

C L I F F O R D

C H A N C E



**WTO MAKES
PROGRESS AT
THIS YEAR'S
MINISTERIAL
CONFERENCE
(MC12)**



— THOUGHT LEADERSHIP

JULY 2022



WTO MAKES PROGRESS AT THIS YEAR'S MINISTERIAL CONFERENCE (MC12)

After years of stalled negotiations, the World Trade Organization agreed a suite of deals at its bi-annual Ministerial Conference (MC12) held in Geneva in June. These include: an IP rights waiver concerning COVID-19 vaccines; an Agreement on Fisheries Subsidies – the first new WTO Agreement signed since 2013 (and also the first ever sustainability-focused WTO agreement); and an extension of a moratorium on applying customs duties to electronic transmissions. The package shows that WTO Members remain capable of agreeing new multilateral trade rules, even if the substance of such rules left some WTO Members disappointed. Here, our experts assess what came out of MC12.

TRIPS waiver on COVID-19 vaccines

An agreement on a temporary waiver of WTO rules on patents for COVID-19 vaccines was the most commercially significant outcome of MC12.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is one of the core WTO texts, agreed in 1994 as part of the Uruguay Round which established the WTO, and is the modern framework of multilateral trade rules. TRIPS expanded mandatory minimum IP protections to all WTO Members, a key negotiating objective of developed countries, but, as the protection and enforcement of IP tends to be pursued more frequently by legal persons in developed countries, TRIPS has provoked controversy amongst developing countries has been a lightning rod issue. Article 27, for example, requires patents to be introduced "in all fields of technology." Prior to TRIPS, some WTO Members, especially developing countries, had excluded pharmaceuticals from their patent law to allow the development of generics.

Conversely, TRIPS is seen by many developed countries as a central pillar of the WTO system, which encourages and protects innovation. It is the result of a grand bargain during the Uruguay Round which saw developed countries make concessions in areas such as agriculture and textiles.

The relationship between TRIPS and public health has long been the subject of WTO negotiations. The 2001 Doha Declaration affirmed that TRIPS should be interpreted in a manner supportive of WTO Members' right to protect public health and promote access to medicines. In 2005, WTO Members approved an amendment to TRIPS enabling countries to import pharmaceuticals produced under "compulsory licences" (which allow WTO Members to license third parties' IP on specific terms when certain criteria are met), with the amendment eventually ratified by the necessary two-thirds of the WTO Membership in 2017.

However, some have argued that compulsory licences are a cumbersome and difficult-to-implement tool, and some developing countries and civil society organisations have continued to view TRIPS as imposing unreasonable barriers to accessing pharmaceuticals, especially in the context of the COVID-19 pandemic.

In October 2020, following the global outbreak of COVID-19, India and South Africa proposed a waiver of almost all IP protections under TRIPS affecting COVID-19 treatments. The proposal proved immediately divisive, supported by some developing countries but opposed in its original form by a number of developed countries.

At MC12, WTO Members were able to find a compromise, agreeing a relatively narrow TRIPS waiver which:

- applies only to patent rules (not other IP such as trade secrets, etc. as originally envisaged);
- covers only vaccines (and not therapeutics and diagnostics as originally envisaged);
- is time-limited to a five-year period;
- is available only to developing countries (but excludes those countries, notably China, that make a binding commitment not to avail themselves of the Decision);
- is an optional derogation to existing WTO measures (meaning countries can choose to apply the waiver or not); and
- applies only to a limited extent to vaccines destined for export.

The agreed waiver has been met with a mixed response. Those in favour of robust IP protections consider a better solution would have been to provide greater clarity to WTO Members on how to implement existing compulsory licensing provisions, for example through the development of model laws.

Meanwhile, many in civil society had higher ambitions for the Decision, and are concerned that the waiver does not go far enough. It is not clear that the TRIPS patent waiver will necessarily allow developing countries to produce the most innovative new COVID-19 vaccines to emerge from the pandemic. For example, the development of novel mRNA vaccines would likely require not only the use of patented products and processes, but also large-scale technology transfers, including sophisticated knowhow and trade secrets and, potentially, the transfer of biological materials, clinical data and genomic information.

Whatever one's position, the TRIPS waiver represents a compromise between WTO Members and stakeholders with divergent interests and policy goals. It shows that the WTO is capable of responding to contemporary developments, that the covered

agreements are capable of evolution, and that WTO Members are turning to trade rules to help states directly in dealing with COVID-19 as an endemic virus.

Fisheries Subsidies Agreement

The Agreement on Fisheries Subsidies agreed at MC12 is the first new multilateral WTO agreement since 2013, and the first time the WTO has agreed rules with sustainability as the primary focus. It goes some way to fulfilling UN Sustainable Development Goal (SDG) 14.6 by prohibiting certain damaging fisheries subsidies, and should have a positive environmental impact.

The Agreement prohibits WTO Members from granting subsidies related to "illegal, unreported and unregulated" (IUU) fishing (Article 3), fishing of overfished stocks (Article 4), and fishing on the unregulated high seas (Article 5). Article 5 also requires WTO Members to "*take special care and exercise due restraint*" when granting subsidies to fishing of unassessed stocks.

As with the TRIPS waiver, the Agreement is a compromise and has been met with some disappointment by environmental groups because, unlike the draft text, the final Agreement does not prohibit subsidies "*that contribute to overcapacity or overfishing*" (as specifically sought by SDG 14.6). This would have been the most far-reaching provision of the Agreement.

However, the value of the Agreement in acting as a foundation on which to build should not be underestimated. Implementing the Agreement will require WTO Members to review their existing subsidies, cease granting some of the most harmful forms of subsidies, conform to transparency requirements and report to a new Committee on Fisheries Subsidies (though compliance with even existing subsidy disciplines remains patchy, and improving transparency of subsidies remains a key element of ongoing discussions on WTO reform).

