

INTELLECTUAL PROPERTY QUARTERLY UPDATE



AN INTERGOVERNMENTAL ORGANIZATION
OF DEVELOPING COUNTRIES



CENTER FOR INTERNATIONAL
ENVIRONMENTAL LAW

An International Legal Framework to Protect Traditional Knowledge and Folklore – More Talk at WIPO or Negotiations Finally Underway?

I. Historical Deadlock at WIPO

The WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC or Committee) has existed since 2001 to discuss and find solutions to issues on the interface between intellectual property (IP), on the one hand, and genetic resources

(GR), traditional knowledge (TK) and folklore, on the other. The IGC is meant to focus its work on the international dimension of these questions. No outcome of its work is excluded, including the possible development of an international instrument or instruments.

The IGC is not a typical WIPO committee. The key difference is that it has a two-year, but renewable, life-span. Since 2003, the mandate of the IGC has been renewed, and redefined, consecutively for two-year periods. The main reason why the IGC was given a two years life-span was for WIPO Member States to accelerate the pace of

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discussions and find agreement on pressing questions within this time frame.

To highlight the urgency of agreed outcomes, the WIPO General Assembly has repeatedly requested that the IGC speed up its work and move towards tangible outcomes. Despite this, in the past eight years, the IGC has not agreed on any outcome for any of the three main issues it is dealing with. The huge amount of research done by the IGC has not yet translated to a new international legal framework for the protection of TK and folklore (or traditional cultural expressions). Nor has it translated into any agreed solutions on IP aspects of access to GR and equitable benefit sharing derived from the use of such resources.

The outcome(s) of the work of the IGC should complement and not undermine the related work taking place in other international fora, including: the negotiations on an international Access and Benefit Sharing Regime in the context of the Convention on Biological Diversity (CBD); implementation of the Bonn Guidelines on access to GR and the fair and equitable sharing of the benefits arising from their utilization; discussions at the WTO on both the relationship between the CBD and the TRIPS Agreement as well as review of Article 27.3b; and the implementation of the United Nations Food and Agriculture Organization (FAO) International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).

II. The New Mandate of the WIPO IGC

The 47th session of the WIPO General Assembly (GA) in September 2009 marks a limited success for developing countries. The GA renewed and reviewed the IGC mandate, giving it clear guidance to start text-based negotiations with a specific objective, time frame and road map.

The objective of the negotiations in the IGC will be to reach agreement by 2011 on a text that would constitute an international legal instrument, or instruments, to ensure effective protection of GR, TK and folklore. Building on the previous work of the IGC, the negotiations and technical work will take place in four regular sessions of the

IGC and three inter-sessional working group meetings in the next two years.

If the IGC successfully completes its mandate, the 2011 WIPO General Assembly would receive the text from the IGC and convene a Diplomatic Conference, the last treaty-making step at WIPO, to conclude the treaty or treaties.

Developing countries fought hard to reach this outcome. It took lengthy and intense discussions in the previous two sessions of the IGC and in the 2009 GA, where positions of developed and developing countries were highly polarized.

At the fourteenth session of the IGC in April 2009, countries failed to reach agreement on the future work plan for the IGC. The IGC did not recommend that the 2009 GA renew its mandate.

Informal deliberations took place on the basis of an African Group proposal that sought to bring diverging positions together concerning the "list of issues" under discussion and set a specific time frame for text based negotiations. Developed countries were adamant in opposing new language for the mandate of the IGC.

The African Group, Brazil, Indonesia, India and most other developing countries strongly supported the African Group proposal. On the other hand, the EU, South Korea, Japan and the US adamantly opposed text-based negotiations towards an internationally legally binding instrument(s). Australia, Canada and New Zealand accepted text-based negotiations, but not the objective of concluding international legally binding instruments.

Indigenous, community groups and other observers reacted strongly against what they viewed as a lack of transparency in informal deliberations, in which they were unable to take part.

Due to the informal nature of the discussions on the issue of the IGC's future work, no country statements are included in the provisional report of the Session (WIPO/GRTKF/IC/14/12 Prov. 2) on this issue.

The 2009 GA was thus a defining moment for the future of the IGC. Developing

countries were unwilling to accept renewal of the previous mandate of the IGC. It was argued that the Committee had built over the past eight years sufficient work to move towards text-based negotiations. Developing countries voiced their frustration with "the deadlock and watering down of substantive issues." Indeed, it would be of little value for developing countries to continue discussions in the IGC without agreement on a clear roadmap for concrete outcomes within a specific time frame. Rather, it could undermine related work in other multilateral fora.

