

No Consensus on TRIPS Agreement Amendments

A group of six developing countries, as well as Norway, have tabled formal proposals that would amend the TRIPS Agreement to make it mandatory for patent applicants to disclose the genetic resources or traditional knowledge used in their inventions.

Brazil, India, Pakistan, Peru, Thailand and Tanzania, subsequently joined by China and Cuba, proposed adding an Article 29bis to the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), which would oblige WTO Members to require patent applicants to disclose the source (provider) and country of origin of any biological resources or associated traditional knowledge used in their invention (WT/GC/W/564/Rev.1). Patent-seekers would also have to demonstrate that they had received permission to use the genetic material or traditional knowledge according to the domestic laws of the country where they obtained it, along with proof of fair and equitable benefit-sharing arising from the commercial or other utilisation of the resources. Even after the acceptance of their applications, patent-holders would need to disclose any “new information of which they become aware.” Members would have to publish the disclosed information. The proposed amendment would also require Member governments to empower domestic authorities to deny and revoke patents “when the applicant has, knowingly or with reasonable grounds to know, failed to comply” with the disclosure requirements, or provided false information. Colombia and Ecuador supported the proposal.

The proposed amendment reflects a decade-long effort by biodiversity-rich developing countries to establish a ‘mutually supportive relationship’ between the TRIPS Agreement and the Convention on Biological Diversity (CBD). The latter requires access to genetic resources to be based on the prior informed consent of the country of origin. Parties to the CBD must also take “legislative, administrative or policy measures [...] with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilisation of genetic resources with the Contracting Party providing such resources.”

The sponsors of the amendment proposal believe that mandatory requirements for

disclosure and proof of benefit-sharing are the best way to curb biopiracy and the uncompensated use of genetic resources. However, a number of other countries, such as Australia and the US, continue to argue that a new disclosure requirement would not help prevent ‘bad’ patents, and could instead generate burdensome procedures. In June, these countries, as well as Canada, Japan, New Zealand, Singapore and Taiwan opposed the start of text-based amendment negotiations on the grounds that Members remained too deeply divided on the issue.

Norway Suggests Alternative Approach

Norway’s proposal differs from that of the ‘Disclosure Group’ on some significant points (WT/GC/W/564/Rev.1). Most importantly, it specifically rejects the notion of revoking already-granted patents. Instead, the proposal prescribes criminal sanctions or other administrative or legal measures that would not render the patent unenforceable. During the application stage, a breach of the disclosure requirements would be treated as a formal error, which would freeze the application process until the patent-seeker furnished the necessary information. Norway did not include benefit-sharing in its submission, arguing that it was unnecessary and unfeasible to discuss it at the international level.

The proposal called for the establishment of a TRIPS obligation to disclose the supplier country of traditional knowledge, even if the knowledge in question was not related to genetic resources, and suggested setting up a notification system under which patent offices would be required to forward all declarations of origin to the CBD’s clearing-house mechanism.

Countries such as India and Brazil expressed appreciation for the proposal, which they described as another step towards starting text-based negotiations on the issue.

Japan submitted a proposal on setting up a database to help patent examiners determine the veracity of ‘inventive step’ in patent applications involving traditional knowledge – an essential part of determining whether an invention deserves a new patent (IP/C/W/572). While the proposal was welcomed by US and Korea, Brazil observed that unless accompanied by a disclosure requirement, a traditional knowledge database would simply make biopiracy easier. Japan countered that the database would only be available to patent examiners, not to the general public.

Efforts Stepped Up on GI Extension

Little has changed in Members’ positions regarding whether or not the higher level of geographical indication (GI) protection currently accorded to wines and spirits should be extended to other products. Nevertheless, some supporters of GI extension, including Bulgaria, the EU, Kenya, Morocco, Thailand and Turkey have urged Members to enter into text-based negotiations on the issue. One trade source reported that China had informally expressed support for GI extension and might soon make its position formal, and that Brazil and India had also shown willingness to discuss the issue.

Developed country proponents, such as Switzerland and the EU, believe that commercial opportunities arising from expanded GI protection for products such as ‘Parma ham’ could partially compensate their agricultural producers for subsidy and tariff cuts under the Doha Round. Developing countries that support GI extension hope that it would help them gain price premiums in export markets with respect to agricultural products and handicrafts, such as Darjeeling tea and Cuban cigars.

