used predominantly for domestic purposes, in relation to vaccines for the COVID-19 pandemic and clarifying some of the provisions of TRIPS relating to compulsory licensing and test data protection. This negotiated outcome was much more

4 Rashmi Banga, *WTO Moratorium on Customs Duties on Electronic Transmissions: How much tariff revenue have developing countries lost?*, Research Paper, No.157 (Geneva, South Centre, 2022). Available from [https://www.southcentre.int/wp-content/uploads/2022/06/RP157\\_WTO-Moratorium-on-Customs-Duties-on-Electronic-Transmissions\\_EN.pdf](https://www.southcentre.int/wp-content/uploads/2022/06/RP157_WTO-Moratorium-on-Customs-Duties-on-Electronic-Transmissions_EN.pdf).

5 Syam, *supra* note 3.

limited in scope than the initial waiver proposal.<sup>6</sup> Paragraph 8 of the MC12 Decision mandated that Members will decide on its extension to therapeutics and diagnostics in no less than six months from the date of the Decision. After more than 18 months since the MC12 Decision, WTO Members have been unable to take a decision on extension as mandated.

In the WTO General Council, developing countries have proposed a *mutatis mutandis* extension of the MC12 Decision to COVID-19 therapeutics and diagnostics. It reflects poorly on the WTO that the members were unable to reach a prompt decision regarding the mere extension of a deadline for deciding on the matter of extension, more so when the issue at hand is of the most pressing nature: an emergency response to a global public health crisis.

Protracted discussion has taken place both formally and informally on the need for the extension of the MC12 TRIPS Decision to COVID-19 therapeutics and diagnostics.<sup>7</sup> The United States (US) delayed the decision having requested more time to internally analyze the matter resulting in a report by the US International Trade Commission that summarizes results of hearings and a literature review.<sup>8</sup>

Diagnostics and therapeutics are an essential part of the COVID-19 response strategy. There is continued need for timely and affordable COVID-19 diagnostics and therapeutics, with cases still increasing daily.<sup>9</sup> The World Health Organization (WHO) International Health Regulations (IHR) Emergency Committee has continued to call on Members to improve access to COVID-19 diagnostics and therapeutics for their populations.<sup>10</sup> The WHO Director-General has expressed concern that there continues to be inequitable access to life-saving interventions.<sup>11</sup>

6 For an analysis of the TRIPS decision, see Carlos M. Correa and Nirmlaya Syam, *The WTO TRIPS Decision on COVID-19 Vaccines: What is Needed to Implement It?*, Research Paper, No. 169 (Geneva, South Centre, 2022). Available from [https://www.southcentre.int/wp-content/uploads/2022/11/RP169\\_The-WTO-TRIPS-Decision-on-COVID-19-Vaccines\\_EN.pdf](https://www.southcentre.int/wp-content/uploads/2022/11/RP169_The-WTO-TRIPS-Decision-on-COVID-19-Vaccines_EN.pdf).

7 See WTO document IP/C/W/706, 23 October 2023 (Report by the TRIPS Council Chair of the informal thematic session for external stakeholder input on paragraph 8 of the Ministerial Decision on the TRIPS Agreement). Available from <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W706.pdf&Open=True>.

8 United States International Trade Commission, “COVID-19 Diagnostics and Therapeutics: Supply, Demand and TRIPS Agreement Flexibilities”, Washington, D.C., October 2023. Available from <https://www.usitc.gov/publications/332/pub5469.pdf>. See also Submission by the South Centre to the USITC hearing on Covid-19 diagnostics and therapeutics, 17 March 2023. Available from <https://www.southcentre.int/wp-content/uploads/2023/03/South-Centre-submission-USITC-1.pdf>.

9 See World Health Organization, “COVID-19 cases”, WHO COVID-19 dashboard. Available from <https://data.who.int/dashboards/covid19/cases?n=c>.

10 See World Health Organization, “Report of the Review Committee regarding standing recommendations for COVID-19”, 4 August 2023, p. 20. Available from [https://cdn.who.int/media/docs/default-source/documents/ihr/final-report-rc-srs-covid-19.pdf?sfvrsn=763ce4f5\\_14&download=true](https://cdn.who.int/media/docs/default-source/documents/ihr/final-report-rc-srs-covid-19.pdf?sfvrsn=763ce4f5_14&download=true).

