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THE TECHNOLOGY TRANSFER DEBATE IN THE UNFCCC¹: POLITICS, PATENTS AND CONFUSION

I. Introduction

The Earth continues to experience record-breaking temperatures caused by increased atmospheric concentrations of carbon dioxide (CO₂) and other greenhouse gases (GHGs). The impacts of this unprecedented warming include increased floods and drought, rising sea levels, the spread of deadly diseases such as malaria and dengue fever, and increasing numbers of violent storms and weather-related catastrophes.

¹ This focus piece is based on forthcoming (2008) paper from CIEL on "Technology Transfer and Climate Change at the UNFCCC: the State of Play".

Any international response to climate change must address the international transfer of environmentally sound technologies. Mitigating and adapting to climate change will require a major shift in economy-wide production and consumption patterns and the development and diffusion of technologies is a fundamental and necessary element of that transformation.

The United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol were built on a fundamental political bargain directly involving technology transfer. On one side, during the first commitment period, industrialized countries would take primary responsibility for emissions reductions. They would move toward low-carbon or carbon-free economies, while transferring technology to enable developing countries to make progress on carbon efficiency. Thus, carbon leakage, that is, the

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shifting of polluting carbon-inefficient industries from industrialized to developing countries, would be avoided. In addition, developed countries would provide financial and technical assistance to developing countries to build capacities to adapt to the negative impacts of climate change. On the other side, the success of the first phase, including the transfer of technologies to enable clean development, would then enable developing countries to take on emissions reduction obligations in the second commitment period.

Industrialized countries, however, have largely failed to provide effective transfer of environmentally sound, climate-related technologies. This failure was the primary bone of contention during the Bali Conference of the Parties (COP 13) in December 2007, and lay behind the refusal of developing countries to agree to negotiations for a new commitment period. Developing countries also argued strongly for a reorientation of the near-term elements of the bargain to focus on climate change impacts and the manner in which they disproportionately and negatively affect developing countries, especially Small Island Developing States (SIDS) and least developed countries (LDCs).

Adaptation to climate change impacts was always a part of the climate bargain, but it has possibly been the most neglected element of discussions and programs for addressing climate change. The Bali negotiations pushed to the fore attempts to address adaptation, but significant confusion remains in policy circles as to the scope, costs, and mechanisms for doing so. Technology transfer, as it relates to climate mitigation and adaptation technologies, is even less understood in terms of scope, costs, and the identification of appropriate beneficiaries. At the December 2008 14th Conference of the Parties (COP 14) in Poznan, Poland; very little happened to change this state of affairs.

How could one of the central pillars of addressing climate change also have been one of the most neglected and least implemented? What is the state of the analysis and debate in the post-Poznan landscape? There are several reasons for the failure of industrialized countries to deliver on technology transfer. The absence of political will from industrialized countries to provide measurable, reliable and verifiable financial support is an intermediate cause. Another cause may be the failure of

developing countries, at least until just prior to the Poznan COP, to go beyond rhetorical statements and to make concrete proposals and demands. In particular to identify specific packages of technologies that are essential for their mitigation and adaptation needs and methodologies for doing so. Finally, intellectual property, and the barrier it may pose, has been identified as another potential reason that industrialized countries have failed to deliver on technology transfer.

The lack of progress in the UNFCCC in ensuring the effective transfer of technologies may be due to a number of other contributing factors, including: difficulty in determining the scope of technologies to be transferred for mitigation and adaptation, and *ad hoc* and unreliable processes for matching identified needs with funding. Since the 2007 Bali COP, however, technology transfer has moved to the top of the agenda in the UNFCCC process as one of the four pillars of the post-Kyoto framework. This piece aims to outline some of the historical background to the discussions, identify some of the main players, and to describe the state of the debate on technology transfer after the December 2008 COP 14 in Poznan, Poland.

