

TRIPs Council Addresses Health, Biodiversity

Members remain divided over how and when to convert the 30 August 2003 Decision on access to generic medicines into a permanent amendment of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs). Meeting on 8 March, the TRIPs Council also discussed a new developing country submission proposing a checklist for moving forward on biodiversity-related discussions.

Paragraph 11 of the Decision on TRIPs and Public Health instructs the Council to elaborate an amendment to the TRIPs Agreement based on the Decision, which spells out the conditions under which countries without pharmaceutical manufacturing capacity can import generic versions of drugs still under patent. The amendment should be adopted by end-June 2004.

On 8 March, outgoing TRIPs Council Chair Vanu Gopala Menon reported on his informal consultations on carrying out this mandate, but Members did not formally discuss the issue.

The US and the EU generally favour concluding the talks by next June, but some developing countries have proposed extending the deadline in hopes that the 30 August deal can be 'improved' based on experience gained with its implementation.

Regarding the content and legal form of the amendment, the US is advocating a

simple footnote to the TRIPs Agreement referring to the Decision and the accompanying Chair's statement. The EU would prefer an amendment to TRIPs Article 31 on the use of patented subject matter without authorisation of the right holder. The Secretariat's legal division said it would look into the legal implications of a footnote and in particular how it would affect the legal status of the Chair's statement, but stressed that it was up to Members to clarify the issue. Chair Joshua Law of Hong Kong will continue to hold informal consultations.

Renewed Calls for Moving Ahead on Biodiversity

Brazil, Bolivia, Cuba, Ecuador, India, Pakistan, Peru, Thailand and Venezuela renewed their efforts to speed up discussions on resolving potential conflicts between the TRIPs Agreement and the Convention on Biological Diversity. To focus the discussions, they proposed a checklist of question regarding three issues raised in previous submissions, namely: disclosure of origin of the biological resource/traditional knowledge (TK) used in the invention; evidence of prior informed consent; and evidence of benefit-sharing related to the genetic material and TK.

Despite reservations with regard to some of the issues, the EU said it was willing to pursue discussions along the proposed lines. It also stressed that in order to avoid duplication, the TRIPs Council's work on TK should await the outcomes of the WIPO Intergovernmental Commission on Intellectual Property Rights and Genetic Resources, Traditional Knowledge and Folklore. Switzerland and Norway also signalled their openness to discussions. The US, however, opposed the checklist, arguing that there was no conflict between the TRIPs Agreement and the CBD and that the CBD should not be enforced through patent law. The US and Japan called for the discussions to take place in WIPO. In response, the India-led group, supported by other developing countries, insisted that discussions should continue in the TRIPs Council pursuant to the mandate set out in para. 19 of the Doha Declaration.

Balancing Act: Trade Concerns in Biodiversity Agreements

Never before have trade considerations been so explicitly and extensively present in formal discussions on the Convention on Biological Diversity (CBD) as at the Conference of the Parties held in February in Kuala Lumpur. The Meeting of the Parties to the Cartagena Protocol on Biosafety appeared less affected by the trade constraints that plagued the treaty's negotiation, perhaps because no major biotech exporter has yet ratified the Protocol.

Trade concerns regarding the CBD were most overtly raised in the context of a draft decision on providing 'positive incentives' for the conservation and sustainable use of biodiversity, as well as removing/mitigating 'perverse incentives' that encourage practices leading to degradation and loss of biodiversity. Echoed by Australia and Brazil, Argentina repeatedly expressed concern about WTO Members' using the proposed language to justify agricultural subsidies. As a result, Parties sent the proposals back to the CBD's scientific body (SBSTTA) for further discussion. All references to positive incentives in other decisions were also dropped.

Argentina registered reservations on 18 paragraphs in the incentives decision, which should be given special attention by SBSTTA, and stressed that before advancing on positive incentives, measures should be taken to eliminate – rather than just mitigate – perverse incentives.

In addition, agriculture was effectively excluded from the Addis Ababa Principles and Guidelines for Sustainable Use of Biodiversity adopted at COP-7 with a request to SBSTTA to "explore the applicability of these principles and guidelines to agricultural biodiversity" before COP-9. Reflecting dissent at the previous CBD Conference of the Parties (COP-6), member countries also failed to bridge disagreements over alien invasive species (see box on page 13).

Negotiations of the ABS Regime Underway

Delegates mandated the Ad hoc Open-ended Working Group on Access and Benefit-sharing to "elaborate and negotiate an international regime on access to genetic resources and benefit-sharing", based on broad terms of reference. Significantly, the regime also explicitly includes traditional knowledge, innovations and practices in its scope, thereby broadening the mandate