

# INTELLECTUAL PROPERTY QUARTERLY UPDATE



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CENTER FOR INTERNATIONAL  
ENVIRONMENTAL LAW

## THE WORLD CUSTOMS ORGANIZATION AND BORDER MEASURES FOR ENFORCEMENT OF IP RIGHTS: SETTING NEW STANDARDS OF INTELLECTUAL PROPERTY ENFORCEMENT THROUGH THE BACK DOOR?<sup>1</sup>

### I. Introduction

The World Customs Organization (WCO) is an international organization representing 171 customs administrations. Since its establishment, the WCO has developed international instruments on harmonized

systems of description and customs classification of goods, customs procedures, temporary importation of goods, and transit trade. The relationship between the World Trade Organization (WTO) and WCO seems evident, especially considering the WTO agreements on Customs Valuation, and Rules of Origin and the current Doha negotiation on trade facilitation.

The WCO is deeply involved in the realm of enforcement of IP by developing model legislation and best practices for WCO members. It has developed Model Provisions for National Legislation to Implement Fair and Effective Measures consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights, in 1995. The model provisions aim at assisting the preparation of the national legislations. The Model was revised subsequently, taking into account developments and experience in

<sup>1</sup> This article is developed by expanding on the Article by Viviana Munoz Tellez on *"The World Customs Organization: Setting New Standards of Intellectual Property Enforcement through the Back Door?"* published under South Bulletin: Reflections and Foresights (Issue 13, 16 April 2008), p.6.

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implementing customs laws in different regions of the world.<sup>2</sup> The WCO has also Guidelines on Controlling Free Zones in relation to Intellectual Property Right Infringements and Guidance to Industry on Information to be provided to Customs to Invoke Special Border Measures for Enforcement of IP Rights.<sup>3</sup>

The WCO is member of the Steering Group of the 'Global Congress to Combat Counterfeiting and Piracy' together with the International Criminal Police Organization (Interpol), the WIPO, the International Chamber of Commerce (ICC), the International Trademark Association (INTA), and the International Security Management Association (ISMA). It hosted the first Global Congress to Combat Counterfeiting and Piracy in May 2004.<sup>4</sup>

The WCO is developing and actively promoting voluntary international standards and model laws that exceed those established by the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). The WCO's work on enforcement of IP rights is undertaken by the Working Group on Standards to be Employed by Customs for Uniform Rights Enforcement (SECURE). In SECURE there are four key activities identified: (1) IP rights legislative and enforcement regime development; (2) cooperation with the private sector; (3) risk analysis and intelligence sharing, and; (4) capacity building for IP rights enforcement and international co-operation.<sup>5</sup> Detail information on the activities of the SECURE Working Group is restricted to members. The SECURE Working Group is expected to supersede all other IP related groups at the WCO.

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<sup>2</sup> See, Model Provisions for National Legislation to Implement Fair and Effective Measures consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights, 2005 available at <http://www.wcoipr.org/wcoipr/gfx/ModelLawfinal.doc>.

<sup>3</sup> WCO, Guidelines on Controlling Free Zones in relation to Intellectual Property Right Infringements, EC0183E1a and Guidance to industry on information to be provided to Customs, EC0182E1b, both adopted during the 24<sup>th</sup> Session of the Enforcement Committee held on 12 January 2005, Brussels.

<sup>4</sup> Information about the Global Congress available at <http://www.ccapcongress.net/index.htm>, last visited on 10<sup>th</sup> April 2008.

<sup>5</sup> WCO, *Provisional Standards Employed by Customs for Uniform Rights Enforcement (SECURE)*, June 2007, available at [http://www.wcoimd.org/files/1.%20Public%20files/PDFandDocuments/Enforcement/SECURE\\_E.pdf](http://www.wcoimd.org/files/1.%20Public%20files/PDFandDocuments/Enforcement/SECURE_E.pdf), p. 3, last visited on 10 April 2008.

The second meeting of the SECURE Working Group took place from 11-13 February 2008 in Brussels. A core group of developed countries and right holder groups, participating on an equal footing in the WCO SECURE Working Group, have set the agenda. During the meeting, the Working Group developed the 'working draft' document of SECURE. Comments on the draft were expected by 10 March 2008. The draft document together with the comments received will be submitted for the third meeting of the SECURE Working Group that will be held on **April 24 – 25, 2008 in Brussels** with the aim of finalizing the draft text. This would then be presented to the WCO Policy Commission and Council in June 2008 for consideration and adoption as WCO IP rights standards.

Although the SECURE standards are only model standards, there is a need to evaluate the process and the development of model legislation on border measures in light of their consequences for use of flexibilities under the TRIPS Agreement and the need to promote balance in IP protection.