The Director General, in his opening remarks to the 2009 GA, appealed on Member States to "show the flexibility and understanding that is necessary to renew the mandate of this Committee on terms that will provide grounds for the developing countries, in particular, to believe that tangible solutions at the international level to the unfair misappropriation of TK and traditional cultural expressions are close".

In their opening remarks, the EC, Japan, South Korea, and the US all expressed discontent with the demand for a legally - binding instrument. The EC suggested that the IGC's mandate be renewed with a more focused work-plan, building towards a WIPO Declaration on Genetic Resources, Traditional Knowledge and Folklore. However, the US disagreed with the EC, stating that many gaps were still present in the Committee's work and that a declaration was premature, let alone a treaty. Rather, the US suggested accelerating substantive work to fill in the gaps left unfinished from the previous mandate. The US further stated that text based negotiations of a declaration or treaty should not be held without agreement on contexts, nature and substance. Australia, in a written proposal offered a compromise solution: text-based negotiations under a clear time-frame.

With these positions on the table, the resolution of the issue of the future mandate of the IGC was yet again taken behind closed doors. These informal discussions dragged for several days.

III. The 2009 General Assembly Decision on the Future Mandate of the IGC

After days of informal deliberations, the 2009 GA reached the following decision:

"The committee will during the next budgetary biennium (2010/2011) and without prejudice to the work pursued in other fora, continue its work and undertake text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of GRs, TK and TCEs"

"The Committee will follow, as set out in the Annex, a clearly defined work program for the 2010/2011 biennium. This work program will make provision for, in addition to the 15th session of the Committee schedule for December 2009, four sessions of the IGC and three inter-sessional working groups in the 2010-2011 biennium"

"The focus of the committee's work in the 2010/2011 biennium will build on the existing work carried out by the committee and use all WIPO working documents, including WIPO/GRTKF/IC/9/4, WIPO/GRTKF/1C/9/5 and WIPO/GRTKF/IC/11/8A (Traditional Cultural Expressions, Traditional Knowledge and Genetic Resources), which are to constitute the basis of the Committee's work on text-based negotiations"

"The Committee is requested to submit to the 2011 General Assembly the text (or texts) of an international legal instrument (or instruments) which will ensure the effective protection of GRs, TK and TCEs. The General Assembly in 2011 will decide on convening a Diplomatic Conference."

"The General Assembly requests the International Bureau to continue to assist the Committee by providing Member states with necessary expertise and funding of the participation of experts from developing countries and LDCs according to the usual formula".

"The General Assembly adopts the draft report of the 14th session of the Committee as reflected in document WIPO/GRTKF/IC/14/12 Prov.2 as the report of that session".

[The Annex to the decision contains the list

of meetings that will be held between this GA and the 2011 GA as follows: First Intersessional Working Group-February/March 2010; IGC 16-May/June 2010; WIPO General Assembly-September 2010; Second International Working Group-October 2010; IGC 17-December 2010; Third Intersessional Working Group-February/March 2011; IGC 18-May/June 2011; IGC 19-Early September 2011; WIPO General Assembly-September 2011]

IV. Future Work under the New Mandate

Developing countries have achieved a major success in achieving the new mandate for the IGC. However, many challenges lie ahead.

A major challenge is the lack of real engagement of developed countries in the IGC. Cohesion among developing countries will be essential to confront the skepticism of developed countries that developing countries are not clear in their demands from the IGC. Developing countries will need to increase their coordination in order to ensure a common voice in the upcoming negotiations.

Second, although the new mandate requires the IGC to negotiate an "international legal instrument", developed countries are likely to argue in the interpretation of the term that the outcome of the IGC may take forms other than a treaty or treaties. Even if developing countries are united in their belief that a treaty approach "will ensure the effective protection of GRs, TK and [Traditional Cultural Expressions]," they will likely face significant opposition.

In order to achieve their desired outcomes, developing countries will also need to maintain political support at the highest level and increase consultations with their national stakeholders in order to solidify national positions on expected outcomes of the IGC.

Working towards a common text language for the instrument(s) must be a priority to meet the 2011 time-frame. The IGC mandate states that "all WIPO working documents" *may* serve as a basis for the Committee's future work. While these documents contain useful information,

interventions by developed countries indicate an intention to revisit earlier working documents. This will delay the Committee's efforts in producing international legal instruments by the 2011 GA.