11 World Health Organization, Statement on the fifteenth meeting of the IHR (2005) Emergency Committee on the COVID-19 pandemic, 5 May 2023. Available from [https://www.who.int/news/item/05-05-2023-statement-on-the-fifteenth-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-coronavirus-disease-\(covid-19\)-pandemic](https://www.who.int/news/item/05-05-2023-statement-on-the-fifteenth-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-coronavirus-disease-(covid-19)-pandemic).

Moreover, increased access to diagnostics and treatment of COVID-19 to reduce mortality, morbidity, and long-term sequelae remains a pillar of the 2023-2025 WHO Strategic preparedness and response plan.<sup>12</sup> The extension of the MC12 decision on TRIPS would contribute to these goals.

### Recommendations

The outcome to pursue should be a MC13 decision that at minimum, ensures the extension of the MC12 Decision on the TRIPS waiver to also apply to diagnostics and therapeutics. In the negotiations for the MC13 outcomes, Members must be pressed to engage substantially on the proposed extension of the MC12 Decision.

There is no legal barrier in extending the MC12 decision beyond vaccines to cover diagnostics and therapeutics. Rather, it would be a proportionate legal measure to facilitate global equitable access by enabling the freedom to operate for manufacturers to export diagnostics and therapeutics to developing countries without fear of patent litigation. It will also provide legal certainty to WTO Members that they would not face complaints by other Members under the WTO rules.

### II.3 WTO response to the COVID-19 pandemic

The 12th WTO Ministerial Conference adopted a declaration on the WTO response to the COVID-19 pandemic which, *inter alia*, stated that increasing the level of global preparedness for COVID-19 and future pandemics requires strengthened productive, scientific and technological capacity across the world.<sup>13</sup> It also recognized that such capacity is instrumental for developing solutions to public health crises beyond COVID-19, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, as well as neglected tropical diseases, and for diversifying manufacturing locations.<sup>14</sup> In line with WTO rules, the declaration underscored the importance of promoting technology transfer that contributes to building capacity in related sectors.<sup>15</sup>

The declaration also mandated the TRIPS Council to continue or initiate work to analyze lessons learned and challenges experienced during the COVID-19 pandemic.<sup>16</sup> However, no proposal has been submitted in the TRIPS Council in this regard.

The WTO response to the COVID-19 pandemic insofar as TRIPS is concerned has been late and ineffective. The MC12 Decision on TRIPS in response to the waiver pro-

<sup>12</sup> World Health Organization, From emergency response to long-term COVID-19 disease management: sustaining gains made during the COVID-19 pandemic (Geneva, WHO, 2023; WHO/WHE/ SPP/2023.1).

<sup>13</sup> WT/MIN(22)31, 22 June 2022.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

posal by India and South Africa was very late and narrow. In view of this, WTO Members could consider exploring normative solutions under TRIPS to make future response to pandemics effective and timely, including the use of the national security exception.<sup>17</sup> A comprehensive discussion on the WTO response to the COVID-19 pandemic in the context of TRIPS should take place to inform preparation for response in a future pandemic or other emergency. This discussion could focus on the scope of use of various TRIPS flexibilities in future pandemics in the light of lessons learned and the experience of the use of TRIPS flexibilities during the COVID-19 pandemic, and work towards actions to facilitate the use of such flexibilities by members including the revision of national legislation and policies.

### Recommendations

The MC13 outcome document should include a reference to the implementation of the MC12 declaration on the WTO response to the COVID-19, recalling that relevant bodies including the TRIPS Council should work to advance its effective implementation.

### II.4 TRIPS-CBD relationship

The issue of the relationship of the TRIPS Agreement and the Convention of Biological Diversity (CBD) and the protection of traditional knowledge (TK) is an important issue for developing countries. It is part of the “implementation” issues – concerns of developing countries in implementing the WTO agreements - that are still pending of a negotiated solution in the WTO.

The provisions of TRIPS come into conflict with provisions of the CBD (this agreement precedes TRIPS, it came into force in 1993) in the following ways:

- TRIPS does not prevent a person from claiming patent rights on an invention based on a genetic resource or TK;
- TRIPS is indifferent to acts of biopiracy and non-compliance by patent applicants with obligations under the CBD in respect of prior informed consent and benefit sharing for accessing biological resources;
- TRIPS does not require patent applicants to disclose the origin of genetic resources (GRs) and TK used in a claimed invention.