II. The Legal Framework on Technology Transfer in the UNFCCC

The UNFCCC was concluded at the 1992 Rio Earth Summit to achieve the stabilization of greenhouse gas concentrations in the atmosphere at a low enough level to prevent dangerous anthropogenic interference with the climate system.² Since its inception, technology transfer has been expected to play a significant role in achieving this objective.

The UNFCCC distinguishes between three categories of Parties. Each category has varying commitments:

- Annex I Parties – industrialized countries (OECD³ members in 1992) and economies in transition (EITs, e.g., the Baltic States) are required to “adopt climate change policies and measures with the aim of reducing

² United Nations Framework Convention on Climate Change: Status of Ratification" Available at: http://unfccc.int/files/essential_background/convention/status_of_ratification/application/pdf/unfccc_conv_rat.pdf

³ Organization for Economic Cooperation and Development

their greenhouse gases emissions.”⁴
The EIT Parties have flexibilities on their commitments.

- Annex II Parties – OECD countries from Annex 1 are required to “provide financial resources to enable developing countries to undertake emissions reduction activities under the Convention and help them adapt to the adverse effects of climate change”, and to take “practical steps” towards the development and transfer of technologies to EIT and developing country Parties.⁵
- Non-Annex I Parties – developing and least developed country Parties. These countries have inventorying, reporting and cooperation obligations, subject to the principle of common but differentiated responsibilities. (Article 4.1)

Technology transfer is addressed in Article 4 of the UNFCCC. This provision covers a range of issues, including financing, transfer and commitments. Notably, Article 4.7 links the ability of developing country Parties to fulfil their commitments under the UNFCCC to the effective implementation by developed country Parties of their commitments, particularly financial and technology transfer.

The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to **financial resources and transfer of technology** and will take fully into account that economic and social development and poverty eradication are the first and

overriding priorities of the developing country Parties.

Further, while the convention provides for the diffusion of technologies amongst all Parties, the key provision for transfer of technology from Annex II to developing countries is Article 4.5:

The developed country Parties and other developed Parties included in Annex II shall take all **practicable steps to promote, facilitate and finance**, as appropriate, the transfer of, or access to, **environmentally sound technologies and know-how** to other Parties, particularly developing country Parties, **to enable them to implement the provisions of the Convention**. In this process, the developed country Parties shall support the development and enhancement of endogenous capacities and technologies of developing country Parties. Other Parties and organizations in a position to do so may also assist in facilitating the transfer of such technologies.

Article 4.1 addresses the diffusion of technologies amongst all Parties:

All Parties, taking into account their **common but differentiated responsibilities** and their specific national and regional development priorities, objectives and circumstances, shall:

[...]

(c) **Promote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes** that control, reduce or prevent anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol in all relevant sectors, including the

⁴ United Nations Framework Convention on Climate Change (UNFCCC), “Uniting on Climate: A Guide to the Climate Change Convention and the Kyoto Protocol”, November 2007, at 15. Available at: http://unfccc.int/essential_background/background_publications_htmlpdf/items/2625.php. This document includes a complete list of Annex I countries.

⁵ United Nations Framework Convention on Climate Change (UNFCCC), “Uniting on Climate: A Guide to the Climate Change Convention and the Kyoto Protocol”, November 2007, at 15. Available at: http://unfccc.int/essential_background/background_publications_htmlpdf/items/2625.php.

energy, transport, industry, agriculture, forestry and waste management sectors;

[...]

(h) **Promote and cooperate in the full, open and prompt exchange** of relevant scientific, **technological**, technical, socio-economic and legal information related to the climate system and climate change, and to the economic and social consequences of various response strategies;

[...]

Finally, Article 4.3 addresses the financing of technologies:

The **developed country Parties** and other developed Parties included in Annex II **shall provide new and additional financial resources** to meet the agreed full costs incurred by developing country Parties in complying with their obligations under Article 12, paragraph 1. They shall also provide such financial resources, **including for the transfer of technology**, needed by the developing countries . . .