## II. Trends to Expand Procedures on Border Measures for Intellectual Property Enforcement

Prior to the TRIPS Agreement, border measures were rarely used as a means to enforce IP rights. The TRIPS Agreement includes detailed provisions on "special border measures" that developing countries are obliged to implement.<sup>6</sup> Nonetheless, in recent years developed countries are increasingly promoting greater use and reliance on border measures to control trade in counterfeit and pirated goods, and the extension of the current responsibilities of customs authorities beyond the TRIPS framework. The developed countries are promoting the extensive use of border measures particularly via the Group of 8 (G8) and various initiatives pursued at international organizations such as the WTO, WIPO and WCO and bilaterally under Economic Partnership Agreements (EPA) and Free Trade Agreements (FTAs). This trend is driven to some

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<sup>6</sup> Developing countries were required to implement these by 2005. Least Developed Countries (LDCs) benefit from a transition period for implementation that currently extends until 2013.

extent by industrialized country concerns on trade in counterfeit and pirated goods. It is also marked by the shift in policies of the developed countries, especially members of the G-8, from setting the minimum standards for protection of IP rights to enforcement. More significantly the trends are the results of pressure and lobbying from industries in technologically advanced countries.

Countering trade in counterfeit and pirated goods is an important public policy concern to the extent that it safeguards national economic interest, where such trade is established based on empirical evidence, and that the measures actually and effectively enforces the legal rights of the IP holder. One reason to use border measures is the fact that, for right holders, stopping counterfeit and pirated goods at the border is easier than tracking down the infringing goods once they enter the domestic market.<sup>7</sup> But the desire to expand TRIPS-related border measures is also directly linked to the interest of right holders in having additional or alternative means to enforce their IP rights faster and more cheaply for all categories of IP rights (patent, geographic indications, plant breeders rights) and on all international trade (export trade and transit of goods). This is evidenced by the cozy relationship and role of right holder groups at the WCO, including their participation on an equal footing with governments at the SECURE Working Group and their provision of IP-related assistance jointly with the WCO Secretariat to its 171 member states. As a result, there is little discussion in the current discourse at WCO on the potential impact of extending border measures beyond the standard under the TRIPS Agreement on legitimate trade, the costs involved in establishing and maintaining such a system for customs offices in developing countries, and the necessary safeguards it requires against abuse.

### III. TRIPS Obligations on Border Measures

In order to understand the trends to expand the procedures and scope of application of border measures, it is important to quickly review what is required by the TRIPS Agreement. Given that IP rights are private rights, the primary responsibility for taking measures to protect IP rights lies with the right holders themselves.

TRIPS Part III, Section 4 (special requirements related to border measures Arts. 51-60) established for the first time international obligations for members to introduce procedures for special border measures enforcing IP rights. This followed the assumption that greater customs involvement would help tackle trade in pirated and counterfeited goods. However, it was also acknowledged that border measures for the enforcement of IP rights may also disrupt legal trade of non-infringing goods.

Countries are required to provide border measures only to the extent of the obligations in Part III Section 4, without contravening other provisions of the TRIPS Agreement. Importantly, the TRIPS agreement provides that countries are free to establish the appropriate method of implementing the provisions of TRIPS in accordance with their own legal system and practice (Art. 1.1). The TRIPS Agreement also does not create any obligation with respect to the distribution of resources as between enforcement of IPRs and the enforcement of law in general (Art. 41.5).

The section as a whole describes the process and conditions under which: a right holder may request for suspension of the release of imported goods. A customs authority may accept the request and suspend the release of the goods in the case of suspected counterfeit trademark or pirated copyright goods, as defined in Note 14 of Article 51, and at the request of a right holder.

<sup>7</sup> Michael Blakeney, Guidebook on Enforcement of Intellectual Property Rights, Queen Mary Intellectual Property Research Institute, Queen Mary, University of London.

There are important limitations placed on the ability of customs authorities to seize goods at the border, to ensure that customs authority is not overbroad and exercised in a way that may restrict trade in legitimate goods, and to deal with the risk of unfair competition, where right holders may use border measures simply to delay and undermine legitimate competitors.

TRIPS Part III Section 4 does not oblige suspension of release of goods in relation to other potential IP rights infringements (such as a good that may contain a component that is in breach of a patent) or to parallel imported goods. It also does not require customs authorities to seize goods that are in transit, having originated in another country, or to goods which are to be exported. It also does not require customs to seize small quantities of goods of a non-commercial nature contained in travellers' personal luggage (*de minimis* imports).

A worrying trend is that countries' efforts on the enforcement of IP rights are largely being quantified by the amount of goods suspected of IP rights infringements seized at the border, whether for import, export or in transit. The effect of this trend is that many developing country customs are being pressed to undertake more seizures to demonstrate in quantitative terms their commitment to the enforcement of IP rights.

Developing countries, particularly Least-Developed Countries (LDCs), require sufficient time and resources to adequately train customs officials to the extent required under Part III Section 4 of the TRIPS Agreement. Developing countries may, but are not required, to extend border measures beyond the requirements of the TRIPS Agreement. The decision of whether to extend the scope of customs involvement on IP rights enforcement beyond the TRIPS provisions requires careful consideration, particularly with respect to the level of customs capacity, potential disruption to legitimate trade and potential abuse by right holders. The LDCs are accorded a transition period for the implementation of the obligations under the TRIPS Agreement (except for national treatment and most-favoured nation treatment) until 2013. The LDC members of the WTO fought hard to secure this transition period considering taking into account their administrative and financial

constraints and the need to have flexibility in building a viable technological base.

