
COMMENTS ON THE WTO CHAIRS' APRIL 2011 REPORTS ON TRIPS-RELATED ISSUES

(TN/IP/21 AND TN/C/W/61)

1. The specific negotiating mandate of the TRIPS Council Special Session has been limited to the negotiations on the Register of Geographical Indications (GIs) for wines and spirits. Two TRIPS implementation issues are being negotiated in informal consultations led by Pascal Lamy; that is, the issue of extension of GIs to other products, and the issue of the CBD-TRIPS relationship to introduce a requirement to disclose the origin of a generic resources and/or associated traditional knowledge in patent applications.
2. However, the majority of World Trade Organization (WTO) members are of the view that the negotiations on the three TRIPS issues are tied. In 2008 joint submission TN/C/W/52, the EU and most developing countries presented text for modalities on all three TRIPS issues. While developing countries are mainly supporters of the disclosure requirement, and the European Union (EU) of GI extension, they came together tactically to press the United States, Japan and a few other developed countries that did not want any TRIPS implementation issue to be part of the outcomes of the Doha Round.
3. In the April 11 reports, the three issues are presented separately. On the one hand, the Chairman of the Special Session of TRIPS Council has reported on the state of play of negotiations on the register for wines and spirits. On the other hand, Pascal Lamy has submitted a report on the separate negotiations he is leading on GI extension and TRIPS/CBD disclosure.
4. The report on the GI register negotiation presents the single Draft Composite Text as of 20 April 2011. The report by Lamy reports on the status of the negotiations of GI extension and CBD/TRIPS. On CBD/TRIPS, Pascal Lamy under-reports the extent of the work carried out on the disclosure proposal, and undermines the disclosure proposal by presenting it as merely one of several issues under the CBD/TRIPS discussion, rather than as the main single issue being negotiated. The report is thus disappointing and unhelpful in advancing the negotiations on CBD/TRIPS.
 - a. *Chairman's Report on TRIPS Special Session negotiations on a Multilateral Register for GIs on Wines and Spirits*
5. The Chairman of the Special session of the TRIPS Council presented a factual report on the state of play of negotiations for the establishment of a multilateral system of notification and registration of GIs for wines and spirits, or « register ». The basis for negotiations is Article 23.4 of the TRIPS Agreement that provides for the establishment of the system. The report provides no new insights as to any changes in the positions of members, but presents the Draft Composite Text circulated as

JOB/IP/3/Rev.1 dated 20 April 2011 that emanated from drafting among a small group and subsequent the open-ended informal consultations. The main divergences among members remain unchanged, mainly on the nature of participation in the register and notification, the legal effect and the coverage.

6. While the composite text advances negotiations, the three main proposals that have been discussed remain on the table, i.e. document TN/IP/W/8, by Hong Kong, China, document TN/IP/W/10/Rev.4, by the "Joint Proposal Group", and document TN/C/W/52, proposal for "Draft Modalities for TRIPS Related Issues".
- b. *Pascal Lamy's Report on TRIPS Implementation Issues of GI extension and CBD/TRIPS disclosure*
7. In his report, Lamy notes that the overall approach of his consultations has been to address the substance of the two issues; GI extension and CBD/TRIPS disclosure, without prejudice to the questions of mandate and linkage. However, for most developing countries that support CBD/TRIPS disclosure requirement, the support in principle by way of document w/52 for a draft modality text on GI extension was part of a deal to ensure that both issues get at least equal treatment in the negotiations leading up to the final negotiation texts to be part of the single undertaking. Therefore, any development on GI extension depends on concrete outcomes on CBD/TRIPS disclosure.
8. Some developing countries are of the view however, that even if the disclosure requirement was agreed, GI extension as a trade-off would imply too great of a loss. This is because most developing countries are « new world » countries that are only beginning to experiment with national GI systems to identify and protect domestic GIs, and thus would stand to lose from a system that would require that they recognize and protect GIs for foreign products that may inhibit local producers from using similar names/denominations for their own products.
9. On CBD /TRIPS, Lamy does not provide a fair account of the state of play. He does not provide any new reading of the negotiations since his last substantial report in 2009 and thus his report fails to advance the negotiations. Lamy misleadingly gives the same treatment to the disclosure requirement proposal as well as to two other proposals that have received very little support from the WTO membership, namely a database system, and national-based approaches to enforcing prior informed consent and equitable benefit sharing. These are proposals favoured by the United States, Japan and Australia, while the majority of the membership, including the EU, developing countries and LDCs, acknowledge the disclosure requirement as the sole proposal to be negotiated. Lamy notes that there is broad support of the principles of the CBD but not to their implementation, and that members "have agreed on the need to take steps to avoid erroneous patents, including through the use of databases, as appropriate, to avoid patents being granted on existing traditional knowledge or genetic resources subject-matter." He further adds that "none of the proposals discussed - disclosure requirements, databases, or the use of contracts - was argued to be a stand-alone response or complete solution to all problems outlined."

10. This reading misses the point that while there is no agreement to date, the negotiations on CBD/TRIPS have rightly focused for the past years on the disclosure requirement proposal. In particular on the disclosure proposal, he merely notes that “members continue to differ on whether the formulation and application of a specific, tailored disclosure mechanism relating in particular to genetic resources and associated TK would be useful and effective in ensuring that the patent system promoted CBD objectives, or whether other mechanisms should be preferred. This discussion underscored the benefits of understanding more fully the practical and operational context of the existing disclosure mechanisms that have been implemented in national systems.” This is a view that has been favoured by the United States, and does not reflect the demand of the majority of the WTO membership. Moreover, Lamy omits reference to the progress achieved in the discussion on the substantive elements of the disclosure proposal, including the informal work carried out by a small group.

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South Centre Analytical Note

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