The Kyoto Protocol directly addresses the transfer of technology in Article 10(c), which requires all Parties to:

Cooperate in the promotion of effective modalities for the development, application and diffusion of, and take all possible steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies, know-how, practices and processes pertinent to climate change, in particular to developing countries, including the formulation of policies and programmes for the effective transfer of environmentally sound technologies that are publicly owned or in the public domain and the creation of an enabling environment for the private sector, to promote and enhance the transfer of, and access to, environmentally sound technologies.

The Kyoto Protocol also addresses technology transfer indirectly in the Clean Development Mechanism (CDM). The CDM is one of the three so-called market-based flexibility mechanisms available to lower the costs of reducing greenhouse gas emissions. The CDM, ostensibly, provides an incentive to transfer technology to developing countries. Investment projects that reduce emissions that would otherwise have occurred can obtain credits, which can be traded in global markets and used to achieve treaty compliance.

III. The UNFCCC Structure for Negotiating and Discussing Technology Transfer⁶

The Conference of the Parties (COP) is the "supreme body of the Convention".⁷ Annual meetings function to "review the implementation of the convention, adopt decisions to further develop the Convention's rules, and negotiate new commitments."⁸ Two subsidiary bodies support the work of the COP:

- **The Subsidiary Body for Scientific and Technological Advice (SBSTA)**, which supports the work of the COP on "matters of science, technology, and methodology, including guidelines for improving standards of national communications and emission inventories"⁹ and monitoring the work of the Expert Group on Technology Transfer ; and
- **The Subsidiary Body for Implementation (SBI)**, which supports the COP in assessing and reviewing implementation, "for instance by analyzing national communications submitted by Parties. It also deals with financial and administrative matters."¹⁰ After the

⁶ This discussion is based on a forthcoming (2008) paper from CIEL on "Technology Transfer and Climate Change at the UNFCCC: the State of Play".

⁷ United Nations Framework Convention on Climate Change (UNFCCC), "Uniting on Climate: A Guide to the Climate Change Convention and the Kyoto Protocol", November 2007, at 16. Available at: http://unfccc.int/essential_background/background_publications_htmlpdf/items/2625.php

⁸ *Id.*

⁹ *Id.*

¹⁰ United Nations Framework Convention on Climate Change (UNFCCC), "Uniting on Climate: A Guide to the

Bali COP, it also has responsibility for monitoring the Expert Group on Technology Transfer (EGTT).

Bodies that exist independently from the UNFCCC are retained to provide important assistance to the Parties to the convention. These include:

- **Intergovernmental Panel on Climate Change (IPCC)** – which provides information via reports at the request of the COP or the SBSTA.
- **The Global Environment Facility (GEF)** operates the Convention's general financing mechanism¹¹, including channelling grant or loan funds to developing countries.

The key UNFCCC body for technology transfer is the **Expert Group on Technology Transfer (EGTT)**, which was established with "the objective of enhancing the implementation of Article 4, paragraph 5, of the convention, including, *inter alia*, by analyzing and identifying ways to facilitating and advance technology transfer activities and, before the Bali COP, making recommendations to the Subsidiary Body on Scientific and Technological Advice."¹²

IV. The History of the Debate on Technology Transfer

From the beginning of the UNFCCC, China has been one of the primary countries pushing for effective implementation of technology transfer commitments. In the first meeting of the SBSTA in September 1995, China identified a need for renewable energy technologies, and the need for the identification of adaptation technologies.¹³

Climate Change Convention and the Kyoto Protocol", November 2007, at 16. Available at: http://unfccc.int/essential_background/background_publications_htmlpdf/items/2625.php

¹¹ The GEF is, *inter alia*, a finance mechanism for four environmental conventions: The Convention on Biological Diversity; The United Nations Framework Convention on Climate Change; The United Nations Convention to Combat Desertification; The Stockholm Convention on Persistent Organic Pollutants. For more information visit <http://www.gefweb.org/>.