#### IV. The WCO and its SECURE Working Group

Since 2005, the WCO has been increasing its work related to the enforcement of IP rights by developing model legislation and best practices for WCO members. The WCO is a large provider of technical assistance to customs administrations. It is disturbing that while most developing countries are struggling to strengthen their customs administration to implement their obligations under the TRIPS Agreement, the WCO is moving forward towards "best practices", "standards" and "model laws" that go beyond TRIPS requirements.

Currently the WCO SECURE Working Group is developing "Provisional Standards to be Employed by Customs for Uniform Rights Enforcement" (Provisional Global Customs Standards to Counter Intellectual Property Rights Infringements). The SECURE Working Group is also revising the WCO "Model Provisions for National Legislation to Implement Fair and Effective Border Measures Consistent with the TRIPS Agreement".

It is of great concern that the "Model Provisions" contain a number of TRIPS-plus requirements. In recognizing the basic objective of the exercise it is stated that "the experience of customs administrations in numerous countries indicates that only by granting certain powers and measures that go beyond the minimum requirement set forth in the TRIPS Agreement, Governments can provide an effective and efficient level of IP [rights] protection and enforcement at their borders".<sup>8</sup>

The extent of the WCO activities, particularly development of "intellectual property standards" is alarming given that: i) they may extend beyond the WCO mandate; ii) may undermine the careful balance achieved in the TRIPS Agreement in relation to IP enforcement and the use of special

<sup>8</sup> Model Provisions for National Legislation to Implement Fair and Effective Measures consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights, 2005 available at <http://www.wcoipr.org/wcoipr/gfx/ModelLawfinal.doc>, preamble.

border measures; iii) contain many TRIPS-plus elements without any prior assessment of their potential impact; iv) are based on developed countries national and/or regional standards, and; v) strongly favour and are guided by right holder interests. The "Model Provisions" provide that:

1. Customs authorities are empowered to suspend clearance of goods that are being imported, exported or in transit either at the request of right holders and at their own initiative (TRIPS obliges only with respect to imports, and does not oblige countries to grant customs power to act on their own initiative)
2. Customs authorities are empowered to suspend the clearance of goods that are suspected of infringing any intellectual property rights (TRIPS only obliges in respect of counterfeit trademark goods and pirated copyright goods)
3. Customs authorities are empowered to suspend clearance of goods suspected of being copyright protection-defeating devices (the TRIPS Agreement includes no obligation of this type. It is also not an explicit obligation in the WIPO Copyright Treaty (WCT) nor the WIPO Performance and Phonograms Treaty (WPPT)).

The latest draft of the Model Law is not publicly available.

The current working draft of the SECURE "Provisional Standards", on the other hand, requires that:

- Customs administrations [should] have the legal authority to enforce IP right laws whenever goods are under Customs supervision, including for example import, export, transit, warehouses, transshipment, free zones, and duty free shops;
- Customs administrations [should] designate a central office or contact point to facilitate the lodging and handling of the requests for intervention;

- Customs administrations [should] have the legal authority, in accordance with the relevant international agreements to act upon their own initiatives;<sup>9</sup>
- Customs administration [should] dispose of goods infringing IP rights other than destruction only with the express authorization of the right holder;<sup>10</sup>
- The storage and destruction costs [should], in accordance with national legislation, be imposed and collected primarily from the counterfeiter, secondarily from the importers, exporters, or the holder of the goods and thirdly from the right holders. The proposal from the 'Common Ground of Private Sector' suggests for provision for recovery of costs from other parts of the supply chain when right holders are required to bear the costs.<sup>11</sup>

It would be especially dangerous for developing countries and more so for LDCs to implement extended border measures. Allowing customs authorities to suspend clearance of goods suspected of infringing a patent, for example, would mean endowing customs with a role that far extends its competence and abilities. Proving patent infringement is a highly complex and technical process. If developing countries extend special border measures to include patents, the risk that these may be abused by right holders and the possibility that these measures may constitute barriers to trade increases greatly.

#### **V. Impact of TRIPS-plus Border Measures and Developing Countries' Participation in the SECURE Working Group**

For governments, particularly of developing countries which are copying to meet the basic human development needs of their people, border measures for intellectual

<sup>9</sup> Id., Standard 8.

<sup>10</sup> Id., Standard 10.

<sup>11</sup> Id., Standard 11.

property enforcement demands re-prioritization and great expense both in terms of financial and human resources. In implementing obligations under the TRIPS Agreement on border measures, customs authorities in developing countries are struggling to adapt to their new role and many are handicapped in lieu of scarce resources.

