



# **Human Rights and International IP Law – some thoughts**

Jayashree Watal

# Disclaimer and Acknowledgement

- Nothing in this presentation should be taken to represent the views of any organization/institution that I am or have been associated with, including the WTO.
- I gratefully acknowledge helpful discussions with Mr. Hannu Wager when preparing this presentation.

# DO MARKETS SUPPORT HUMAN RIGHTS?

- Is it important for everyone to have the freedom to participate in markets that are free of distortions, including arbitrary government procedures?
- Well-functioning national and international markets contribute to raise standards of living, which is important to fulfil economic, social and cultural rights
- MIWI- reality of global value chains - need global rules to govern trade

# WTO – BASIC FEATURES

- Rules-based system, non-discrimination (national treatment, MFN) is at the core
- Decision-making by consensus
- Trade negotiations involve difficult decisions, trade-offs – has to be seen as a package where all lose some, win some
- Shifting power equations, evolving system
- Effective dispute settlement processes, cross-retaliation in IPRs
  - Ecuador, Antigua and Barbuda, Brazil
- Not perfect and needs to be strengthened
  - This is in the interest of the poorer Members

## AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

The *Parties* to this Agreement,

*Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to, raising standards of living ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,

*Recognizing* further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,

*Being desirous* of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations,

*Resolved*, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations,

*Determined* to preserve the basic principles and to further the objectives underlying this

# Role and function of IPRs

- Efficient markets require well-functioning institutions, including property systems
- IPRs provide a mechanism to capture value inherent in ideas and their applications so that these can be more easily exchanged and diffused for the benefit of society
- IPRs have different economic functions:
  - Patents, copyright, designs support creativity and inventiveness
  - Trademarks, geographical indications correct information asymmetries and prevent confusion

# Do IPRs obstruct the realization of some human rights?

Some human rights that are commonly invoked:

- Right to health (Article 12 of the ICESCR)
  - TRIPS flexibilities as reiterated by the Doha Declaration
- Right to food (Article 11 of the ICESCR)
  - Effective *sui generis* system to protect new plant varieties
- Right to education (Article 13 of the ICESCR)
  - Article 10.2 of the Berne Convention and the Appendix
- Right to participate in cultural life and enjoy the benefits of scientific progress and its application (Article 15)
- Freedom of expression and more specifically, the freedom necessary for scientific research and creative activity (Article 15.3)
- Right to development (UNGA resolution A/RES/41/128, 4 December 1986)

# Are IPRs really contrary to the realization of these human rights? ...

- IP (patent, copyright) systems rarely result in effective “monopoly” and contain a **balance** between benefitting right holders and allowing access to users and other creators to use or improve these products through **subject matter exclusions, exceptions and limitations to rights, duration**.
  - This mirrors the balance in Article 15 of the ICESCR
- Balanced IP systems are as much about **preservation of the public domain** and are relevant to provide the **freedom** necessary for scientific research and creative activity as well as freedom of expression.
  - For example, the right to use copyrighted works to create parodies; paradox with traditional cultural expressions
  - Economic viability is the basis of a free media vs. government owned media



## *Article 3*

### *National Treatment*

1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection<sup>3</sup> of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS.

2. Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.

## *Article 4*

### *Most-Favoured-Nation Treatment*

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member:

- (a) deriving from international agreements on judicial assistance or law enforcement of a

## *Article 7*

### *Objectives*

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*

### *Principles*

1. Members may, in formulating or amending their laws and regulations, 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, provided that such measures are consistent with the provisions of this Agreement.

2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

## Article 27

### Patentable Subject Matter

1. Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.<sup>5</sup> Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

2. 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.

3. Members may also exclude from patentability:

- (a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;
- (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

## *Article 6*

### *Exhaustion*

For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

- The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4.

## Article 30

### *Exceptions to Rights Conferred*

Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

## Article 31

### *Other Use Without Authorization of the Right Holder*

Where the law of a Member allows for other use<sup>7</sup> of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected:

- (a) authorization of such use shall be considered on its individual merits;
- (b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly;

- (b) Each Member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.
- (c) Each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.

# WORLD TRADE ORGANIZATION

WT/MIN(01)/DEC/2  
20 November 2001

(01-5860)

**MINISTERIAL CONFERENCE**  
**Fourth Session**  
**Doha, 9 - 14 November 2001**

## **DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH**

Adopted on 14 November 2001

1. We recognize the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.
2. We stress the need for the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to be part of the wider national and international action to address these problems.
3. We recognize that intellectual property protection is important for the development of new medicines. We also recognize the concerns about its effects on prices.
4. We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner

4. We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' **right to protect public health** and, in particular, **to promote access to medicines for all**.



## Article 9

*[Right of Reproduction: 1. Generally; 2. Possible exceptions; 3. Sound and visual recordings]*

- (1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.
- (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.
- (3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

## Article 10

*[Certain Free Uses of Works: 1. Quotations; 2. Illustrations for teaching; 3. Indication of source and author]*

- (1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.
- (2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.
- (3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.

## APPENDIX

### [SPECIAL PROVISIONS REGARDING DEVELOPING COUNTRIES]

#### Article I

*[Faculties Open to Developing Countries: 1. Availability of certain faculties; declaration: 2. Duration of effect of declaration, 3. Cessation of developing country status; 4. Existing stocks of copies; 5. Declarations concerning certain territories; 6. Limits of reciprocity]*

(1) Any country regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations which ratifies or accedes to this Act, of which this Appendix forms an integral part, and which, having regard to its economic situation and its social or cultural needs, does not consider itself immediately in a position to make provision for the protection of all the rights as provided for in this Act, may, by a notification deposited with the Director General at the time of depositing its instrument of ratification or accession or, subject to Article V(1)(c), at any time thereafter, declare that it will avail itself of the faculty provided for in Article II, or of the faculty provided for in Article III, or of both of those faculties. It may, instead of availing itself of the faculty provided for in Article II, make a declaration according to Article V(1)(a).

