

## Le Président souhaite “revitaliser” les discussions sur la propriété intellectuelle au Conseil des ADPIC

Lors d'une réunion tenue les 7 et 8 juin, le Président du Conseil de l'OMC sur les aspects des droits de propriété intellectuelle qui touchent au commerce (ADPIC) a incité les Membres à “revitaliser” les discussions au sein du Conseil, y compris grâce à des échanges plus ouverts dans le cadre de discussions informelles.

The chairman, Ambassador Modest Jonathan Mero of Tanzania, offered what he said was a “minor” procedural suggestion that more extensive use be made of the possibility to hold parts of the Council meeting in informal mode, a standard practice in many other WTO bodies.

Reverting to informal mode would have the “clear advantage of encouraging an open and stimulating discussion in which delegates would not feel compelled to be limited to simply putting well-known positions on record,” he said and should encourage delegations to “think outside the box”.

The chairman said his impression, which was shared by many delegations he spoke to, was that “after over twenty years of work on a relatively static agenda, it would be timely to have a fresh look at how the Council manages its agenda and to consider the possibilities for adapting its working procedures.”

Members followed up on the chairman’s suggestion by holding parts of their discussion in informal mode. In particular, both formal and informal exchanges took place on the so-called “triplets” issues of [biotechnology, biodiversity and traditional knowledge](#), the issue of [non-violation complaints](#), as well as the pending requests for observer status.

### Non-violation and the “triplets”

Other WTO agreements allow members to bring cases against each other if they feel that another government’s action or a specific situation has deprived it of an expected benefit, even if no obligation has been violated. But opinions differ among WTO members on whether these so-called non-violation cases should also apply to intellectual property.

For the seventh time in a row, members agreed at the December 2015 Ministerial Conference in Nairobi to extend an existing moratorium on bringing non-violation complaints under the TRIPS Agreement until the next Ministerial Conference in 2017; they also instructed the TRIPS Council to examine scope and modalities for such complaints in the meantime and to make recommendations to the next Ministerial Conference.

Discussions took place in both informal and formal modes, but essentially followed the pattern of previous meetings, with the United States and Switzerland arguing such complaints should be allowed. Many other members (Peru, Brazil, China, India,

Ecuador, Indonesia, South Africa, Bangladesh, Cuba, Argentina, Russia, Korea, Egypt, Colombia and Nigeria for the African Group) reiterated their position as outlined in a [May 2015 proposal](#) that non-violation complaints not be allowed under the TRIPS Agreement; some also referred to the proposal a number of members had made in 2015 for a ministerial decision that would exclude such disputes permanently. Canada also reiterated its concerns about bringing non-violation complaints under TRIPS.

The chairman said that he had intended to put forward a paper in order to help overcome the decades-long deadlock on the issue, but that this did not receive consensus support as some delegations believe the process should be entirely member-driven.

On the “triplets” issues, members repeated their longstanding positions. The chair concluded by saying that while constructive discussion took place, positions have evolved neither in terms of substance nor procedure.

A number of members reiterated their position that a [proposed 2011 decision](#) from several members to enhance mutual supportiveness between the TRIPS Agreement and the Convention on Biological Diversity (CBD) should be the basis of further discussions, and that the CBD Secretariat should be invited to brief WTO members on developments regarding the convention, the chair said, but none of the suggestions garnered full support of the membership.

### [Work programme on electronic commerce](#)

For the first time in more than a decade, electronic commerce was placed on the agenda for discussion at the TRIPS Council. Canada noted that the WTO’s General Council established a work programme on electronic commerce in 1998 to be carried out by relevant WTO bodies, including the TRIPS Council, with discussions on e-commerce issues taking place within the TRIPS Council between 1998 and 2003 on the basis of proposals from a number of members and a Secretariat background note.

In view of the decision by members at the Nairobi Ministerial Conference to “reinvigorate the regular work” of the WTO committees, Canada asked members to consider possible approaches, including in a [written submission](#) to the Council, for re-engaging in discussions under the e-commerce work programme at the TRIPS Council.

The discussions could allow members to share national experiences and practices on IP and e-commerce issues in light of the rapid growth in digital technology and telecommunications as facilitators of commerce, Canada said.

The Canadian initiative was generally well received, with many delegations supporting discussion of IP-related issues in e-commerce, both as regards the trading of IP-protected goods as well as the technology needed to enable e-commerce.

A number of delegations also said they did not want e-commerce to be a standing item on the TRIPS Council agenda but rather be dealt with on an ad hoc basis.

## IP and innovation

Continuing the series of items related to IP and innovation that have been added to the Council's agenda since 2012 by various co-sponsors, members engaged this time in a discussion that focused on sustainable resource and low emission technology strategies. The item was co-sponsored by Canada, the European Union, Japan, Singapore, Switzerland, Chinese Taipei and the United States.

The co-sponsors as well as a number of other members highlighted private and public initiatives in this area, the growing importance of technological innovation, the role of intellectual property in sustaining innovation, and its contribution to environmentally friendly growth and development. Also, delegations linked the discussions to the broader policy context, including the Paris climate change agreement that had set the framework to facilitate the development of green technology, and the implementation of the UN's 2030 Sustainable Development Goals.

India saw patent laws as representing only one element of the innovation process. Open innovation structures and patent pool mechanisms also served to reward the final research outcome. And prices should be de-linked from research-and-development costs. Bangladesh noted that least-developed countries (LDCs) were particularly vulnerable to climate change and called for the implementation of Articles 66.2 and 67 of the TRIPS Agreement to foster the transfer of green technology.

## New EU trademark package

Five members — Brazil, India, South Africa, China and Indonesia — took the floor to express concerns about the impact of the [new directive](#) and [regulation](#) that modernize the European Union's trademark regime.

The five said they were concerned the new trademark regime could result in possible restrictions on legitimate shipments of goods, in particular essential medicines, while transiting through the EU.

In particular, they said the regime would allow EU member state customs authorities to detain goods while in transit even if there were no indications that the goods in question were destined for the EU market. India said the new directive appeared to violate various provisions of the TRIPS Agreement.

The concerns originate from the detention by Dutch customs authorities in 2008 of several shipments of generic medicines originating from India and bound for Brazil and other developing countries. The shipments were mostly detained during transit at Schiphol airport in Amsterdam on the grounds of alleged infringement of patents in the Netherlands.

Both India and Brazil initiated WTO dispute complaints ([DS408](#) and [DS409](#)) in May 2010 to address claims that EU and Dutch regulations and practices authorizing or requiring the seizure or destruction of medicines in transit on the ground of alleged patent infringement were in violation of WTO rules.

The EU responded by saying there were specific provisions written into the trademark regime to prevent any undue detention of pharmaceutical shipments in transit, including a reference to the Doha Declaration on TRIPS and public health. The trademark provisions were limited to the use of trademarks that are identical with a trademark registered in the EU and would thus neither target patent infringements nor pharmaceutical products. Also, the entitlement of the right holder to seek Customs action would lapse if the declarant or holder of the goods provides evidence that there is no infringement in the final destination country.

The incident in the Netherlands eight years ago has never been repeated, and was totally unrelated to trademark infringement. Others — in particular Brazil — have similar measures allowing Customs to seize illegal goods.

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