While the traditional role of customs is revenue collection mainly via taxes on imports, they are now required to act as an IP enforcement agency. Though the costs of the system are substantial, its full impact is still unclear in light of growing demands and pressure on custom administrations to strengthen TRIPS commitments. Customs and border authorities in developing countries require substantial, constant specialized training and time to gain experience in effectively implementing the system for border control of counterfeit and pirated goods as laid out in the TRIPS Agreement. This includes not only experimenting in implementing the obligations, but also the safeguards against abuse by right holders, customs officials and third parties, and measures to ensure customs actions do not become barriers to trade.

It is also too early to assess the impact of existing TRIPS-plus intellectual property border enforcement regulations in developed countries, including the European Communities' custom regulation in force as of 1 July 2004.<sup>12</sup> Nonetheless, some recent cases point to the potential excesses and abuse of border measures by right holders.<sup>13</sup>

Among the developing country members of the WCO, only Brazil is actively engaged in the SECURE Working Group discussions. The WCO has published a list dated 14 February 2008 of 34 countries that purportedly "have indicated their intention to implement the WCO SECURE IP [rights] Programme", which includes thirteen LDCs and various developing countries.<sup>14</sup> It also

includes landlocked states that would face the challenges of border measures interfering with their importation and transit trade by Customs authorities of the coastal states despite the territorial nature of IP rights. Developed countries are notoriously missing. Brazil has expressed deep concerns about the activities on IP enforcement of the SECURE Working Group as a country that has fully incorporated its international intellectual property obligations. It has highlighted that any result of the work of the Working Group should not contradict the international legal framework that governs intellectual property enforcement, particularly the TRIPS Agreement. This includes both the substantive obligations and safeguards. But at the WCO more voices of dissent from developing countries, particularly from LDCs that requested in the WTO extension of the TRIPS transition period, need to be heard.

Whether or not the WCO has the political support to craft "soft law" in the field of IP enforcement is an open question. Though the best practices, TRIPS-plus international standards and model laws on border measures for intellectual property enforcement advanced by the WCO are voluntary and thus not in itself legally binding, soft law is often the basis on which "hard law" is later established. The issue of the strengthening of IP enforcement is now high on the agenda of developed countries.<sup>15</sup> At the WTO, Japan, the United States and Switzerland have sought in the TRIPS Council to engage members in discussion on their experience in implementing TRIPS and TRIPS plus special border measures, which has raised questions from other members as to whether there is compliance with the TRIPS obligation to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.<sup>16</sup> Opposition encountered in one forum drives proponents of TRIPS-plus enforcement measures to shift to another. It cannot be said with any certainty that if the WCO IP right Standards are agreed to, these may not be advanced in future as binding norms in fora "with teeth" such as the WTO.

<sup>12</sup> See Council Regulation (EC) No 1383/2003.

<sup>13</sup> See Biadgleng E. and Munoz Tellez V., *The Changing Structure and Governance of Intellectual Property Enforcement*, Research Papers 15, South Centre, p.14-15.

<sup>14</sup> WCO Members who have expressed their intention to implement the WCO SECURE IPR Program, as of 2<sup>nd</sup> February 2008, available at <http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/Enforcement/WCO%20TABLE%20Intention%20>

[o%20implement%20the%20SECURE-%20EN-FR\\_Feb08.pdf](#), last visited on 10 April 2008.

<sup>15</sup> Biadgleng and Munoz Tellez, *Research Papers 15*, South Centre

<sup>16</sup> WTO document IP/C/M/55, Minutes of the TRIPS Council Meeting, 23-24 October 2007, paras. 228-233

## VI. What Next?

To increase reliance on border measures for the enforcement of intellectual property rights is a policy choice that requires careful *ex-ante* assessment. The cost, risk, complexity and potential negative impact on trade are too often understated.

The TRIPS Agreement requires that governments ensure that measures and procedures for the enforcement of intellectual property rights, including border measures are fair and equitable. It also requires that they be applied in a manner that avoids the creation of barriers to legitimate trade, and provide for safeguards against their abuse. These elements require further discussion and examination in the WCO, other multilateral fora and bilateral negotiations where TRIPS-plus border enforcement measures are being advanced.

The upcoming third meeting of the WCO IP rights Standards Working Group, that will take place from **April 24 – 25, 2008 in Brussels** would greatly benefit from the participation of developing country WCO member states, to bring forth some of these concerns. The working group should further discuss the impact of the proposed TRIPS-plus standards before reaching any agreement. Member states party to the TRIPS Agreement of the WTO and participating in the WIPO discussions or follow IP-related discussions in the Geneva context and less so in Brussels, should monitor and scrutinize more closely the activities and discussions in the WCO. Coordination of positions among the various national institutions is vital considering the specialized expertise and authorities of customs offices.

## **AN OVERVIEW OF RELEVANT DEVELOPMENTS IN THE VARIOUS IP FORA**

The following is an overview of developments in the various fora dealing with intellectual property issues in the first quarter of 2008.

