

IP Enforcement Tensions At WTO; Health Amendment Extended Again

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Enforcement of intellectual property proved to be a point of contention among World Trade Organization members at this week's meeting of the Council on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

Meanwhile, despite debate, the Council extended the deadline for members to accept a TRIPS amendment on public health, leaving the December WTO ministerial to consider that extension plus an extension on a moratorium on so-called non-violation cases under TRIPS.

Other key issues addressed at the 24-25 October meeting were Australia's plain package tobacco legislation, and a trio of issues related to biodiversity, biopiracy and patenting life forms.

The TRIPS Council typically meets three times a year, with the October meeting usually the most substantive as it includes annual reviews. During this meeting, the Council conducted an annual review of China's implementation of intellectual property obligations for the last time under the country's 2001 WTO accession deal.

How to Talk about Enforcement

Negotiating countries of the Anti-Counterfeiting Trade Agreement (ACTA) added the IP enforcement item to the meeting agenda. But developing countries took issue with its nomenclature, resulting in an unusually long review of the agenda (about an hour according to sources). In a compromise, the item initially called "Enforcement of Intellectual Property Rights" was changed to "Trends in the Enforcement of Intellectual Property Rights."

"People on the outside might think it ridiculous to pass so much time on the wording of an agenda item," a delegate from Pakistan commented outside of the meeting. "However, we know that nomenclature can have great bearing on future proceedings." Pakistan made the objection, calling for the name change, as the country did not want ACTA to become a benchmark or a standard in enforcement.

ACTA was actually first brought into the TRIPS agenda last year by developing countries concerned about its impact on WTO activities. This year, countries that negotiated the trade agreement (Australia, Canada, European Union, Korea, Japan, New Zealand, Singapore, Switzerland and the United States) brought up the item, in part as a response to other members' concerns, said one of the participating countries of ACTA. On 1 October, eight

countries signed ACTA ([IPW, Bilateral/Regional Negotiations, 4 October 2011](#))

During its meeting intervention, this ACTA country highlighted the agreement's "not excessive, but very practical set of provisions" for enforcement, especially in a digital environment. The country also announced that ACTA is open for WTO members and encouraged further explanation and exchange on the agreement. It acknowledged concerns raised, such as trade distortions, the balance between rightsholders and defendants, and flexibilities and options for parties.

In a view from another ACTA country, an official from the US Trade Representative's office said afterward: "An important function of the TRIPS Council is to afford members the opportunity of consulting on matters relating to trade-related aspects of intellectual property rights, including enforcement of those rights. The signing of the Anti-Counterfeiting Trade Agreement is clearly one such matter, and falls squarely in the Council's mandate."

"The timing of the discussion at this meeting reflected the October 1 signing of ACTA by eight countries and provided an opportunity to promote discussion among WTO members of ACTA's provisions," the USTR official said.

In prepared remarks to the meeting obtained by *Intellectual Property Watch*, India said that it appreciated the information and the briefings that had been given by the ACTA countries, but that it had remaining concerns.

"The scope of ACTA is broad and we feel that it would target generic medicines, which have served as a lifeline by providing access to medicines at an affordable cost in developing countries," it said. India also had concerns about how ACTA could affect established trade agreements. "As far as systemic concerns go, ACTA bypasses the multilateral processes of WTO or WIPO [World Intellectual Property Organization] and goes way beyond the enforcement levels laid down in the TRIPS agreement." It suggested that under WTO most-favoured nation rules, the deal struck by a group of countries could apply to other WTO members.

India also raised concerns about the Trans-Pacific Partnership agreement currently under negotiation, particularly reports that the secret text contains provisions that could be harmful to the generics industry. India's intervention on enforcement trends is [available here](#).

Angola, Brazil, Chile, China, Ecuador, Venezuela and Zimbabwe also shared concerns that ACTA could raise the bar for enforcement beyond WTO requirements, according to a WTO source.

TRIPS Health Amendment Extended; US Practice Questioned

The review of the so-called “Paragraph 6 system” caused expected debate amongst members, but an agreement was reached to extend the deadline for two-thirds of the WTO membership to accept the public health amendment to TRIPS. The deadline was moved ahead two years, to 31 December 2013.

Paragraph 6 of the 2001 Doha Declaration on TRIPS and Public Health committed members to solve a problem in TRIPS that prevents countries from manufacturing pharmaceuticals under compulsory licence primarily for export, even to countries that lack their own manufacturing capacity. A compromise solution was found on 30 August 2003, and agreed as an amendment to the TRIPS Agreement in 2005. But it is still waiting for the required two-thirds of the membership to accept it before it can enter into effect.