The work of the IGC should be "fully complementary with, and supportive of," the work of the other intergovernmental fora.¹ Under the new mandate, it remains to be seen how the IGC will interact with the other intergovernmental institutions and international instruments so as to both not undermine the developments in the fora mentioned above, but also provide an adequate response to the demands and expectations of the IGC in producing international instrument(s) that will provide effective protection of GR, TK and Folklore.

A more long-term challenge will be to ensure that any international instrument(s) that derive from the IGC will be integrated into national and/or regional law. While a Diplomatic Conference may help in this regard, respective governments must still (1) ratify the Treaty and (2) implement legislation that will indeed ensure the effective protection of GR, TK and folklore.

V. Conclusion

The agreement on text based negotiations to conclude international instrument(s) for the effective protection of GR, TK, and folklore may be a historical turning point and mark the first major success for developing countries in their demand to make the IP system work in their favor.

In moving the process forward, developing countries face many challenges ahead. Developing countries must show leadership in the negotiations and coordinate effectively among them. They must also consult with and ensure support from their variety of national stakeholders.

The work of the IGC should in no way hinder, but rather complement, the work currently undertaken in related issues at other multilateral fora. In particular, the WIPO process should complement the negotiations in the WTO on the relationship on the CBD and TRIPS, and the CBD

¹ See WIPO/GRTKF/IC/9/6, para. 19.

International Access and Benefit Sharing
Regime.

AN OVERVIEW OF RELEVANT IP DEVELOPMENTS IN VARIOUS FORA

Below is an overview of updates involving intellectual property issues in various fora for the third quarter of 2009.

The World Trade Organization (WTO)

General Council

The Seventh Ministerial Council of the WTO will be held in Geneva from **30 November - 2 December 2009** under the general theme "The WTO, the Multilateral Trading System and the Current Global Economic Environment".

TRIPS Council

The Council on Trade-Related Aspects of Intellectual Property Rights (TRIPS Council) convened on **20 October 2009**.

Dispute Settlement Body

India Considers Taking the Drug Seizure Issue to WTO Dispute Settlement Body

The Indian government is planning to take up the matter of drug seizures in transit to the WTO dispute settlement forum.

Most recently, in October of 2009, French customs authorities seized 740,000 tablets of heart attack prevention medicine Clopidogrel that were shipped by Mumbai-based Macleods Pharma to Venezuela on complaints of alleged patent violation. This was the 18th instance of seizure, and second during the year, when generic drugs meant for developing countries were confiscated during transit within the European Union, though the manufacture of the drug in India and sale in the destination country were legal.

India informed the TRIPS council meeting in Geneva on 20 October 2009 that widespread and repeated seizures would have an adverse impact on legitimate trade of generic medicines, universal access to medicines in developing countries and national public health budgets.

World Intellectual Property Organization (WIPO)

WIPO General Assembly

The 47th WIPO General Assembly (WIPO GA) was held on **22 September – 1 October 2009**.

In his report to the WIPO GA, Mr. Francis Gurry, Director General of WIPO, emphasised the role of IP in climate change mitigation and adaptation, pointing out that IP is not a barrier to the diffusion of green technologies; but rather, is making a positive contribution to the development of these technologies. In addition, regarding the transfer of these technologies, the Director General stated that "the experience of the IP system and community in the creation, commercialization and diffusion or transfer of technology can make a valuable contribution."

During the course of the 2009 WIPO GA, various committees presented reports on their work. The following is an overview of these reports.

Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)

The WIPO GA discussed a report by the Secretariat (WO/GA/38/9) which provided a summary of the work done by the IGC under its mandate which was renewed by the General Assembly in 2007 for the biennium 2008-2009. The document invited the GA to take adopt the report of the 14th Session of the IGC and consider the possible extension of the mandate of the IGC for the 2010-2011 biennium and the terms thereof. Developing countries sought a new mandate for text-based negotiations for an internationally legally binding instrument or instruments for the protection of GRTKF. On the other hand, developed countries were unwilling to have a mandate for a legally binding instrument. After days of informal deliberations, the GA renewed the mandate of the IGC asking it to continue its work and undertake text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of GRs, TK and TCEs.

The Focus Piece of this edition of the IP Quarterly discusses the IGC discussions in detail.