### **The World Trade Organization**

There has not been significant movement in the Doha Round of negotiations despite several statements over the period suggesting that agreement was close. Agriculture and non-agricultural market access remain the focus of discussions. Revised draft modalities were circulated by the chairperson of the agriculture negotiations, Crawford Falconer, on 8 February, containing formulae for cutting tariffs and trade-distorting subsidies and related provisions.

### **Progress in the Council for TRIPS during the first quarter of 2008**

The TRIPS Council met on 13 March 2008, but discussions were mainly carried out in informal "Green Room" consultations. This was the last meeting chaired by Ambassador Yonov Frederick Agah (Nigeria). Ambassador Gail Marie Mathurin (Jamaica) was elected the new chair of the Council.

### **Outstanding Implementation Issues and the Doha Work Programme**

In a communication dated 22 January 2008, the delegation of Mauritius on behalf of the ACP group of countries requested the addition of the ACP group to the list of co-sponsors of the document WT/GC/W/564/Rev.2 that proposes an amendment to the TRIPS agreement requiring the disclosure of origin of genetic resources and traditional knowledge (Issued with the joint symbol WT/C/W/41/Rev.2 and IP/C/W/474). The European Union continued to differ from the group of disclosure proponents on the scope of disclosure of origin of genetic resources in patent applications. However, there have been signals from the European Union that it may be willing to refrain from blocking the proposed amendment in exchange for support for its proposal to expand the geographical indications protection enjoyed by wines and spirits to other products. The Disclosure proponents

have not yet succeeded in moving the issue to text-based negotiations.

### **Disputes**

Measures Affecting Financial Information Services and Foreign Financial Information Suppliers

The European Communities (WT/DS372/1) and the United States (WT/DS373/1), on 3 March 2008, requested consultations with China for measures affecting financial information services and foreign financial information suppliers. The EU and the US consider that the measures at issue appear to be inconsistent with China's obligations under the GATS, the TRIPS agreement and China's protocol of accession. Only the European Union raised a TRIPS-related claim arguing that China's regulations violated article 39.2 of TRIPS "by not ensuring the possibility for financial information services suppliers of preventing secret and commercially valuable information lawfully within their control which they have tried to protect from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices."

### **2003 Paragraph 6 Doha Waiver and 2005 Public Health Amendment**

Under Section 92A of India's amended patent legislation applying the 2005 Public Health amendment allowing compulsory licenses for export. The Indian Patent Office is considering a request from an Indian company (NATCO) to manufacture two patented cancer drugs for export to Nepal. The Indian Patent Office is expected to make a decision during the second quarter of 2008 following the outcome of a hearing to determine the validity of the request.

On 31 January 2008 (WT/Let/611) the Netherlands notified its acceptance and implementation of the 2005 Public Health amendment on behalf of the Netherlands Antilles and Aruba.

**The next meeting of the WTO Council for TRIPS will be held 17-18 June 2008.**

## World Intellectual Property Organization (WIPO)

### Standing Committee on Copyright and Related Rights (SCCR)

The 16th session of the Standing Committee on Copyrights and Related rights took place from 10 - 12 March 2008. Issues on the agenda were protection of audiovisual performances, protection of broadcasting organizations and limitations and exceptions to copyrights. The future work of the committee was an important concern in the run-up to the meeting and was extensively discussed during the meeting, as many delegates expressed concerns that discussion on the Broadcast Treaty had, for too long, dominated the agenda of the committee. Much of the first day of the meeting was taken up with discussions on the election of the Chair, which resulted in the return of Ambassador Jukka Liedes from Finland, with Chile and Morocco as Vice-Chairs.

A group of Latin American countries, Brazil, Chile, Nicaragua and Uruguay presented a proposal<sup>17</sup> which was the elaboration of a document submitted by Chile in the thirteenth session of the standing committee (SCCR/13/5). In the proposal the countries suggested three areas of work to be undertaken:

1. Identification, from the national intellectual property systems of Member States, of national models and practices concerning exceptions and limitations.
2. Analysis of the exceptions and limitations needed to promote creation and innovation and the dissemination of developments stemming therefrom.
3. Establishment of agreement on exceptions and limitations for purposes of public interest that must be envisaged as a minimum in all national legislations for the benefit of the community; especially to give access to the most vulnerable or socially prioritized sectors.

In their proposal the Latin American countries emphasized that a comparison of the various national legislations has revealed a disparity in the scope of limitations and exceptions to copyright especially in the area of digital and internet content. Also in a given area of exceptions, considerable differences may exist in the way those exceptions are handled in terms of depth and scope.

Many of the delegations supported the proposal in whole or in part. Other delegations expressed support or opposition to specific elements in document SCCR/13/5. Many delegations requested to be given more time to study the new proposal. Group B (Industrialized countries) in particular, opposed any work in part 2 and 3 of the proposal by the Latin American countries.

In the final decisions of the committee, the secretariat was requested to make a study on exceptions and limitations for educational activities, including distance education and trans-border education. The secretariat was also requested to organise an information session on existing and forthcoming studies, in conjunction with the next session of the SCCR. Both decisions reflect elements of the proposal put forward by Brazil, Chile, Nicaragua and Uruguay.