¹² UNFCCC decision 4/CP.7 ¶12, Available at <http://unfccc.int/resource/docs/cop7/13a01.pdf#page=22>).

¹³ Earth Negotiations Bulletin "Summary: 1st Session SBSTA & SBI" Volume 12, Number 23, August 28 -

Access to technologies protected by intellectual property was raised almost immediately as a concern by the Alliance of Small Island States (AOSIS).¹⁴

From the beginning of the work of the SBSTA, technology inventorying and assessment have been a major element of agreement amongst states, although little agreement could be found on criteria. The SBI was also an important player in evaluating the implementation of technology transfer, although not always playing as significant a role as the SBSTA.

A key transition in the discussions on technology transfer was the report on technology transfer by the Secretariat examining the nature and scope of technology transfer as reported in national communications of Annex II Parties.¹⁵ The report noted that because reporting guidelines were so vague, national communications varied both as to detail, interpretation, format, and comprehensiveness.¹⁶ This report was the beginning of serious concerns on the part of developing countries that implementation of technology transfer obligations would not occur in a sufficient and timely manner. The lead countries in expressing such concerns were China and Russia. The response from the US and the EU focused on overcoming some of the technical barriers to information and emphasized the role that the private sector played, noting the limited role that government can play.¹⁷

The early years of the discussion were characterized by repeated demands for acceleration of technology transfer, but without any information on technology needs being generated by the developing countries demanding such transfers. In part this was due to lack of funding for carrying out such needs assessments. In the meantime, industrialized countries preferred to carry out their activities through joint implementation measures, some of which were later codified

September 01, 1995. Available at: <http://www.iisd.ca/vol12/1223000e.html>

¹⁴ *Id.*

¹⁵ UNFCCC "Note by the Secretariat on transfer of technology" UN Doc. FCCC/SBI/1996/5, 1995. Available at: <http://unfccc.int/resource/docs/1996/sbi/05.pdf>

¹⁶ *Id.* at 4.

¹⁷ Earth Negotiations Bulletin "Summary: 2nd Session SBSTA & SBI" Volume 12, Number 26, February 27 - March 04, 1996

in the Kyoto Protocol. This meant that technology transfer was largely focused on mitigation and less so on adaptation.

It was at the 4th COP that industrialized countries began to emphasize the issue of the lack of enabling environments as a barrier to technology transfer. Focusing on private sector delivery, they argued that developing countries needed to ensure proper regulatory environments to create demand for technologies and that they needed to ensure intellectual property protection and enforcement to ensure that companies felt comfortable licensing technology.¹⁸ This was part of a broader re-framing of the issue by the main industrialized countries, US, Australia, Japan, Canada (and sometimes the EU) to focus on market mechanisms, mitigation technologies, and on the flexibility mechanisms such as the CDM. Developing countries, led by the G77 plus China grouping argued that market mechanisms were insufficient and that adaptation technologies were being ignored. A key sticking point was that industrialized countries saw the CDM as the main vehicle for technology transfer.

The establishment of the EGTT at COP 6 in 2000 only served to shift the debate from one forum to another and may actually have served to delay further action on technology transfer. The work of the SBSTA from this point on focuses on examining the reports of the EGTT, which meets in closed session. The establishment of the EGTT, which, at the time, did not report to the SBI, also meant that technology transfer fell off the agenda of the SBI over time, as all technology transfer issues were deferred to the 'technical' body of the EGTT. The process appeared stuck in a cycle of approval or disapproval of the EGTT work program without actually addressing the substantive issues that the EGTT's work raises. In addition, the EGTT was not, for the most part, actually composed of experts in technology transfer, intellectual property, or clean industry, who were capable of carrying out and evaluating methodologies and tools for technology transfer themselves. The body instead consisted largely of appointees from environment ministries or meteorological bodies. A significant amount of substantive work in the EGTT was therefore dependent on

an under-resourced secretariat and outside consultants.