Accordingly, developing countries have proposed that the TRIPS Agreement be amended to introduce a requirement of mandatory disclosure of the country or source of origin of GRs or associated TK used in an invention,<sup>17</sup> See, e.g., Frederick Abbott, *The TRIPS Agreement Article 73 Security Exceptions and the COVID-19 Pandemic*, Research Paper, No.116 (Geneva, South Centre, 2020). Available from [https://www.southcentre.int/wp-content/uploads/2020/08/RP-116-reduced\\_1.pdf](https://www.southcentre.int/wp-content/uploads/2020/08/RP-116-reduced_1.pdf).

and evidence of prior informed consent and access and benefit sharing.<sup>18</sup>

This discussion is mandated under paragraph 19 of the Doha Ministerial Declaration of 2001.

In 2006, Brazil, India, Pakistan, Peru, Thailand and Tanzania submitted a proposal (IP/C/W/474) for an amendment to the TRIPS Agreement to introduce Article 29bis requiring mandatory disclosure of the country or source of origin of genetic resources and associated TK used in an invention, and evidence of prior informed consent and compliance with access and benefit sharing regulations. In July 2008 a joint proposal for a modality text (TN/C/W/52) was submitted for decision at MC7, linking the proposed outcomes on the patent disclosure requirement with the extension of the level of protection for geographical indications for products other than wine and spirits. This draft modality text obtained the support of 108 members. A draft decision text (TN/C/W/59) was also submitted in April 2011 by Brazil, China, Colombia, Ecuador, India, Indonesia, Peru, Thailand, ACP (African, Caribbean and Pacific) Group and African Group. This revised proposal was updated to be consistent with the CBD Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, concluded in October 2010. Discussions continued in a Special Session of the TRIPS Council and although the issue has become a regular item in the agenda of the TRIPS Council no progress has been made to respond to developing countries' demands.

Overall, the trend is an increase in countries that are adopting such disclosure requirement at the national level.<sup>19</sup> However, there are divergences in the specificities of the requirement and its implementation. An international agreement would support harmonization that would increase certainty for both users and suppliers of genetic resources and associated TK. As a mechanism within the international patent system, it would also be useful to increase transparency.

There are some countries that now outright refuse to discuss the TRIPS and CBD relationship in the TRIPS Council. The main argument is that issue is being discussed in the World Intellectual Property Organization (WIPO).<sup>20</sup>

18 See Nirmalya Syam and Thamara Romero, *Misappropriation of Genetic Resources and Associated Traditional Knowledge: Challenges Posed by Intellectual Property and Genetic Sequence Information*, Research Paper, No. 130 (Geneva, South Centre, 2021), pp. 25-8. Available from <https://www.southcentre.int/wp-content/uploads/2021/04/RP-130.pdf>.

19 World Intellectual Property Organization, *Key Questions on Patent Disclosure Requirements for Genetic Resources and Traditional Knowledge*, Second Edition (Geneva, 2020). Available from <https://www.wipo.int/publications/en/details.jsp?id=4498>.

20 See Viviana Munoz Tellez, "A Breakthrough in Negotiations on Intellectual Property Protection of Genetic Resources and Traditional Knowledge in WIPO", Policy Brief, No. 113, (Geneva, South Centre, 2022). Available from [https://www.southcentre.int/wp-content/uploads/2022/10/PB113\\_A-Breakthrough-in-Negotiations-on-Intellectual-Property-Protection-of-Genetic-Resources-and-Traditional-Knowledge-in-WIPO\\_EN.pdf](https://www.southcentre.int/wp-content/uploads/2022/10/PB113_A-Breakthrough-in-Negotiations-on-Intellectual-Property-Protection-of-Genetic-Resources-and-Traditional-Knowledge-in-WIPO_EN.pdf).

However, the WIPO and WTO processes are mutually supportive and do not overlap. The fact that there is likely to be an outcome in WIPO on an international instrument on patent disclosure in relation to genetic resources makes it the more relevant for discussion in the WTO. In WIPO, an international instrument is only applicable to the WIPO Members that become party to the agreement, and there is always the possibility of opting out.

