

TRIPS Council Still Stuck on All Fronts

The WTO Council for Trade-related Aspects of Intellectual Property Rights remains deadlocked on every single item on its agenda, ranging from compulsory licensing for pharmaceuticals and the relationship between the TRIPS Agreement and the Convention on Biological Diversity, to a registration system for geographical indications and the enforcement of intellectual property rights.

Meeting in mid-June, the Council made no headway on a permanent solution to problems experienced by countries with insufficient manufacturing capacity to make effective use of compulsory licensing under the TRIPS Agreement. The debate opposes the African Group, supported by a number of developing countries, to practically all developed countries, as well as some developing countries, such as India and Korea. The key issue is whether a permanent amendment to the TRIPS Agreement should be a ‘technical conversion’ of the temporary waiver of TRIPS restrictions adopted by the General Council in August 2003 and how to reflect the Chairman’s Statement read out at the time. The African Group continues to contend that the amendment need not be a mere technical exercise and that any reference of the Chairman’s Statement is unnecessary. In contrast, the US, Canada, Japan and others maintain that the Statement is an integral part of the August 2003 compromise and must therefore be reflected in any amendment (see box for background).

The EU announced that it would soon submit a new proposal, suggesting a technical conversion of the 2003 waiver into an amendment of the TRIPS Agreement. African countries expressed hope that this issue could be dealt with by the summer break, after Members missed the latest deadline in March this year. This appears highly unlikely as resistance to the African proposal continues unabated, and several countries familiar with the EU’s forthcoming proposal, including the US, Japan and Switzerland, are opposed to it as well. Ambassador Choi Hyuck, who chairs the TRIPS Council, will continue consultations on the issue.

In the Doha Declaration on TRIPS and Public Health, ministers mandated the Council for TRIPS to find, by the end of 2002, an expeditious solution to the difficulties faced by WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector to make use of compulsory licensing.

On 30 August 2003, the General Council adopted a Decision – usually referred to as ‘the waiver’ – outlining the conditions under which Members could export and import medicines manufactured under compulsory license. A large number of the waiver’s provisions were aimed at preventing the re-export of low-cost generic drugs into other markets than the country requesting the import of medicines manufactured under compulsory license. These provisions were further reinforced by the Chairman’s Statement, which offered assurances that WTO Members would use the system in good faith and not as “an instrument to pursue industrial or commercial policy objectives” (Bridges Year 7 No.6, page 9). Members were instructed to come up with a permanent amendment to the TRIPS Agreement “based where appropriate on this Decision” by mid-2004, but the deadline was missed, as have all subsequent ones.

In November 2004, the African Group did propose a permanent amendment, which received a frosty welcome from countries with large brand-name pharmaceutical sectors because it cut out many of the waiver’s trade diversion provisions. In addition, the proposal made no mention of the Chairman’s Statement (Bridges Year 8 No.10, page 1).

Many developing countries and health activists contend that the August 2003 provisions are too cumbersome, and point to the fact that so far not a single country that lacks domestic manufacturing capacity has notified the WTO of its intent to use the system as an importer.

Meanwhile, Norway, Canada and India have already amended their patent laws to reflect the waiver, while the EU and Switzerland are in the process of doing so. In Korea changes to domestic law will take effect in December 2005.

No Convergence on TRIPS-CBD

Members continued discussions on the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD) and the protection of traditional knowledge (TK), but did not move any closer to consensus on this long-standing agenda item.

The debate focused on earlier proposals by a group of developing countries led by Brazil and India to require patent applicants to disclose the country of origin of genetic resources and/or TK used in an invention, and evidence of prior informed consent (PIC) and benefit-sharing. These countries would like to see the issue included in the July ‘first approximations’ of the Doha Round negotiating modalities, allowing it to be included in the Hong Kong Ministerial Conference package. They requested Tony Miller, who chairs parallel informal consultations on the issue, to remain available to hold more consultations that would contribute to the July exercise.

While a new submission from Peru elaborated on ways to prevent poor-quality patents and ‘biopiracy’ (IP/C/W/44/Rev.1), the US reiterated its view that disclosure requirements were not the best way to prevent ‘bad’ patents or ensuring PIC and benefit-sharing (IP/C/W/449). It argued that other means, such as searchable patent databases, would be more useful. Australia and Japan concurred with the US position. While the EU generally supports a disclosure requirement in patent applications, it opposes an obligation on patent applicants to provide evidence of fair and equitable benefit sharing, due to concerns that patent offices would not have the expertise to determine what is ‘fair and equitable’.

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Switzerland tabled a number of questions with regard to the proposals of the Brazil-India group, the US and the EU (IP/C/W/446). Malaysia and Taiwan also sought further clarifications from the developing country group.

