

No Consensus on Key Issues in the TRIPS Council

February meetings of the Council for Trade-related Aspects of Intellectual Property Rights did little to bridge differences between WTO Members on geographical indications, biopiracy or the enforcement of intellectual property rights.

Members are debating whether to extend the higher level of geographical indication (GI) protection currently accorded to wines and spirits to other products. The EU, India, Sri Lanka and Switzerland called for negotiations to develop an agreement on GI extension. This met with opposition from Argentina, Australia, Canada, Japan and the US, which argued that there was no mandate for doing so. The EU and Switzerland believe that commercial opportunities arising from extending GI protection to products such as ‘Parma ham’ could help compensate their farmers for liberalisation under the Doha Round. Both delegations had already brought up their demands on GIs during a 9 February session of the agriculture negotiating committee, where Argentina questioned why they were even referring to the issue. Argentina, like most ‘new world’ countries, including Australia, Canada and the US, have few well-known GIs and remain adamantly opposed to extension, preferring instead strong protection for registered trademarks.

Biopiracy

Well-established fault lines also reappeared on the issue of how best to minimise the granting of ‘bad’, or erroneous, patents incorporating naturally-occurring genetic resources without recognition or compensation. Countries including Bolivia, Brazil, China, India and Norway called for negotiations to amend the TRIPS Agreement in order to make it mandatory for patent applicants to disclose the use of any biological resources or associated traditional knowledge in their inventions.

A number of African countries supported the disclosure of origin proposal, and said they were considering becoming co-sponsors.

The drive for a TRIPS disclosure of origin obligation derives from biodiversity-rich countries’ desire to harmonise enforceable internationally binding intellectual property rights with the Convention on Biological Diversity (CBD) requirement that the benefits accruing from the commercialisation of an invention based on genetic resources or traditional knowledge be shared with the community at the origin of the resource or knowledge regarding its use.

A number of countries, including Argentina, Australia, Canada, Japan, New Zealand, South Korea and the US maintain that there is no conflict between the CBD and the TRIPS Agreement, which makes an amendment of the latter unnecessary. The proponents of this view again told TRIPS Council that negotiations on an amendment would be premature in view of the lack of consensus on its usefulness. The EU reiterated its position that the TRIPS Council was not the appropriate forum for discussing the issue, which should rather be debated at the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organisation (WIPO).

Enforcement Continues to Stir Controversy

Members considered a new US submission on enforcement of TRIPS obligations (IP/C/W/488). Originally introduced by the EU, the issue divides Members among those that support implementing effective measures to enforce IPRs at the international and regional levels as well as multilateral discussions at the WTO, and those that feel the issue belongs at the national level.

The US paper highlighted its experience in IPR-related border enforcement. The paper acknowledged that the TRIPS Agreement gave Members the flexibility to determine appropriate means for implementing enforcement measures, but said the purpose of the submission was to contribute examples of tools that the US had found useful in the context of its activities seeking protection against IPR infringement, with a view to promoting international co-

operation and information exchange. After presenting figures on the increasing number of pirated products at US borders, the paper provided examples of risk analysis methods, as well as on post-entry verification, where auditors review companies’ financial records to identify potential IPR violations.

A number of developing countries, led by China, expressed opposition to making enforcement a permanent agenda item for the Council. China noted that there was no mandate in either the TRIPS Agreement or the Doha agenda to pursue such work, and that a discussion on the topic would not be helpful in advancing other agenda items currently under negotiation or review.

China, Argentina, Brazil, Cuba, India and South Africa underlined the importance of Members’ freedom to determine the appropriate means of IP enforcement, and the need to consider enforcement issues in conjunction with TRIPS provisions on the non-discrimination obligation and the need to avoid the creation of unnecessary trade barriers. In addition, they cautioned against duplication of work already carried out by the World Customs Organisation and WIPO.

Australia, Canada, El Salvador, Japan, the EU, New Zealand and Switzerland supported increased exchange of information on domestic IP enforcement practices.

The Way Forward

Informal discussions are underway between intellectual property negotiators from individual delegations to determine how best to proceed.

WTO Deputy Director-General Rufus Yerxa will hold further consultations on GI extension. Ambassador Trevor Clarke is set to chair talks on the closely related topic of the review of the application of the TRIPS Agreement’s provisions on GIs. Members currently disagree on whether the review should be based on the individual TRIPS provisions or on their reactions to a WTO questionnaire.