It should be noted that while a WIPO Diplomatic Conference for adoption of an international legal instrument on intellectual property and genetic resources will be held in 2024, the nature of the instrument and its content is still uncertain. If a legal instrument (the form of which is still undecided, whether binding as a treaty or non-binding) is adopted in WIPO, it will not bind any WTO Member that does not ratify the WIPO instrument. If the instrument is concluded, it will take years to see whether the disclosure obligation is introduced by most patent offices around the world, depending on the number of countries that ratify the agreement. Some countries, such as the United States, are unlikely to sign a WIPO binding agreement on this matter. An instrument adopted by WIPO would in any case facilitate the work of the WTO to amend TRIPS to introduce a disclosure requirement that would bind all members and thus create more legal certainty with greater homogeneity on how it is applied by each patent office. Therefore, it remains important and relevant that a mandatory disclosure requirement as proposed by developing countries be adopted under TRIPS, to become a binding commitment on all WTO Members.

### Recommendations

Mobilise support among like-minded countries to include text for an outcome on the TRIPS and CBD relationship based on the proposal for a disclosure requirement in MC13. Developing countries, as proponents of an outcome on TRIPS-CBD, should coordinate to propose the text for the MC13 outcome document. The MC13 can decide to expedite discussions on the relationship between the TRIPS Agreement and CBD with a view to achieving a legally binding outcome by MC14 in 2025. To that end, the MC13 can provide guidance for the TRIPS Council to ensure the negotiations on this issue take place on an accelerated timeframe, and take into account the outcome of the WIPO negotiations.

### III. Technology Transfer

The MC4 Doha Ministerial Declaration -paragraph 37- led to the creation of a Working Group under the auspices of the General Council, to examine the relationship between trade and transfer of technology. It was also mandated to make any possible recommendations on steps that might be taken within the mandate of the WTO to increase flows of technology to developing countries. The work of the WGTTC has been slow and stalled in recent years.

Subsequent Ministerial Conferences have instructed the WGTTT to continue its work (see for example MC9 decision [WT/MIN\(13\)/35](#) [WT/L/910](#)). However, the WGTTT has not provided any recommendations to date, and the General Council has not provided additional guidance on accelerating the work.

There is no lack of proposals in the WGTTT to engage in more detailed examination of WTO agreements and their impact on transfer of technology, rather reluctance from few members to engage substantially in elaborating recommendations for areas of potential actions by the WTO. In 2023 two new proposals have been tabled by several developing countries, including the African Group [WT/WGTTT/W/34/Rev.1](#) on reinvigorating the work by organising discussions by themes and deepening experience sharing, and India [JOB/WGTTT/2](#) on the transfer of environmentally sound technologies to developing countries to address climate change. The Chairperson of the WGTTT in July 2023 reported on consultations that there was renewed interest in substantive proposals and a general acknowledgment among delegations of the continued relevance of the mandate, and the value of experience sharing within the WGTTT to enhance understanding of the relationship of trade and transfer of technology ([JOB/WGTTT/1](#)). The Chairperson suggested the adoption of a work programme to structure future work of the WGTTT to include prioritized areas for technology transfer, mechanisms for cooperation and proposals for outcomes. However, the WGTTT did not find consensus on a work

programme.

If there is a large coalition of members working together to mobilize a new agenda on technology transfer, the discussion could be reinvigorated, not only in the WGTTT but in other WTO bodies. In the current context, whereby the technological gap among WTO Members has widened significantly, and there is a pressing need to work collaboratively to address global challenges harnessing the power of new technologies, such as to address climate change, it is urgent to bring back high on the WTO the issue of facilitating technology transfer through the trade framework.

### Recommendations

Developing countries should work together to propose a text for the MC13 Outcome Document to increase prominence of the issue of technology transfer, which can include guidance to formulate a new work programme for the WGTTT considering the proposals that have been recently tabled and any new proposals. The relationship of trade and technology transfer has been extensively discussed. It is time for WTO Members to work towards defining specific actions that can be taken within the scope of WTO agreements to increase technology transfer towards developing countries.

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*The South Centre is the intergovernmental organization of developing countries that helps developing countries to combine their efforts and expertise to promote their common interests in the international arena. The South Centre was established by an Intergovernmental Agreement which came into force on 31 July 1995. Its headquarters is in Geneva, Switzerland.*

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The South Centre  
International Environment House 2  
Chemin de Ballexert 7-9  
PO Box 228, 1211 Geneva 19  
Switzerland  
Tel.: +41 22 791 8050  
[south@southcentre.int](mailto:south@southcentre.int)  
<https://www.southcentre.int>