WTO Members agreed:

A waiver of obligations under TRIPS for developing countries in respect of patents protecting COVID-19 vaccines for a period of five years.

An Agreement on Fisheries Subsidies prohibiting WTO Members from subsidising IUU fishing, fishing of overfished stocks, and fishing on the unregulated high seas.

A two-year extension of the otherwise expiring 1998 moratorium on WTO Members imposing duties on electronic transmissions (i.e. e-commerce services).

A variety of other measures, including a commitment to discussions on WTO reform and a 29-point statement on handling future pandemics.

Importantly, the agreed text also acts as a basis for further negotiation. The Ministerial Decision adopting the Agreement provides that the Negotiating Group on Rules will continue negotiations with a view to making recommendations to MC13 *"for additional provisions that would achieve a comprehensive agreement on fisheries subsidies, including through further disciplines on certain forms of fisheries subsidies that contribute to overcapacity and overfishing."*

Article 12 of the Agreement includes a high-stakes sunset clause, providing that if no *"comprehensive disciplines"* are adopted within four years of the Agreement's entry into force, then the Agreement *"shall stand immediately terminated."* The sunset clause is reminiscent of that provided for in Article 31 of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), which imposed a five-year sunset on: (i) the right to grant certain non-actionable (or 'green light') subsidies (Articles 8 and 9); and (ii) the presumption that certain subsidies cause serious prejudice (and are therefore actionable). In what is perhaps an ominous sign for the prospects of comprehensive disciplines on fisheries subsidies, those provisions expired in 2000.

E-Commerce Moratorium

WTO Members also agreed to prolong the economically highly significant E-Commerce Moratorium. The moratorium, which has been in place since 1998, prohibits the application of duties on e-commerce services such as email, streaming services, and software. A group of developing countries led by India and South Africa had called for the moratorium to be scrapped, but ultimately agreed to an extension until the earlier of MC13 or 31 March 2024.

Of note, the final language of the agreement to prolong the e-commerce moratorium is similar to the sunset clause in the Agreement on Fisheries Subsidies, in that it requires WTO Members to reconsider and find an acceptable long-term solution, lest the entire waiver fall apart.

WTO reform:

Ministers also agreed to launch discussions on WTO reform. While goals for such reform were left vague,

with limited consensus on scope, the emergence of a formal WTO reform agenda is a significant milestone, which represents a vote of confidence in the future of the WTO that was not guaranteed in the lead-up to MC12.

Importantly, the negotiations are to be conducted *"with the view to having a fully and well-functioning dispute settlement system accessible to all members by 2024,"* setting the scene for intensive engagement in relation to the function and conduct of WTO dispute settlement, and the future of the Appellate Body (alongside a much broader package of reforms). Reform negotiations will be undertaken through the General Council and its subsidiary bodies.

Other outcomes

Pandemic preparedness: Separately from the TRIPS waiver, ministers have agreed a 29-point statement on the WTO response to COVID-19 and preparedness for future pandemics. This includes a commitment to ensure that any future emergency trade measures designed to tackle a pandemic situation, where these are deemed necessary, are *"targeted, proportionate, transparent, temporary, and do not create unnecessary barriers to trade or unnecessary disruptions in supply chains."*

Food export restrictions: WTO Members **agreed** not to impose export restrictions on foodstuffs purchased by the UN's World Food Programme (WFP) for humanitarian aid. This built on a non-binding pledge by a sub-set of nearly 80 WTO members in January and is a symbolically important outcome that showcases the political will of WTO members to tackle the ongoing food crisis.

The also-rans: A number of issues did not reach conclusion. The inability to conclude a long-term solution on public stockholding meant that there could be no agreement on a work programme for reforming the Agreement on Agriculture.

What's next?

While MC12 delivered less than most hoped for, it delivered more than many feared. A failure to reach consensus on a credible package of outcomes would have been (yet another) significant setback to the WTO's negotiating function, particularly at a time when trade and supply chains are becoming increasingly fractured. The outcomes of MC12 show that the WTO's negotiating

function remains capable of delivering results for its Members, despite years of disappointment, and lays the groundwork for negotiations on WTO reform at MC13, which could be significant in determining the WTO's future direction. It remains to be seen whether WTO Members are able to build on this momentum in the years ahead to unlock more contentious areas and build upon the successes of MC12. Next comes implementation – which WTO Members will implement the TRIPS waiver and what tangible impact it will have are still uncertain; meanwhile, the Agreement on Fisheries Subsidies needs to be ratified by two-thirds of WTO Members before taking effect.



CONTACTS



Jessica Gladstone
Partner
London
T: +44 207006 5953
E: jessica.gladstone@cliffordchance.com



Janet Whittaker
Senior Counsel
Washington DC
T: +1 202 912 5444
E: janet.whittaker@cliffordchance.com



Phillip Souta
Head of UK Public Policy
London
T: +44 207006 1097
E: phillip.souta@cliffordchance.com



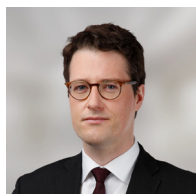
Federico Ortino
Consultant to
Clifford Chance
London
E: federico.ortino@cliffordchance.com



Roland Scarlett
Lawyer
London
T: +44 207006 2191
E: roland.scarlett@cliffordchance.com



Jeremy Stewart
Senior Associate
London
T: +44 207006 4502
E: jeremy.stewart@cliffordchance.com



Kieran McCarthy
Senior Associate
London
T: +44 207006 1374
E: kieranjohn.mccarthy@cliffordchance.com

CLIFFORD CHANCE

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

© Clifford Chance 2022

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Delhi • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhermed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.