The next session of the IGC is scheduled for **7-11 December, 2009**.

Report of the Committee on Development and Intellectual Property (CDIP)

The WIPO GA discussed the Report of the CDIP described in document WO/GA/38/3.

The next meeting of the CDIP will be held on **16 – 20 November 2009**.

Report on the Work Concerning the Advisory Committee on Enforcement (ACE)

The GA took note of the work of the ACE described in document WO/GA/38/4.

Report on the Work of the Standing Committee on Copyright and Related Rights (SCCR)

The GA took note of the work of the SCCR described in document WO/GA/38/5.

The next meeting of the SCCR will be **14-18 December 2009**.

Report on the Work of the Standing Committee on the Law of Patents (SCP)

The GA took note of the work of the SCP described in document WO/GA/38/6.

The fourteenth session is scheduled to be held on **25-29 January 2010** in Geneva.

Report on the Work of the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT)

The GA took note of the work of the SCT described in document WO/GA/38/7.

The twenty-second session is scheduled to be held on **23-26 November 2009**.

Report of the Standing Committee on Information Technology (SCIT)

The WIPO GA discussed a proposal concerning the Standing Committee on Information Technologies (SCIT). The proposal is for creating two Committees to replace the SCIT: 1) Committee on WIPO Standards (CWS) and 2) Committee on Global IP Infrastructure (CGI) (WO/GA/38/10). When the SCIT was established in 1998, the original mandates of the SCIT, as contained in documents A/32/3, involved “*the implementation of the WIPO global information network and the provision of intellectual property information services on the network*”, which has been used as a justification for such realignment. This followed the termination of the global information network (which was called “WIPONET”) at the end of 2003 (document A/40/2, paragraph 70), and the mandate of the SCIT needed to be reviewed and updated since then.

These two proposed Committees will work independently and should prepare proposals and/or activity reports for the consideration of the WIPO GA or other relevant assemblies.

The mandate of the CWS would be to continue to work on the revision and development of WIPO standards relating to IP information. The CWS would, in effect, perform the same work as the SDWG, but under a different name.

The mandate of the CGI would be to discuss matters concerning global IP infrastructure that do not fall into the mandate of the CWS. Such matters include: development of good practices; common tools and coherent approaches to various projects for strengthening international cooperation; and the interchange of data and information on IP.

Intergovernmental Committee on Intellectual Property and Generic Resources, Traditional Knowledge and Folklore (IGC)

The 14th Session of the IGC was held on **29 June – 3 July 2009**.

The Focus Piece of this edition of the IP Quarterly discusses the IGC discussions in detail.

The next session of the IGC is scheduled for **7-11 December, 2009**.

WIPO Conference on Intellectual Property and Public Policy Issues

The WIPO Conference on Intellectual Property and Public Policy Issues was held on **13-14 July 2009**, Geneva.

The Conference on Intellectual Property and Public Policy Issues explored the specific contribution that IP can make in supporting a range of public policy objectives. The inter-disciplinary nature of the Conference tried to reflect the complexity of the shared challenges that the international community is facing, including climate change, epidemics, public health, food security and the preservation of biodiversity.

Climate change was the principal public policy issue covered, with the entire first day dedicated to the topic, specifically with respect to the dangers presented by climate change the potential role of mitigation technologies in helping to prevent these dangers from developing. Presentations were made by UN Agencies, as well as professionals engaged in academia and industry.

The second day brought a mixture of IP policy issues, ranging from international trade, to public health, to food security. Pascal Lamy, Director General of the World Trade Organization, recognizing the cross-cutting nature of IP, stressed that "coherence, cooperation, and practical dialogue is indispensable if we are to address these global challenges."

However, neither he, nor Margaret Chan (Director General of the World Health Organization), nor Francis Gurry (Director General of WIPO) offered anything in the way of concrete efforts as to how their respective organizations would increase collaborative effort on IP issues.

Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT)

The Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) did not convene this quarter.

The twenty-second session of the SCT will be held on **23-26 November 2009**.

Program and Budget Committee (PBC)

The Fourteenth Session of the Program and Budget Committee (PBC) was held on **14-16 September 2009** in Geneva.

In the draft report of the session (WO/PBC/14/13 Prov.), the Director General took responsibility for the delay of releasing the Medium-Term Strategic Plan (MTSP), saying that a draft would be released immediately following the 2009 General Assembly that will be the subject of an interactive process of discussions over a period of twelve months.