Leading up to the 2007 Bali COP, there were several clear dynamics in play. Within the group of developing countries, solidarity remained a key driver of positions, meaning that proposals on technology transfer were largely dominated by the interests of the larger developing countries. This resulted in a focus on mitigation rather than adaptation in such proposals. In addition, proposals reflected the political fight between large developing countries (Brazil, India and China) and industrialized countries on reduction commitments, rather than any serious attempt to build bridges. Thus, despite many proposals from the G77, few attempts at coalition building between industrialized and developing countries took place. The least developing countries grouping has had no separate voice on technology transfer issues.

Industrialized countries have remained reactive and defensive on this issue, refusing to put forward proposals on technology transfer. Much of their energy has been focused on ensuring that funding mechanisms for technology transfer stayed in preferred venues such as the Global Environment Facility (GEF), or in existing multilateral mechanisms over which they had control such as UNCTAD and UNDP, as well as via bilateral Overseas Development Aid.

COP 1 saw attempts by the G77 plus China to refashion the EGTT. They proposed establishing a new Technology Development and Transfer Board (TDTB); a Multilateral Technology Acquisition Fund (MTAF) to license intellectual property rights; and indicators to monitor implementation of the technology transfer framework. This move was opposed by Japan, Canada, the US, and the EU, which proposed maintaining the EGTT and continuing its work.¹⁹

The disagreement on the role of the EGTT continued into the next meeting of the SBSTA and into the Bali COP. There were no new realignments on the technology transfer issue at Bali. Despite a significant push from the G77 plus China, no new financing or

¹⁸ Earth Negotiations Bulletin "Summary: 4th COP FCCC" Volume 12, Number 97, November 02 - 13, 1998. Available at: <http://www.iisd.ca/vol12/enb1297e.html>

¹⁹ Earth Negotiations Bulletin "Summary of the Twelfth Conference of the Parties to the UN Framework Convention On Climate Change and Second Meeting Of The Parties To The Kyoto Protocol" Volume 12, Number 318, 6-17 November 2006. Available at: <http://www.iisd.ca/vol12/enb12318e.html>

implementing mechanism was established. Negotiations on technology transfer were a major stumbling block at Bali and were among the last issues to be resolved.

V. The Post-Bali Landscape

The primary negotiating forum for the post-2012 regime to be concluded in 2009 in Copenhagen, Denmark, is the Ad Hoc Working Group on Long-term Cooperative Action (AWG-LCA). Established at the 2007 Bali COP, it has on its agenda: technology development and transfer; adaptation; provision of financial resources and investment; and mitigation of climate change by cutting emissions.²⁰

The Bali conference established an interim Technology Transfer Fund to be managed on an interim basis by the GEF, until a more permanent fund and mechanism would be established in the post-2012 regime. With respect to technology transfer, the Bali Action Plan²¹ aims to address:

(d) Enhanced action on technology development and transfer to support action on mitigation and adaptation, including, inter alia, consideration of:

(i) Effective mechanisms and enhanced means for the removal of obstacles to, and provision of financial and other incentives for, scaling up of the development and transfer of technology to developing country Parties in order to promote access to affordable environmentally sound technologies;

(ii) Ways to accelerate deployment, diffusion and transfer of affordable environmentally sound technologies;

(iii) Cooperation on research and development of current, new and innovative technology, including win-win solutions;

(iv) The effectiveness of mechanisms and tools for technology cooperation in specific sectors;

On this basis the mandate of the EGTT and work on performance indicators for evaluating technology transfer were renewed. In addition, whereas the EGTT had previously reported to the purely advisory SBSTA, the EGTT was tasked to also report to the Subsidiary Body on Implementation (SBI). In so doing, technology transfer became a responsibility of the main implementation body of the UNFCCC.