The waiver has only been used once by Canada and Rwanda. There is disagreement over whether this represents a failure of the provision.

Developing countries such as India argued that the fact the waiver has only successfully been used once demonstrates the system’s ineffectiveness. A WTO source said that during the meeting, some developed countries, including Canada, the European Union, Japan, Switzerland and the United States, took the view that paragraph 6 should be viewed as only one of a number of policies that make medicines more affordable. Outside the meeting, a developed country delegate said there is no “silver bullet” when it comes to making medicines accessible, but that this system provides another possibility for countries.

According to NGO Knowledge Ecology International, in [another intervention from India](#), a question was raised of how the United States’ use of compulsory licensing for exports is in line with TRIPS rules, and whether it might offer an alternative to the paragraph 6 process.

Sources also said that some developing countries, such as China, Cuba, Ecuador, India, Turkey, and Venezuela, resumed a push for WTO to hold a workshop on paragraph 6 open to members and outside experts such as non-governmental organisations, and research-based and generic pharmaceutical companies. But developed countries said that they need to hear specifics on why the system is not working before holding such a workshop.

Meanwhile, some countries continue to accept the TRIPS amendment, with Argentina, Indonesia and New Zealand taking the action just prior to the meeting, according to a WTO source. The recommendation of a two-

year extension will be put to the 15-17 December 2011 Ministerial Conference and most likely approved.

Non-Violation Clause

Also being put to the December ministerial is a clause in TRIPS allowing members to bring a case against another member for causing a loss of expected benefits even if there is no violation of a WTO agreement. Developing countries have been wary of this clause and it is under moratorium, which is due to expire this year. According to a WTO source, if consensus is not reached to renew the moratorium, it will expire. The United States and Switzerland have opposed the moratorium but have been willing to discuss it, the source said, but no agreement could be reached in the TRIPS Council.

The Importance of the Pack

Australia's pending legislation on plain-packaged cigarettes was another divisive issue during this TRIPS Council meeting. Australia's bill, which has passed the country's lower house and is now in the Senate, is part of its national anti-smoking campaign. If the bill becomes law, brands and trademarks would be banished from tobacco packaging. Concern was raised during the last TRIPS meeting by the Dominican Republic and was put on this week's agenda by Ukraine.

The issue could be seen as an indicator of trade-versus-public health debates to come as governments increase their efforts to confront the spread of non-communicable diseases. According to a WTO source, Ukraine and a number of developing countries including Cuba, the Dominican Republic, Honduras, Mexico, Nicaragua, Nigeria and Zimbabwe, repeated their concern that the law will violate intellectual property rights by preventing cigarette and cigar companies from using their trademarks. Outside of the meeting, a number of delegates said that the Dominican Republic's intervention particularly stood out amongst statements provided on this issue. Reportedly, the country claimed that 100,000 jobs rely on this industry. Other arguments that have arisen are that plain packaging could contribute to counterfeiting, and lower prices, actually making tobacco products more accessible.

But Brazil emphasised the right of every member state to protect its citizens' health. In prepared remarks, Brazil said, "All countries are allowed, by the present body of international rules on intellectual property, to adopt whatever measures they deem it fit to protect the public health of their respective populations."

The World Health Organization's initiative against tobacco has called for plain packaging.

China's Last Annual Review

The meeting also saw the final review of how China is implementing IP rights obligations under the TRIPS agreement and as part of its WTO membership deal.

In prepared remarks, the Chinese delegation said: "In the TRIPS aspects, China has not only established a sound legislative framework, but also an enforcement system featured with the integration of both administrative and judicial measures. In all the achievements that we have made so far, what is particularly worth of mentioning is the enhanced awareness of IPR protection in the whole society of China as one of the largest developing country." *[sic]*

For the 10-year occasion, the United States circulated a printed statement on its observations of Beijing's progress thus far. Although the US recognised that "China has put in place the framework of laws and regulations aimed at protecting the IPR of domestic and foreign right holders," it pointed to a need for further reforms. Identified areas included: "further improvement of China's measures for the protection of copyrights and trademarks in the context of the internet, correction of continuing deficiencies in China's criminal IPR enforcement measures, and providing remuneration to authors for the broadcast of their works that occurred between 2001 and 2009." The US statement should be posted here soon.

Other members also raised concerns about particular activities related to China, such as exports of counterfeit and substandard medicines, other counterfeit products, and a law against patenting of scientific discoveries, the WTO source said.

Additional issues addressed by the TRIPS Council included a trio of issues related to biodiversity, biopiracy and patenting life forms, with the discussion largely following that of previous meetings.

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