During discussions on the future work plan of the committee, there remained some disagreement on how many new issues to add. The EU proposed several new areas (orphan works, resale rights, collective management) without elaborating on them or establishing some justification for raising them in a multilateral forum. Some delegations continued to press for conclusion of a treaty for the protection of broadcasting organizations, despite the significant lack of consensus on basic principles and objectives. The Chair was asked to prepare an informal paper outlining his understanding on divergences and convergences as a basis for discussions at the next SCCR. However, there was significant enthusiasm for working on the issue of limitations and exceptions. No consensus was reached on future work but the Chair was tasked with preparing an informal paper based on the outcomes of the session of the SCCR that would frame further discussions for a decision on future work at the following SCCR.

<sup>17</sup>Available at [http://www.keionline.org/misc-docs/New\\_proposal\\_on\\_exceptions\\_limitations.pdf](http://www.keionline.org/misc-docs/New_proposal_on_exceptions_limitations.pdf).

**The next session of the SCCR will take place 3 – 6 November 2008.**

### **Committee on Development and Intellectual Property (CDIP)**

The first session of the Committee on Development and Intellectual Property took place from March 3 to March 7, 2008. The main functions of the committee are:

- Development of a work programme for implementation of the recommendations adopted by the general assembly for actions in the agreed proposals.
- Monitor, assess, discuss and report on the implementation of all recommendations adopted and to coordinate with relevant WIPO bodies for that purpose.
- Discuss intellectual property and development related issues as agreed by the committee as well as those decided by the general assembly.

The CDIP unanimously elected Ambassador C. Trevor Clarke, permanent representative of Barbados as chair and Mr. Muratbek Azimbakiev, Deputy Permanent Representative of Kyrgyzstan and Mr. Javier Alfonso Moreno Ramos, Director of the Department of Legal Coordination and International Relations of the Spanish Patents and Trademarks Office as the vice chairs.

Mr. Clarke, in his capacity as the chair of the Provisional Committee on proposals for a Development Agenda (PCDA), prepared a preliminary implementation report, with respect to the 19 proposals identified for immediate implementation by WIPO and an initial working document regarding the implementation of the other 26 agreed proposals. The CDIP adopted the rules of procedure included in document CDIP/1/2 and discussed the initial working document (CDIP/1/3) and decided to use it as the working document of the CDIP. Discussions on procedure took up much of the first two days of the meeting.

Documents commenting on both the preliminary implementation reports were submitted by the Central European and Baltic States, the Friends of Development and

the Republic of Korea. In the discussions, member states that had made written suggestions and comments elaborated on their submissions which were followed by general discussion on the adopted recommendations during which member states:

- Provided focussed comments on the list of activities;
- Suggested modifications where necessary;
- Considered new activities; and
- Identified points, where necessary, to seek further information from the secretariat.

At the request of the Chair, much of the substantive discussion was held in informal session. NGOs were permitted to remain in the room, but not to report or attribute statements.

Areas of discussion covered related to a tracking mechanism for sharing information on technical assistance funding and sources as well as transparency regarding technical assistance and when and how such information would be made available. Much of the meeting was spent discussing issues in Cluster A of the agreed proposals, largely addressing Technical Assistance.

The session was concluded with a decision that there was a need to continue consideration of the work programme for implementation of the adopted recommendations. The chair would organise informal consultations between the first and the second sessions of the CDIP. The draft report of the meeting is available at [http://www.wipo.int/meetings/en/doc\\_detail\\_s.jsp?doc\\_id=98893](http://www.wipo.int/meetings/en/doc_detail_s.jsp?doc_id=98893).

**The next session of the Committee on Development and Intellectual Property will take place 7 – 11 July 2008.**

### **Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)**

The IGC met from 25 – 29 February 2008. The committee elected as its chair Mr. Jaya Ratna of Singapore and as its deputy chairs

Mr. Abdullah Ouadrhiri of Morocco and Mr. Lu Guoliang of China.

In the meeting, concerns were raised by some of the developing country members about lack of progress in the committee. The discussions were based on responses to the factual extraction of views that the Secretariat had conducted based on previous IGC discussions as well as a continuing discussion on agreed lists of issues under the categories of Traditional Cultural Expressions and Traditional Knowledge. There was little movement in the positions of many states, especially from the United States and Japan who continued to restate previous positions that they did not see a need for action at this time. Many delegations expressed frustration at the lack of progress on moving towards an instrument on the protection of traditional knowledge and traditional cultural expressions. Several industrialized countries also expressed their view that the discussion on genetic resources was lagging too far behind and that the committee should make discussions in this area a priority.

Concerted efforts were made to try to find methodologies to accelerate the work of the committee, resulting in acquiescence to the demands from industrialized countries to carry out further studies and gap analyses, as well as a commitment to consider taking a decision at the 13<sup>th</sup> session of the IGC for inter-sessional processes. The inter-sessional processes came out of a proposal put forward by the African Group during the course of the meeting.