As can be expected, however, positions remained significantly polarized. Developing countries insisted that before they move toward binding GHG emissions reductions commitments, industrialized countries must deliver on their commitments relating to technology transfer for mitigation and adaptation. Developed countries continued to resist engaging on the issue and instead focused on trying to move China and other large developing countries to take on binding GHG emissions reduction obligations.

The Post-Bali review of the technology transfer provisions focused on Article 4, paragraph 1(c) and 5, of the Convention. At Bali, the COP initiated a review process for these provisions by requesting that the Parties submit to the secretariat, by 15 February 2008, their views on the elements for the terms of reference for a review and assessment of these provisions.²²

In May 2008, the secretariat made a summary of these views available.²³ While this

²⁰ FCCC/CP/2007/6/Add.1. Available at <http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf#page=3>,

See also Burleson, Elizabeth "The Bali Climate Change Conference" American Society of International Law Insights, Vol. 12, No. 4, March 17, 2008 at 1. Available at: <http://ssrn.com/abstract=1107667>

²¹ FCCC/CP/2007/6/Add.1. Available at <http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf#page=3>

²² This request is in Para. 7, "Development and transfer of technologies under the Subsidiary Body for Implementation" in "Development and transfer of technologies under the Subsidiary Body for Scientific and Technological Advice", Decision 4/CP.13, UN FCCC, 13th Sess., U.N. Doc FCCC/CP/2007/6/Add.1, online: UNFCCC <http://unfccc.int/documentation/decisions/items/3597.php?such=j&volltext=/CP.13#beg> (accessed 6 August 2008).

²³ Subpara. 22(f), "Synthesis of views on elements for the terms of reference for the review and assessment of the effectiveness of the implementation of Article 4, paragraphs 1(c) and 5, of the Convention: Note by the secretariat", Subsidiary Body for Implementation, 28th Sess., Bonn, 4-13 June 2008, U.N. Doc. FCCC/SBI/2008/7, 20 May 2008, online: UNFCCC:

document only identified what Parties thought should be included in the terms of reference for a review of technology transfer, the fact that the Parties highlighted certain areas indicated the expectations and the disappointments that the Parties have in this area.

In June 2008 the "SBI requested its Chair to prepare a draft terms of reference for the review and assessment of the effectiveness of the implementation of Article 4, paragraphs 1(c) and 5, of the Convention for consideration by the SBI" which was to be completed for the 29th session of the SBI in December 2008. These terms of reference are to account for the summary of views referenced above, the deliberations of the Parties at the June 2008 SBI session and relevant work from the EGTT.

The synthesis of submissions on this covers "12 submissions from 12 parties, representing the views of 45 Parties".²⁴ Submissions were from: Argentina, Australia, Brazil, Canada, Indonesia, Japan, Philippines, Slovenia (on behalf of the EC and its member states), South Africa, Sri Lanka, and the United States of America and Uzbekistan. Note that this is a relatively poor submission rate considering that most countries are Party to the convention.

The Annex I parties highlighted:

- *in general* - that there is increasing awareness as to the development, deployment, and transfer of technology; that technology flows occur through a multitude of mechanisms, in many directions (North-North, South-South, North-South), involving a number of actors (government and private sectors) and that a review should focus on public sector flows of technology transfer; that these flows should be discussed in country and sectoral bases; that the review should be linked to the

assessment of the EGTT and its fulfilment of the performance indicators that the SBI will monitor.

- *on the objective of work proposed* – that the TORs develop "a balanced and robust set of indicators"; to provide input towards the Bali Action Plan, including enhanced action on the development and transfer of ESTs.
- *on the scope of work proposed* – should account for concurrent reviews of relevant activities, or in a broader context, of a review of the Convention as a whole; should account for the EGTT performance indicators.