Enforcement Proposal Opposed

Introducing a new and controversial issue of discussion at the TRIPS Council, the EU noted that it “would like the TRIPS Council to carefully examine compliance of Members with the enforcement provisions of the TRIPS Agreement, pursuant to Article 68 of the TRIPS Agreement” (IP/C/W/448). Such examination would include assessing “the implementation of TRIPS provisions on enforcement in detail, and make recommendations on ways to improve the situation (for instance by laying down benchmarks to evaluate the progress made by national administrations towards a higher level of intellectual property enforcement, suggesting best practices, etc) to ensure a full implementation of TRIPS obligations in this field.”

While all Members agreed that intellectual property counterfeiting and piracy constituted a serious problem, developing countries – including Argentina, Bolivia, Brazil, Cuba, India, Malaysia, Peru, the Philippines and Venezuela – strongly opposed the EU proposal, arguing that it would result in a *de facto* norm-setting role for the Council, which would go beyond its field of competence. In addition, developing countries noted that a discussion on enforcement was premature, given that many of them were still struggling with the challenge of implementing TRIPS obligations. Countries raised the concern that the EU proposal might lead to a loss of TRIPS flexibilities in the area of enforcement.

Deadlock over GIs

Geographical indications (GIs) continue to be one of the most controversial items on TRIPS Council’s agenda. The issue is two-fold: (i) Members are to negotiate the establishment of a multilateral system of notification and registration of GIs for wines and spirits¹ as part of the Doha Round (these discussions take place in Special Sessions of the TRIPS Council), and (ii) as part of the outstanding ‘implementation issues’ identified in Doha, they are to ad-

dress (in regular TRIPS Council meetings) the extension of the strong protection of GIS for wines and spirits provided under Article 23 of the TRIPS Agreement to other products. GI protection divides the membership according to ‘old world’/‘new world’ lines rather than developed vs developing countries.

In June, the EU tabled a controversial proposal that covered all aspects of its position on GIS (TN/IP/W/11, WT/GC/W/547 and TN/C/W/26), but specified that it intended only the section on the multilateral register to be discussed in the Special Session. In that context, the EU proposed a new annex to the TRIPS Agreement, laying down the details of registration and legal effects. The EU said that the proposal took account of a number of concerns expressed by other Members, including costs; how to deal with existing trademarks that could conflict with geographical indications; and the circumstances in which countries could later challenge a term even if they failed to do so when the term was first registered.

A large number of both developed and developing countries (Argentina, Australia, Brazil, Canada, Chile, Costa Rica, Guatemala, Japan, Mexico, New Zealand, Taiwan and the US) strongly objected to the document, not least because it also covered the bitterly divisive issue of ‘extension’, which would significantly strengthen the protection of such product names as Parma ham or Gruyere cheese. On the other side, Bulgaria, Switzerland, Thailand, Turkey and Zimbabwe supported the EU’s argument that the paper was within the Council’s mandate, with Bulgaria, Switzerland and Turkey specifically supporting the sections on extension as well. The Special Session Chair, Ambassador Manzoor Ahmad of Pakistan, said it was clear the discussions were “not going anywhere” and that differences appeared to “be as large as ever and not to have narrowed since prior to Cancun.” He said his report to the July meeting of Trade Negotiations Committee would repeat his earlier assessment that “two key points of difference that continue to impede efforts towards finding agreement [on the register], namely the questions of legal effect and participation. In addition, I would mention that there are other issues which need further discussion, such as costs and administrative burdens.”

Informal consultations on GI extension, chaired by WTO Deputy Director-General Thompson-Flôres, yielded no results. Argentina, Australia, Brazil, Canada, Chile, New Zealand and the US said there had been no agreement to negotiate extension and that those in favour of it (the EU, Switzerland, India, Bulgaria, Turkey, Romania, Kenya and others) still had not provided factual evidence of the inadequacy of the present Article 22. Some of these countries also argued that the EU paper did not provide a complete picture of its ambitions, since a separate proposal had been tabled in the agriculture negotiations, aimed at reclaiming and protecting certain terms that are now treated as generic. The Chair said he would report on the discussion to Director-General Supachai Panitchpakdi, who could decide how best to proceed. Further consultations remained possible before a document is produced at the end of July.

Maldives Gets TRIPS Exemption

Only one issue commanded consensus: the Maldives’ transition period for implementing the TRIPS Agreement was extended beyond 1 January 2006, which is when current exemptions for least-developed countries (LDCs) are set to expire (except for pharmaceutical patents for which the transition period was extended to 2016 in Doha). Taking into account the country’s need to recover from the 26 December 2004 tsunami, the Council agreed to extend the transition period until 20 December 2007, the date the Maldives is due to graduate out of its LDC status under a UN General Assembly decision of 20 December 2004.

The next formal session of the TRIPS Council is currently scheduled for 25-26 October. Special Sessions on the multilateral register will be held on 16 September and 27-28 October. Further informal consultations on TRIPS-CBD and GI extension might be held in the lead-up to the July General Council meeting.

ENDNOTE

¹ GIs for wines and spirits protect denominations such as Champagne against the use of the indication for similar products (in this case, sparkling wines).