The final committee document requires the WIPO Secretariat to prepare separate documents on international protection for traditional knowledge and traditional cultural expressions. The documents are also required to describe the gaps in the protective measures at the international level. In the case of genetic resources, instead of a gap analysis, the secretariat will reissue the issued documents for full-in-depth discussion at the next IGC meeting. The new documents will be made available on 31 May with comments due on 30 June. The final draft will be published on 15 August.

The compromise decision on future work calls for a secretariat analysis and member state review over the next eight months. It is stated in the future work

document that all the three substantive issues- traditional knowledge, traditional cultural expressions and genetic resources will be allotted an equal amount of time for discussion. The issue of genetic resources was not extensively discussed in this meeting and will be maintained on the agenda for the next meeting.

**The next session of the IGC has not been scheduled although it will be after 31 August 2008.**

### **Assemblies of the Member States of WIPO**

A resumed session of the forty fourth series of the Assemblies of the member states of WIPO took place on 31 March 2008, specifically to adopt the "proposed programme and budget for 2008/09 biennium" (Documents A/44/2 AND A/44/INF/2). The decision states:

'The assemblies of the member states of WIPO and the unions administered by it, each as far as it is concerned

- Took note of the content of document A/44/2; and
- Approved the programme and budget for the 2008/09 biennium, as proposed in document A/44/2, in accordance with the recommendations of the twelfth session of the programme and budget committee as reproduced in the document (WO/PBC/12/9) and having also taken note of amendments of the schedule of fees adopted by the thirty seventh session of the PCT assembly.'

This program and budget had become linked with a decision about the process for addressing accusations against the WIPO Director-General Kamil Idris. Mr. Idris' decision to leave his post by the time of the 2008 General Assemblies enabled member states to come to some agreement on issues related to the program and budget as well as a compromise on fees under the Patent Cooperation Treaty that had also posed a serious obstacle at the 2007 General Assemblies.

## Other Multilateral Fora

### Convention on Biological Diversity

The sixth meeting of the Ad Hoc Open Ended Working Group on Access and Benefit Sharing was held at the United Nations Office at Geneva from 21 to 25 January 2008. The agenda of the meeting was a continuation of the agenda from October 2007, at the 5<sup>th</sup> meeting of the ABS Working Group. The working group decided to set up an open ended contact group with Mr. Rene Lefeber (Netherlands) and Mr. Pierre du Plessis (Namibia) serving as co-chairs.

Mr Rene Lefeber, the co-chair of the contact group on objective and main components, produced an informal paper containing options under the heading 'Objectives'. He drew attention to the need to define a number of terms in particular 'derivatives', 'misuse' and 'misappropriation'. Mr. Hodges, co-chair of the working group, said that the content of the paper merely constituted the basis for an evolving process of negotiation.

The co-chairs drew attention to an informal paper prepared by the secretariat containing a draft recommendation from the working group on possible elements of a decision of the ninth session of the conference of the parties on access and benefit-sharing. It was decided to set up a second open ended contact group to discuss the draft recommendation, with Mr. Linus Spenser Thomas (Grenada) and Mr. Francois Pythoud (Switzerland) serving as co-chairs. The co-chair prepared a new informal paper reflecting the contact group's deliberations. Mr Hodges presented a draft recommendation on possible elements of a decision on access and benefit-sharing for the consideration of the conference of the parties to the convention at its ninth meeting (UNEP/CBD/WG-ABS/6/L.2) reflecting the outcome of the deliberations of the two contact groups, including the proposals regarding the objective, scope, main components and nature of the international regime on access and benefit sharing.

The final day of the meeting was characterized by last minute discussions as delegations reacted to the draft recommendation and bilateral negotiations took place on the floor of the plenary.

The most difficult discussions centred on defining the scope, nature and objectives of the international ABS regime. The issue of compliance under such a regime also proved difficult, as always. In the final recommendation, the substantive elements are included in an Annex to the draft recommendations which are themselves included as an Annex to the Report (UNEP/CBD/COP/9/6) to the ninth COP in May in Bonn, Germany. As requested by some member states, it was made clear that the proposals as included were neither negotiated nor agreed. They simply reflected whether an issue had been 'included and discussed' or 'included but not discussed'. The document presents an incremental step beyond the previous stalemate. Nevertheless, there was progress in that some states have stepped back from their assertions that an ABS regime is not needed at all. The document, however, remains severely bracketed. In addition, the draft recommendation itself has several sub-sections with several options for the COP to decide, creating a concern that participation in making decisions will be limited by the fact that many developing country delegations may not be sufficiently large enough to be present in all discussions and to take part in all decisions.

**The ninth meeting of the Conference of the Parties to the Convention on Biological Diversity (COP 9) will take place from 19 - 30 May 2008 in Bonn, Germany.**

### Internet Governance Forum

The Multistakeholder Advisory Group (MAG) met in Geneva on 27-28 February 2008. The meeting discussed the mandate to make proposals; measures to increase the transparency of its proceedings, and; preparations for the third meeting of the Internet Governance Forum to be held in Hyderabad, India.

