

TRIPS AND THE DOHA ROUND

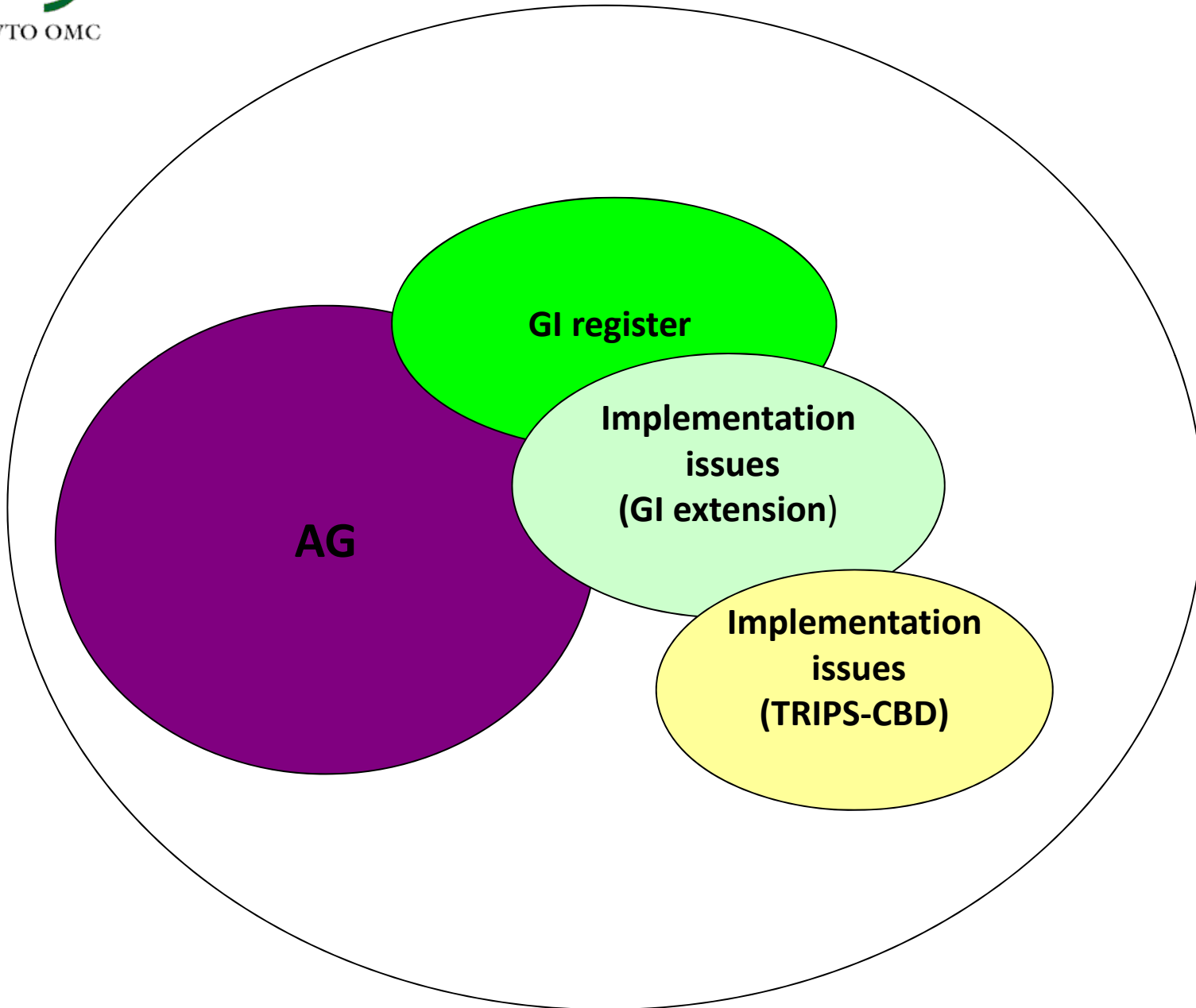
- a presentation at ICRIER

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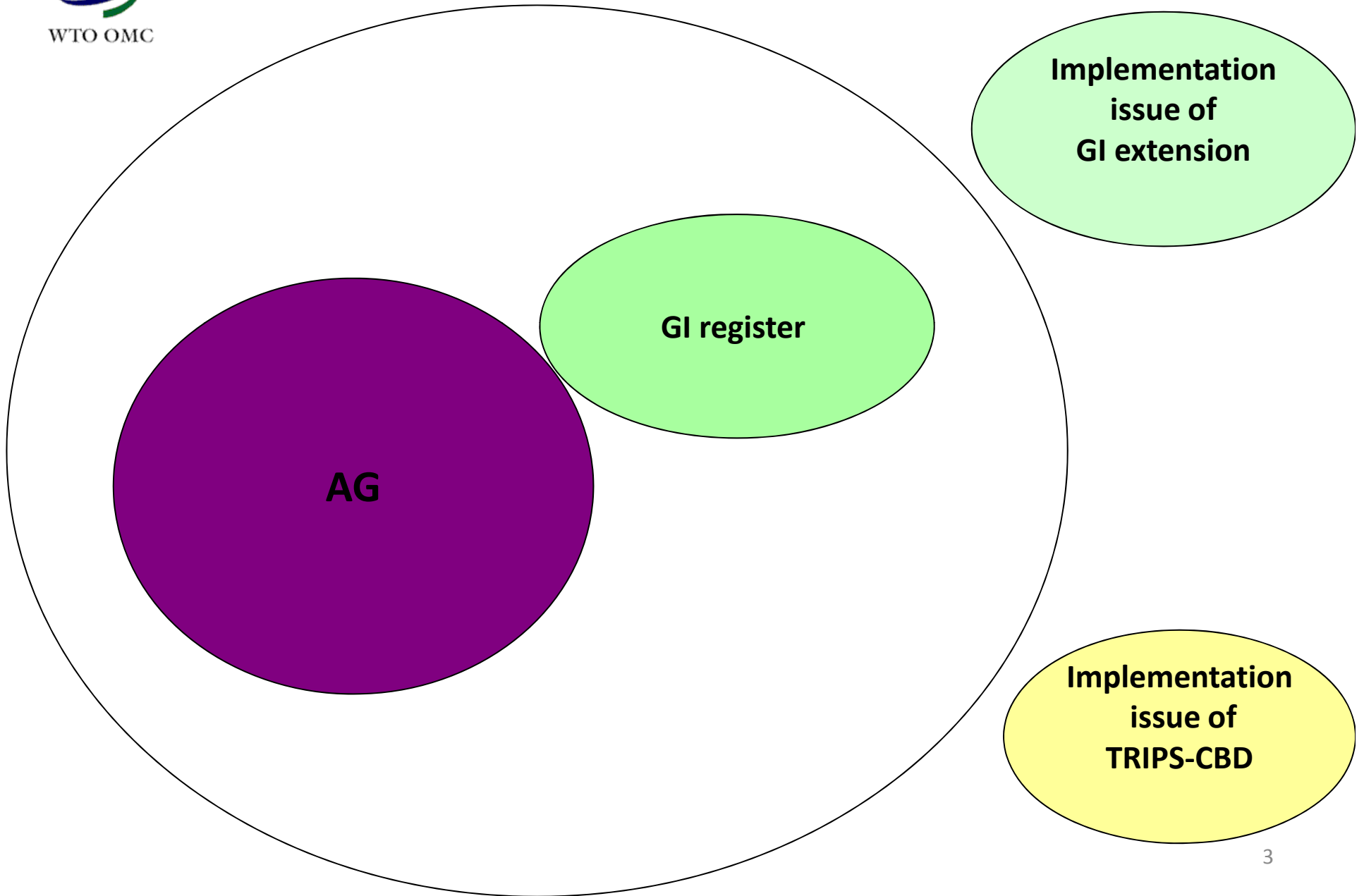
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How one side sees the TRIPS issues as part of Doha Round



How another side sees the same issues



Register: Article 23.4

*In order **to facilitate** the protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a **multilateral system** of **notification and registration** of geographical indications for **wines eligible** for protection in those Members **participating in the system**.*

The Doha Declaration and GIs (1)

Register of GIs for wines and spirits

Paragraph 18, first sentence:

*With a view to completing the work started in the Council for Trade-Related Aspects of Intellectual Property Rights (Council for TRIPS) on the implementation of Article 23.4, we agree to negotiate the establishment of a multilateral system of notification and registration of geographical indications for wines **and spirits** by the Fifth Session of the Ministerial Conference.*

Clear mandate; “early harvest” not achieved in 2003.



The Doha Declaration and GIs (2)

Extension

- Paragraph 18, second sentence

"We note that issues related to the extension of the protection of geographical indications provided for in Article 23 to products other than wines and spirits will be addressed in the Council for TRIPS pursuant to paragraph 12 of this Declaration."



The Doha Declaration and GIs (3)

"Work programme

Implementation-Related Issues and Concerns

12. ... *we agree that negotiations on outstanding implementation issues shall be an integral part of the Work Programme... 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.*"

Special Session: the actors

- The **main actors** in the Special Session:
 - European Communities: proposal in 2005; new ideas in 2007; Group of 108 Members (cf. TN/C/W/52 of 19 July 2008)
 - Joint Proposal Group: co-sponsors: Argentina, Australia, Canada, Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Japan, Korea, Mexico, New Zealand, Nicaragua, Paraguay, South Africa, Chinese Taipei, USA (see TN/IP/W/10/Rev.2 of 24 July 2008)
- Hong Kong, China (see TN/IP/W/8 of 23 April 2003)
- Less or no interest from other delegations

Special Session: work done so far

- **Divergence on 2 key issues:**
 - **The extent to which the registration of a geographical indication should create legal effects at the national level; and**
 - **The question of participation, in particular whether legal effects under the system should apply in all WTO Members or only on those opting to participate in the system**
- Debate on kind/level of legal effect/consequence, territoriality principle, "to facilitate protection", "multilateral", legal status of translations and transliterations, etc.