On the opposite side of the debate, Australia, supported by the US and Canada, continues to argue that text-based negotiations would be premature, since many questions regarding the

proposals on the table remained unanswered. These include the implications for names considered to be generic in many countries (such as feta cheese), and potential effects on exports to third country markets. They also argued in June that there was not enough proof that the current level of protection afforded to products other than wines and spirits was inadequate.

Links between GIs, Disclosure and Other Doha Round Negotiations

Switzerland has explicitly linked WTO negotiations on disclosure requirements, which it would prefer to address under the auspices of WIPO, to progress on GI extension. Despite the staunch opposition, some trade observers have conjectured that a tradeoff between the two issues might break the deadlock on both.

Three GI extension proponents have also made broader linkages between different negotiations areas. The EU has controversially proposed bringing GI extension within the agriculture

negotiations, with the object of prohibiting the use of ‘a limited number of well known GIs’ by anyone other than the right-holders (JOB(6)190).

Switzerland stated on 13 June that a clear result on GI extension in the TRIPS context would have to be part of any framework deal for cutting farm tariffs and subsidies, and Bulgaria declared that it would not move forward on agriculture or NAMA modalities unless it was satisfied with the outcome on GI extension.

Aid for Trade

The WTO Aid for Trade Task Force is in the process of refining the set of recommendations it is due to make to Members by the end of July.

The Task Force’s mandate is to provide recommendations on how to ‘operationalise’ Aid for Trade (A4T) and on how A4T might contribute most effectively to the development dimension of the Doha Development Agenda. According to the Hong Kong Ministerial Declaration, A4T “should aim to help developing countries, particularly least-developed countries, to build the supply-side capacity and trade-related infrastructure that they need to assist them to implement and benefit from WTO Agreements and more broadly to expand their trade.”

A key point in the Task Force’s 13 July draft outline of Possible Aid for Trade Recommendations was that operationalising A4T depended on “substantial increases in additional financial resources for trade-related programmes and projects, for example, as pledged at the Hong Kong Ministerial Conference,” as well as other broader international commitments to significantly scale up development assistance by 2010. In their 16 July trade statement, G-8 leaders reaffirmed their commitment to A4T and trade capacity-building, and said they expected spending on A4T to increase to US\$4 billion.

Responding to developing country concerns about existing development assistance funding being diverted to A4T, the draft pointed to the need to “establish a border between A4T and other development assistance,” so that it could be reliably monitored and measured. A number of recommendations would establish a multi-layer monitoring system, including a body within the WTO that should conduct periodic global reviews of A4T, based on reports from recipient countries and donors, regional and global clearing house functions, relevant multilateral agencies and the private sector. Such reviews should be followed by an annual debate in the WTO General Council to give political guidance on A4T.

The draft also contained detailed recommendations on what the different reports should cover, including one that would have donors report on how they intend to meet their announced A4T targets. In addition, an assessment of A4T – either as a donor or as a recipient – should be included in the WTO Trade Policy Reviews.

Developing countries have generally expressed satisfaction over the recommendation that A4T should be guided by the Paris Declaration on Aid Effectiveness, which applies to donors, agencies and beneficiaries. Among its key principles are: recipient country ownership, mutual accountability, aligning aid to national development strategies, transparency, and predictable and multi-year commitments, which should be built into all programming.

The draft recommendations suggested that a separately funded mechanism comparable to the existing Integrated Framework for Trade-related Technical Assistance to Least-developed Countries (IF) could be established, upon a recipient country’s request, to assist the poorest WTO Members in the identification of A4T needs. The IF is administered by six international financial, trade and development institutions, including the WTO. The new mechanism would be available to ‘IDA-only’ countries, that is those eligible for loans provided entirely by the World Bank’s concessionary lending arm, the International Development Association.

The Task Force recommended that A4T should cover trade policy and regulation; trade development; compliance with commitments, rules and standards; supply-side capacity-building; trade-related infrastructure; and trade-related adjustment.

The draft text noted that a successful conclusion of the Doha Round would increase the need for assistance associated with implementation of the agreement, for adjusting to its effects and for making use of its new market access. However, the Task Force added that A4T was “a complement to the Doha Round but not conditional upon its success.” The final draft recommendations are to be sent to the General Council for possible adoption.