A new method was established for the renewal of the MAG according to which the MAG will derive some principles and criteria that will be sent to the secretary general of the United Nations with a list of candidate names.

The MAG also concluded that the current balance of MAG, of 50% of its members

proposed by the governments and 50% by other stakeholder groups, would be maintained.

The group discussed several suggestions for opening its meetings to various observers, as a transparency measure. However, concern was expressed that this could lead to a geographical and stakeholder imbalance in favour of Geneva-based participants.

Two alternative draft proposals were presented as the starting point of the preparation of Hyderabad meeting. These drafts will be merged into a single proposal after considering comments from MAG members and interested stakeholders. All the stakeholders were invited to submit proposals by 30 April 2008 in order to speed up planning.

**The next open consultations and the Multistakeholder Advisory Group Meeting will take place on 13 and 14-15 May 2008, in Geneva, respectively.**

#### **United Nations Framework Convention on Climate Change**

A special meeting of the Expert Group on Technology Transfer took place on 10-11 March 2008. No official report of the meeting is available. According to the agenda, the group addressed terms of reference for a report of performance indicators, as well as a report of financial mechanisms for enabling technology transfer. The group also planned to address what inputs it would make to the Nairobi Work programme on adaptation to climate change, specifically by looking at technologies for adaptation to climate change.

#### **Regional and Bilateral Trade Agreements with Intellectual Property Provisions**

The following section highlights the latest developments in US and European bilateral and regional trade with developing countries with specific focus on IP issues.

#### **Free Trade Agreements (FTAs) involving the United States**

The last round of US-Malaysia free trade negotiations took place in January 2008 in Kuala Lumpur, though no further develop-

ments were seen. The next round of negotiation is scheduled in April. The US is hopeful that it will conclude the agreement this year ahead of the presidential elections. The US-Thailand free trade negotiations did not see any progress in the first quarter of 2008, though there were reports of business leaders urging the new Thai government to press forward with the bilateral free trade negotiations with the United States, aiming to receive more preferential treatment than rival countries. The agreement is supposed to be crucial for new developments in intellectual property trade relations.

The controversial deal with Colombia was not approved by the US congressional leadership in the first quarter of 2008 and there are reports of the Bush administration debating whether to submit the agreement for ratification without such approval. The agreements with Panama and Korea are also pending ratification.

#### **Free Trade Agreements (FTAs) involving the European Union**

The EU and ASEAN have scheduled four negotiating rounds in 2008 for negotiating bilateral free trade agreements. But no progress was seen in negotiations in the first quarter of 2008. No progress was seen in the EU-Mercosur FTA negotiations in the first quarter of 2008 either. The EU-GCC free trade agreement did not see any development in the first quarter of 2008, after the last round was conducted in Brussels in November 2007. The partnership and cooperation agreements concluded with Turkmenistan and Tajikistan are still in the process of ratification.

The EU's Economic Partnership Agreements (EPAs) with the African, Caribbean and Pacific continue to cause controversy as many ACP countries assess the nature and scope of the obligations that some of them have committed to in the interim 'goods only' agreements hastily signed at the end of 2007. The Caribbean remains the only region to have signed a comprehensive with IP provisions EPA with the EU. Including the Caribbean, a total of 35 countries out of 76 signed either a full or interim EPA. Many of those that have signed interim agreements have committed to further negotiations on IP during 2008.

## ABOUT THE IP QUARTERLY UPDATE

The IP Quarterly Update is published on a quarterly basis by the South Centre and the Center for International Environmental Law (CIEL). The aim of the Update is to facilitate a broader understanding and appreciation of international intellectual property negotiations by providing analysis and a summary of relevant developments in multilateral, plurilateral, and bilateral fora as well as important developments at the national level. In each IP Quarterly Update, there is a focus piece analysing a significant topic in the intellectual property and development discussions.

Today, in addition to the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO), there are other multiple fronts of discussion and negotiation on intellectual property. These other fora range from international organizations, such as the United Nations Educational and Scientific Organization (UNESCO), the Food and Agriculture Organization (FAO), the World Health Organization (WHO), the United Nations Conference on Trade and Development (UNCTAD), the World Customs Organization (WCO), INTERPOL, and the UN human rights bodies to regional and bilateral fora such as in the context of free trade agreement (FTAs) or economic partnership agreements (EPAs). In some cases, national processes or decisions, for example, invalidation of a key patent may have important international ramifications.

Consequently, all these processes constitute an important part of the international intellectual property system and require critical engagement by developing countries and other stakeholders such as civil society organizations. Multiple fronts of discussions and negotiations require a coordination of strategies and positions that is not always easy to achieve. The Quarterly Update is meant to facilitate such coordination and strategy development, and is therefore a vehicle for awareness raising as well as capacity development.



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