Extension: the proposal

= *Extension of the higher protection of GIs for wines and spirits to other products*

- What do proponents (“GI Friends”) want?
 - Article 23 to apply to all GIs
 - Article 24 exceptions to apply *mutatis mutandis* (by analogy)
 - Multilateral register (of GIs for wines and spirits) to apply to all GIs
- Opposition to the proposal for extension, notably for lack of mandate



Negotiations/discussions in July 2008 (1)

- Two reports:
 - Register (for wines and spirits): Chair's report - TN/IP/18 of 9 June 2008
 - Two implementation issues (GI extension and TRIPS/CBD): Dg's report - WT/GC/W/591-TN/C/W/50 of 9 June 2009
- Proposal by a group of 108 Members on "Draft Modalities for TRIPS Related Issues" (TN/C/W/52 of 19 July 2008) on the register, TRIPS/CBD and GI extension

Negotiations/discussions in July 2008 (2)

1. Divergences on substance
 - Proposals and views: see reports TN/IP/18 for register and WT/GC/W/591-TN/C/W/50 for GI extension and TRIPS/CBD
2. Divergences regarding linkages
 - Linkage between the register for W&S and GI extension?
 - Linkage between GIs and Disclosure requirement (TRIPS/CBD)? *(see session on Theme 22)*
 - Linkage between GIs and Agriculture negotiations?
3. “Horizontal modalities decision”
 - So-called “parallelism” asked by proponents of GIs and disclosure requirement.

Positions since July 2008 (1)

- Proposal for “Draft modalities for TRIPS related issues” by 108 Members - TN/C/W/52 and add. of 19 July 2008
 - The alliance
 - Parallelism (or symmetry)
 - Parameters (draft modality texts) in terms of substance and process for:
 - Register of GIs for wines and spirits
 - TRIPS/CBD disclosure (see session on Theme 22)
 - Extension



Positions since July 2008 – register W&S

TN/C/W/52 and add.

- Each WTO Member shall provide that domestic authorities will consult the Register and take its information into account when making decisions regarding registration and protection of trademarks and geographical indications in accordance with its domestic procedures. In the framework of these procedures, and in the absence of proof to the contrary in the course of these, the Register shall be considered as a *prima facie* evidence that, in that Member, the registered geographical indication meets the definition of "geographical indication" laid down in TRIPS Article 22.1. In the framework of these procedures, domestic authorities shall consider assertions on the genericness exception laid down in TRIPS Article 24.6 only if these are substantiated
- Text based negotiations shall be intensified, in Special Sessions of the TRIPS Council and as an integral part of the Single Undertaking, to amend the TRIPS Agreement in order to establish the Register accordingly.



Positions since July 2008 – GI extension

TN/C/W/52 and add.

- Members agree to the extension of the protection of Article 23 of the TRIPS Agreement to geographical indications for all products, including the extension of the Register.
- Text based negotiations shall be undertaken, in Special Sessions of the TRIPS Council and as an integral part of the Single Undertaking, to amend the TRIPS Agreement in order to extend the protection of Article 23 of the TRIPS Agreement to geographical indications for all products as well as to apply to these the exceptions provided in Article 24 of the TRIPS Agreement *mutatis mutandis*.



Positions since July 2008 (4)

Other positions:

- On register for wines and spirits (TN/IP/W/10/Rev.2)
- GI extension
 - No mandate
 - Disrupts the balance in the Doha Development Agenda (DDA) and endangers possible outcome of the whole DDA
 - Cannot be part of the single undertaking
 - Case not made
 - Artificial parallelism between the three issues

GI extension in 2009

- **GI Extension** (*and for TRIPS/CBD*)
- In 2009: consultations by DG Lamy himself in his capacity as DG pursuant to para. 39 of the Hong Kong Ministerial Declaration
 - Small group representative of the range of positions at the level of Heads of Delegations (HoDs) + 1 technical expert
 - No negotiations (because the mandate is controversial)
 - Clarifications regarding technical issues exclusively

Doha Ministerial Declaration

- Doha Ministerial Declaration(WT/MIN(01)/DEC/1, 14 Nov. 2001)
 - Para. 19: “*We instruct the TRIPS Council, 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...*”
 - Para. 12: Outstanding implementation issues

Para. 12 of Doha Declaration

"Work programme

Implementation-Related Issues and Concerns

12. ... we agree that negotiations on **outstanding implementation issues** shall be an integral part of the Work Programme... 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."**

- Different views on whether or not part of Doha round of negotiations

Organization of work since Doha

1. Paragraph 19 - Regular meetings of the TRIPS Council.
 - Three separate items on the agenda of TRIPS Council since 2002
2. Paragraph 12 also took place in TRIPS Council and was reported upon to the TNC at the end of 2002.
 - Since 2003 part of DG's consultative process on outstanding implementation issues
 - Some of the *demandeurs* wanted negotiations to be clearly agreed to.