He then discussed the impact of the financial crisis on the budgetary envelope for the next biennium, reassuring the Committee that the financial impact of the crisis will be managed within the current and following biennia.

The Director General stated that these projections were based on the positive results achieved last year and the measures taken will cause this biennium to end on a positive note, despite an expected decrease in the number of applications in the PCT and Madrid Systems (about 5% and 10%, respectively).

There will be a 10% increase in financial resources of the Small and Medium-sized Enterprise (SME) Division, relative to the financial resources currently available.

Regarding funding for the Development Agenda, in the Summary of Recommendations (WO/PBC/14/12), a provisional earmarking of 2.3 million Swiss francs were allocated to fund the start-up and immediate implementation costs of projects and its coordination mechanism.

The PBC recommended to the Assemblies of the Member States of WIPO and the Unions administered by WIPO, the process for the selection of the External Auditor (document WO/PBC/14/5). The selection panel should

be established by March 2010.

The Chair of the WIPO Audit Committee presented a report to the PBC, after which the PBC recommended to the General Assembly that a thorough examination of the recommendations in the report be made for their implementation (WO/PBC/14/12).

The Advisory Committee on Enforcement (ACE)

The ACE did not convene during this quarter.

The next meeting of the ACE will be held on **2-4 November 2009**.

Standing Committee on Patents (SCP)

The SCP did not convene during this quarter.

The next session of the SCP will be held from **9 - 13 November 2009**

Assembly of the Patent Cooperation Treaty (PCT) Union

The Assembly of the Patent Cooperation Treaty (PCT) Union met in Geneva **on 25 September 2009**, as part of the meetings of the Assemblies of the Member States of WIPO.

The PCT Assembly appointed the Egyptian Patent Office and the Israel Patent Office as International Searching and Preliminary Examining Authorities under the PCT, bringing the total number of such offices to 17. The appointments will become effective from future dates to be notified by the respective offices when they are ready to begin operation. Member states also adopted a number of amendments to the regulations under the PCT which will enter into force on July 1, 2010. These concern clarification of the extent to which authorities may define the scope of supplementary international search which will be offered, a requirement for applicants filing amendments to indicate the basis of those amendments in the application as filed, and improvements to the process for establishing equivalent amounts of certain PCT fees in different currencies.

Working Group on the Legal Development of the Madrid System for the International Registration of Marks

The Working Group on the Legal Development of the Madrid System for the International Registration of Marks did not convene during this quarter.

The eighth session of the Working Group on the Legal Development of the Madrid System for the International Registration of Marks has tentatively been scheduled for **25-28 May 2010**.

World Health Organization (WHO)

World Health Assembly

SEARO Resolution on Measures to Ensure Access to Safe, Efficacious, Quality and Affordable Medical Products

The 62nd Annual Regional Committee meeting of the World Health Organization's (WHO) South East Asia Regional Office (SEARO) was held in Katmandu on **7-10 September 2009**.

During this meeting, a resolution has been adopted asking the regional director of SEARO to advocate that WHO does not support intellectual property policies that could potentially undermine availability of safe, efficacious, quality and affordable medical products. The resolution also asked the WHO regional director not to support any IP policy that undermines access to medicines. This resolution rejects the counterfeit agenda being propagated by developed countries and multinational pharmaceutical companies.

The meeting noted that the term and definition of 'counterfeit' relates to infringement of intellectual property rights and should not be equated with substandard medical products.

This is viewed as a signal of rejecting the IP enforcement agenda advocated by International Medical Product Anti-Counterfeit Task-force (IMPACT), for which WHO is acting as the Secretariat. Member

States from SEARO, e.g. India and Thailand, opposed the IMPACT Agenda in the World Health Assemblies of 2008 and 2009 as well as in the WHO Executive Board meeting in January of 2009.

Pandemic Influenza Preparedness (PIP) Framework for Sharing Influenza Viruses and Access to Vaccines and Other Benefits

The Director General of WHO held a two-day consultation with Member States on Influenza Virus and Benefit Sharing on 19-20 October 2009.

The WHO has prepared a document (HSE/GIP/PIP/2009.1) which contains proposals on IPRs and benefit sharing.