(2)

(a) Any declaration under paragraph (1) notified before the expiration of the period of ten years from the entry into force of Articles 1 to 21 and this Appendix according to Article 28(2) shall be effective until the expiration of the said period. Any such declaration may be renewed in whole or in part for periods of ten years each by a notification deposited with the Director General not more than fifteen months and not less than three months before the expiration of the ten-year period then running.

(b) Any declaration under paragraph (1) notified after the expiration of the period of ten years from the entry into force of Articles 1 to 21 and this Appendix according to Article 28(2) shall be effective until

<a href="#"><u>DS434</u></a>	Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complainant: Ukraine)	<p>Consultations requested: 13 March 2012</p> <p>Current status: Panel established, but not yet composed</p>
<a href="#"><u>DS409</u></a>	European Union and a Member State – Seizure of Generic Drugs in Transit (Complainant: Brazil)	<p>Consultations requested: 12 May 2010</p> <p>Current status: In consultations</p>
<a href="#"><u>DS408</u></a>	European Union and a Member State – Seizure of Generic Drugs in Transit (Complainant: India)	<p>Consultations requested: 11 May 2010</p> <p>Current status: In consultations</p>
<a href="#"><u>DS372</u></a>	China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers (Complainant: European Communities)	<p>Consultations requested: 3 March 2008</p> <p>Current status: Settled or terminated (withdrawn, mutually agreed solution)</p>
<a href="#"><u>DS362</u></a>	China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights (Complainant: United States)	<p>Consultations requested: 10 April 2007</p> <p>Current status: Implementation notified by respondent</p>
<a href="#"><u>DS290</u></a>	European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (Complainant: Australia)	<p>Consultations requested: 17 April 2003</p> <p>Current status:</p>

<a href="#"><u>DS176</u></a>	United States – Section 211 Omnibus Appropriations Act of 1998 (Complainant: European Communities)	<p>Consulations requested: 8 July 1999</p> <p>Current status: Report(s) adopted, with recommendation to bring measure(s) into conformity</p>
<a href="#"><u>DS174</u></a>	European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (Complainant: United States)	<p>Consulations requested: 1 June 1999</p> <p>Current status: Implementation notified by respondent</p>
<a href="#"><u>DS171</u></a>	Argentina – Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals (Complainant: United States)	<p>Consulations requested: 6 May 1999</p> <p>Current status: Settled or terminated (withdrawn, mutually agreed solution)</p>
<a href="#"><u>DS170</u></a>	Canada – Term of Patent Protection (Complainant: United States)	<p>Consulations requested: 6 May 1999</p> <p>Current status: Implementation notified by respondent</p>
<a href="#"><u>DS160</u></a>	United States – Section 110(5) of US Copyright Act (Complainant: European Communities)	<p>Consulations requested: 26 January 1999</p> <p>Current status: Authorization to retaliate requested (including 22.6 arbitration)</p>

> [trade topics](#) > [dispute settlement](#) > [the disputes](#) > [disputes by agreement](#)



**DISPUTE SETTLEMENT: THE DISPUTES**

## Disputes by agreement

(as cited in request for consultations)

A dispute arises when a member government believes another member government is violating a WTO agreement. The complaining member must submit a “request for consultations” identifying the agreements it believes are being violated. A dispute can be, and often is, brought under more than one agreement. The list below shows the agreements cited in the request for consultations.

A summary has been prepared by the Secretariat under its own responsibility. The summary is for general information only and is not intended to affect the rights and obligations of Members.

Click an agreement in the list below to see the relevant disputes.

### AGREEMENT

- > [Agreement Establishing the World Trade Organization](#)
- > [Agriculture](#)
- > [Anti-dumping \(Article VI of GATT 1994\)](#)
- > [Civil Aircraft](#)
- > [Customs valuation \(Article VII of GATT 1994\)](#)
- > [Dispute Settlement Understanding](#)
- > [GATT 1947](#)
- > [GATT 1994](#)
- > [Government Procurement](#)
- > [Import Licensing](#)
- > [Intellectual Property \(TRIPS\)](#)
- > [Preshipment Inspection](#)
- > [Rules of Origin](#)
- > [Safeguards](#)
- > [Sanitary and Phytosanitary Measures \(SPS\)](#)
- > [Services \(GATS\)](#)
- > [Subsidies and Countervailing Measures](#)
- > [Technical Barriers to Trade \(TBT\)](#)
- > [Textiles and Clothing](#)

**See also:**

- > [Find disputes cases](#)
- > [Find disputes documents](#)
- > [Disputes chronologically](#)
- > [Disputes by country/territory](#)
- > [Disputes by current status](#)
- > [Disputes by short title](#)
- > [Disputes by subject](#)
- > [Map of disputes](#)
- > [GATT disputes \(pre-WTO\)](#)

# Concluding thoughts

- International IP law in general and the **TRIPS Agreement** in particular **does contain sufficient policy space** for States to pursue various human rights objectives and considerations, bearing in mind the balance that exists in both human rights law and IP law.
  - Balance differs between jurisdictions and over time within a jurisdiction, based on changing economic, social and cultural considerations.