WTO OMC

Para. 12 of Doha Declaration

Work programme

Implementation-Related Issues and Concerns

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- Different views on whether or not part of Doha round of negotiations

After Doha..

- The General Council's decision on **1 August 2004**
 - The General Council instructs the TNC, negotiating bodies and other WTO bodies to **redouble** their **efforts** to find an appropriate solution, as a priority, to outstanding implementation-related issues.
- **Hong Kong Ministerial Declaration** on 18 December 2005
 - **Paragraph 39**
 - Reiterates the above-mentioned instruction
 - Request the DG to **intensify his consultative process** on all outstanding implementation-related issues, and to report to each regular meeting of the TNC and the General Council. The General Council shall take **any appropriate action** no later than 31 July 2006.
 - **Paragraph 44**
 - The work shall **continue** on the basis of paragraph 19 of the Doha Declaration and the progress made in the TRIPS Council to date. The **General Council shall report** on its work in this regard to the next Session.

Relationship between TRIPS and the CBD

- **Two issues:**
 - Whether or not there is conflict between the two
 - Whether or not something needs to be done in the WTO on the TRIPS side to ensure mutual supportiveness
 - If yes, what?
- Important common ground on **key underlying objectives:**
 - Importance of TRIPS and CBD being implemented in a mutually supportive way
 - Avoidance of erroneous patents for inventions that use genetic resources and related TK
 - Securing compliance with national access and benefit-sharing regimes
- Widely accepted that patent offices need to have necessary information and patent system's role should not be undermined.
- See **Secretariat's summary note** - IP/C/W/368/Rev.1 and Corr.1.
- See also **WT/GC/W/591** and **TN/C/W/50** - DG's report 9 June 2008.

Compatibility of TRIPS and CBD and action recommended (1)

4 positions:

1. No conflict

- There is no legal conflict between TRIPS and CBD
- Both have different and non-conflicting objectives
- Nothing needs to be done on the TRIPS side to ensure that the two are implemented in a mutually supportive way at the national level
- Willing to engage constructively on the basis of widely shared objectives
 - Ensuring authorized access and equitable benefit sharing
 - Avoiding erroneously granted patents

2. No inherent conflict but undecided whether international action desirable

- Further study is needed, including sharing of national experiences to examine pros and cons of different approaches

Compatibility of TRIPS and CBD and action recommended (2)

3. **No inherent conflict, but international action desirable**
 - Both can and should be implemented in a mutually supportive way
 - A disclosure requirement on patent applicants is needed:
 - » Amendment to TRIPS required
 - » Amendment to PCT regulations but not TRIPS
 - » Mandatory for all patent applications

4. **Inherent conflict**
 - Need to reconcile CBD and TRIPS as part of the review of Article 27.3(b) by amendment to TRIPS
 - Patents over genetic resources not compatible with sovereignty
 - A mandatory prohibition of patents on life forms, including on microorganisms as well as a disclosure requirement in TRIPS

International action - Disclosure approach

- An obligation upon patent applicants using genetic resources and associated traditional knowledge in inventions to disclose **at least** the source and/or country of origin of such resources or knowledge
 - Brazil et al ("Disclosure Group"), EC, Norway, Switzerland



TN/C/W/52 - TRIPS/CBD

- Members agree to **amend the TRIPS Agreement** to include a **mandatory requirement** for the **disclosure of the country providing/source of genetic resources**, and/or associated **traditional knowledge for which a definition will be agreed**, in patent applications. Patent **applications will not be processed** without completion of the disclosure requirement.
- Members agree to define the nature and extent of a reference to **Prior Informed Consent and Access and Benefit Sharing**.
- **Text based negotiations** shall be undertaken, **in Special Sessions** of the TRIPS Council, and as an **integral part of the Single Undertaking**, to implement the above. **Additional elements** contained in members' proposals, such as **PIC and ABS** as an integral part of the disclosure requirement and **post grant sanctions**, may also be raised and **shall be considered** in these negotiations.

CURRENT WORK - DG'S CONSULTATIONS

- DG began his consultations on 11 March 2009 on the two TRIPS implementations issues at the request of TN/C/W/52 group to have focused technical discussions.
- Continued until December 8 2009