The IPR proposal comprises two versions of the SMTA for transfer of Materials among the WHO laboratories:

1) If intellectual property rights are obtained on inventions derived from the use of PIP Biological Materials, the holder of such rights should grant to WHO a non-exclusive, royalty-free, sub-licensable licence with respect to such rights. Licences to WHO shall be subject to the following terms: (a) WHO shall, upon request, have the right to grant sub-licences of said licence for public health purposes; (b) WHO may subject WHO sub-licences to appropriate conditions based on sound public health principles; or

2) Member States should urge entities that receive PIP Biological Materials and obtain IP rights derived from their use to agree to grant to WHO a non-exclusive, royalty-free, sub-licensable licence with respect to such rights, to the extent that this is not prohibited by law, regulation or third-party obligation (which obligation exists before the receipt of the PIP Biological Materials). To the extent that such prospective grants are prohibited by law, regulation or pre-existing third-party obligation, the recipient will in good faith consider requests from WHO for the right to use such intellectual property rights and explore ways to enable such use in a similar cost-limited manner. Licences to WHO should be subject to the following terms: (a) WHO shall, upon request, have the right to grant sub-licences of said licence for public health

purposes; (b) WHO may subject WHO sub-licences to appropriate conditions based on sound public health principles.

The discussions during the consultation revealed two "different perspectives." The first option supported having no restriction on the right of parties handling pandemic influenza preparedness (PIP) Biological Materials to seek IP rights (IPRs) with respect to inventions developed from these Biological Materials; The alternative option sought to limit or restrict parties from pursuing IPRs over these Biological Materials.

The proposed text represented a "compromise between these positions", on the basis of "equitable rights" of all laboratories that handle and use PIP Biological Materials, "permitting all laboratories to seek IPRs derived from the use of such Biological Materials, regardless of the laboratories' legal status".

Brazil said, in its statement to the informal meeting, "most people living in developing countries will not have access to H1N1 vaccines, in view of the limited global production capacity and impediments to access vaccine production technologies." Brazil then called for an increase in aid to developing countries to help with the acquisition of technology for vaccine manufacture, and for commitments to be added to the Standard Material Transfer Agreement (SMTA) on how vaccine manufacturers from all over the world will share benefits arising from the sharing of influenza materials through the WHO system.

The views expressed by the Member States during the consultation will be reported by the Director General to the WHO Executive Board meeting to be held on **18-23 January 2010** in Geneva.

DEVELOPMENTS IN OTHER FORA

Convention on Biological Diversity (CBD)

There are two upcoming events which will be held in Montreal, Canada for discussions

on the Convention on Biological Diversity (CBD) and Access and Benefit-sharing (ABS). These are:

- 1) The sixth meeting of the Ad Hoc Open-ended Working Group on Article 8(j) and Related Provisions, **2-6 November 2009**; and
- 2) Eighth meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing, **9-15 November 2009**.

Food and Agriculture Organization (FAO)

Commission on Genetic Resources for Food and Agriculture (CGRFA)

The twelfth regular session of the Commission on Genetic Resources for Food and Agriculture (CGRFA-12) was held on **19 October 2009**, at the headquarters of the Food and Agriculture Organization (FAO), Rome, Italy.

Over 200 participants attended, representing 107 countries, intergovernmental and non-governmental organizations, and international agricultural research centres.

The meeting resulted in the adoption of its report, which incorporated a number of outcomes, including agreement on the major outputs and milestones of the Strategic Plan. Delegates also: adopted new rules of procedure for the CGRFA; adopted the Strategic Plan; elected members of the Intergovernmental Technical Working Groups (ITWGs) on Plant, Animal and Forest Genetic Resources; adopted a resolution on policies and arrangements for access and benefit-sharing (ABS) for GRFA; agreed to the funding strategy for the implementation of the Global Plan of Action (GPA) for animal genetic resources (AnGR); approved the outline of the State of the World's Forest Genetic Resources; and agreed to create an ITWG on Forest Genetic Resources.

CGRFA-12 was preceded by a special information seminar on "Policies and Arrangements for ABS for GRFA," which convened on 17 October 2009, also at FAO headquarters. This event focused on the status and challenges of ABS for GRFA, with

presentations on the: status of the negotiations on the international regime on ABS; food security and ABS; recent developments in intellectual property law and policy; and the impact of climate change on GRFA. There was also discussion on the use and exchange of GRFA, which includes the domains of plant, animal, forest and microbial genetic resources and biological control agents.

United Nations Framework Convention on Climate Change (UNFCCC)

The Seventh Session of the Ad Hoc Working Group on Long-term Cooperative Action (AWG-LCA) and the Ninth Session of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) was held in Bangkok, Thailand on **28 September - 9 October 2009**.

Discussions in the Contact Group on Enhanced Action on Development and Transfer of Technology were based on Non-Paper 4 containing further consolidation of the negotiating document (FCCC/AWGLCA/2009/INF.2, annex V), which contains various options on measures to address intellectual property rights. Non-Paper 4 enumerated four options covering: 1) promotion of technology development and transfer by operating the IP regime through use of flexibilities; 2) removing barriers to development and transfer of technologies through specific and urgent measures; 3) exemption of least developed countries (LDCs) or countries vulnerable to adverse effects of climate change from patent protection of climate-related technologies; and 4) establishing an advisory panel to address IP issues, while ensuring that access to adaptation technologies is achieved. The options cover a wide range of flexibilities that developing countries and LDCs can use to guarantee their access to climate friendly technologies. These include the creation of patent pools, and the possibility of enforcing all TRIPS flexibilities. Compulsory licensing, differential pricing and limited-time patent protection were expressly listed as options.

The negotiations led to further streamlining of the negotiating text, which is contained in Non-Paper 29. On IPRs, Non-Paper 29

introduced a new fifth option, which states that countries may issue compulsory licenses for specific technologies for the purpose of mitigation and adaptation to climate change, if consistent with their obligations under international treaties and agreements, and it has been demonstrated that patents are a barrier to the deployment and diffusion of the technology in that country. This option seeks to limit the grounds for issuing compulsory licenses by requiring the consistency of compulsory licenses with international treaties and agreements, including bilateral and plurilateral TRIPS-plus regimes.

The resumed Seventh Session of the Ad Hoc Working Group on Long-term Cooperative Action (AWG-LCA) and the Ninth Session of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) will be held from **2-6 November 2009** in Barcelona, Spain.

World Summit on Information Society (WSIS)

Commission on Science and Technology for Development (CSTD)

The CSTD 2009-2010 Inter-sessional Panel will take place on **9-11 November 2009** in Geneva.

Internet Governance Forum (IGF)

No IGF meetings were held this quarter; however two preparatory meetings for the Fourth IGF meeting were held: 1) Open Consultations meeting on 16 September 2009, Geneva; and 2) a Multistakeholder Advisory Group (MAG) meeting on 17-18 September 2009.

The next IGF meeting will be held on **15-18 November 2009** in Sharm El-Sheikh, Egypt.

REGIONAL AND BILATERAL FREE TRADE AGREEMENTS (FTAs) WITH INTELLECTUAL PROPERTY PROVISIONS

FTAs involving the United States

Central American Free Trade Agreement (CAFTA)

The text of the Central American Free Trade Agreement (CAFTA) was finalised in June 2009. Guatemala is still drafting and implementing related legislation. A recent study has shown that CAFTA has reduced access to some generic drugs in Guatemala, some of which were already on the market, and delayed entrance of new generics to the market. Guatemala is a low-income country with domestic generic-based pharmaceutical industry. Data exclusivity, a TRIPS-plus provision in CAFTA (see India-Japan EPA, below), has provided pharmaceutical companies with monopoly in the Guatemalan market to the extent that some drugs will be open to generic competition in the US before generics could be legally introduced in Guatemala.

Other FTAs

India-Japan EPA

In a fresh round of talks of the India-Japan FTA negotiations which took place on 29 September 2009, Japan has pressed for data exclusivity for drug registration data. In case data exclusivity is applied to drug registration data, this would mean delayed access to generics, because domestic drug producers rely on clinical trials data submitted by innovator drug companies. Data exclusivity to clinical trials data means that domestic pharmaceutical companies would have to conduct clinical trials all over again, delaying entry of generic medicines into the market.

Japan is also negotiating a clause to grant patents to naturally-occurring micro-organisms, for which TRIPS gives member states the flexibility of limiting patents to genetically modified micro-organisms.

OTHER RELATED PROCESSES

Proposed Anti-Counterfeiting Trade Agreement (ACTA)

The fifth round of negotiations for the proposed Anti-counterfeiting Trade Agreement (ACTA) was held in Rabat, Morocco on **16-17 July 2009**.

Australia, Canada, the European Union (represented by the European Commission and Member States including the EU Presidency (Sweden), Japan, Republic of Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the United States participated in the negotiations. Jordan, which participated in the last round of negotiations, was not present. In his opening address, Mr Ahmed Reda Chami, Minister of Industry, Trade and New Technologies of the Kingdom of Morocco, highlighted the importance of ACTA as an agreement which shall provide an enhanced framework to fighting counterfeiting and piracy of intellectual property rights.

The discussions during this round focused on international cooperation, Enforcement Practices and institutional issues, transparency matters, including information to stakeholders and interested public. Negotiating parties intend to conclude the agreement as soon as possible in 2010.

The next round of negotiations will be hosted by the Republic of Korea in November 2009.

ACTA Internet Chapter Leaks

The issue of internet enforcement has been agreed by governments to be the focus of the latest round of talks of the Anti-Counterfeiting Trade Agreement (ACTA) negotiations hosted by Seoul, Korea on **4-6 November 2009**.

The ACTA chapter subject to the next negotiations, the Internet Chapter, has been drafted by the United States under enormous secrecy, with selected groups granted access under strict non-disclosure agreements and other countries (including Canada) given physical, watermarked copies designed to guard against leaks.

Despite the efforts to combat leaks, information on the Internet Chapter has begun to emerge. Sources say that the draft text, modeled on the U.S.- South Korea Free Trade Agreement, focuses on following five issues:

1. Baseline obligations inspired by Article 41 of the TRIPS which focuses on intellectual property enforcement;
2. A requirement to establish third-party liability for copyright infringement;
3. Restrictions on limitations to third-party liability;
4. Anti-circumvention legislation that establishes a WIPO-plus model by adopting both the WIPO Internet Treaties and the language currently found in U.S. free trade agreements (FTAs) that go beyond the WIPO treaty requirements; and
5. Digital Rights Management provisions, also modeled on U.S. free trade treaty language.

The technological protection measures (TPMs) are supposed to be modeled after the US - Jordan FTA and the WIPO Internet treaties. The actual text is still secret.

African Anti-counterfeit legislation

The Kenyan anti-counterfeit legislation was enacted at the beginning of July this year. Uganda and Eastern African Community (EAC) are still considering similar legislations.

The definition of counterfeit under these legislations does not distinguish between legal generic products and counterfeits. In Kenya, this has raised concerns of impaired access to medicines, particularly antiretroviral treatment, and is certainly threatening to the generic drug industry. The enforcement of this law will be undertaken by a special IP police force who will have a wide range of powers, including searching any place or person, and seizing any products that they suspect are counterfeit.

G8 Intellectual Property Expert Group

The Group of Eight (G8) 35th Summit was held on **8-10 July 2009** in L'Aquila, Italy.

The G8 Members discussed the report of the discussions of the Intellectual Property Expert Group (IPEG) which had convened in Rome in February and April 2009. The report of the discussions of the Intellectual Property-Customs Subgroup that was established after the 2008 G8 Summit in Hokkaido Toyako, Japan, was also

presented at the 2009 summit along with the IPEG report. Members continued to show great commitment to fight counterfeiting and piracy, and advocated the adoption of TRIPS plus enforcement actions.

G8 members and WIPO shared the idea of a web-based database for sharing experiences on the use of IP for economic development, and they called upon WIPO to further elaborate this idea of sharing successes in linking IP and business with developing countries.

In the context of global patent harmonisation, members reaffirmed the importance of the Patent Cooperation Treaty (PCT), and of accelerating discussions related to a Substantive Patent Law Treaty (SPLT). In addition, IPEG called upon the G8 members and the global community to continue discussing ways to combat digital piracy on the Internet, including the establishment of legal liability in the digital environment. Discussions have continued on bilateral information sharing among members for fighting counterfeiting and piracy by identifying high risk cargo by specific traders infringing intellectual property rights. Such legal constraints require that custom and border enforcement authorities of member states to establish a legal framework for bilateral information exchange through Customs Mutual Assistance Agreements (CMAAs). Moreover, leaders also called for ACTA negotiations to conclude as soon as possible.

In September, leaders of the G8 announced that the Group of 20 (G20) will replace the G8 as the main forum for coordinating global economic policy.

Global Congress on Combating Counterfeiting and Piracy

The Fifth Global Congress on Combating Counterfeiting and Piracy will be hosted by Interpol and the Mexican Institute of Industrial Property (IMPI) in Cancun, Mexico on **1-3 December 2009**. The theme for the Congress is "Bridging Boundaries for Shared Solutions".

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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