The non-Annex I parties highlighted:

- *in general* - the need for enhanced technology deployment, and transfer and the possibility of setting up a protocol to facilitate a legal instrument for technology transfer and development; that the review should highlight the Bali commitments to accelerate and advance technology transfer and development; the need for new financing and institutional mechanisms without relying on private-sector financing.
- *on the objective of work proposed* – to provide input towards the Bali Action Plan;
- *on the scope of work proposed* – the review should include an assessment of the market penetration of clean technologies; an analysis of TNAs as a tool for parties to identify technologies; quantifying the effectiveness of the role of the various financing mechanisms; basing the review on the key themes for technology transfer that were adopted in decision 4/CP.7; status of TNAs and activities to mobilize financial resources; level of R&D in developing countries; and that the review should account for article 4, para. 7 of the Convention.

The Small Island Developing States highlighted:

- *in general* - that appropriate rather than obsolete technologies should be transferred; and that programmes that ensure the sustainability of technology transferred are needed.

<http://unfccc.int/resource/docs/2008/sbi/eng/07.pdf> (accessed 20 August 2008).

²⁴ Para. 2, "Synthesis of views on elements for the terms of reference for the review and assessment of the effectiveness of the implementation of Article 4, paragraphs 1(c) and 5, of the Convention: Note by the secretariat", Subsidiary Body for Implementation, 28th Sess., Bonn, 4-13 June 2008, U.N. Doc. FCCC/SBI/2008/7, 20 May 2008, online: UNFCCC: <http://unfccc.int/resource/docs/2008/sbi/eng/07.pdf> (accessed 20 August 2008).

In addition, a table on the suggestions from Annex I parties on performance indicators can be found in the Annex of the synthesis document.²⁵

The issue of IP, and the possibility that it may be a barrier to technology transfer, has become a significant part of the debate. Under the theme of "Enabling environments for technology transfer", the Parties at Bali recommended that all Parties "avoid trade and intellectual property rights policies, or lack thereof, restricting transfer of technology."²⁶ Common ground on the interpretation of this recommendation, however, does not appear to be forthcoming. Two approaches to IP have been articulated: Cuba, India, Tanzania, Indonesia, China and others argued that IP needs to be addressed as a barrier within the technology transfer discussion; Australia and the US argued that IP is a catalyst, rather than a barrier, to technology transfer.²⁷

The discussions on IP as it relates to technology transfer accelerated when the AWG-LCA began meeting in 2008. In Bonn, Parties put forward different views on how IP can be best addressed within the framework on technology transfer.²⁸ Some Parties also

suggested that a working group be established to "review the barriers in trade policies and agreements, including the lack of a special intellectual property rights (IPRs) regime for climate-friendly technologies and inappropriate use of trade-related financing policies of multilateral financial institutions, with special consideration being given to supporting positive sustainable development aims."²⁹

Additionally, all Parties have supported the development of performance indicators to measure the effectiveness of technology transfer as it relates to the work of the EGTT.³⁰ Industrialized countries have suggested indicators measuring the degree of IP protection,³¹ and developing countries have emphasized technology sharing.³² There remain serious concerns, however, as to whether such a review would be concluded in time to feed into the Copenhagen outcome at the end of 2009. Developing countries are pushing for a speedier conclusion, while industrialized countries have tried to ensure that any results would come out after a final agreement in Copenhagen.

The most significant development in the lead up to the Poznan COP was a proposal from the G77 plus China for a comprehensive technology transfer mechanism under the convention, submitted for the AWG-LCA on the last day of the August 2008 meeting in Accra, Ghana. It makes two key proposals: (1) a centralized implementation body within the UNFCCC with sub-bodies responsible for creating implementation strategies, providing technical expertise, measuring and verifying technology financing and transfer; and (2) a Multilateral Climate Technology Fund under

²⁵ Annex, "Synthesis of views on elements for the terms of reference for the review and assessment of the effectiveness of the implementation of Article 4, paragraphs 1(c) and 5, of the Convention: Note by the secretariat", Subsidiary Body for Implementation, 28th Sess., Bonn, 4-13 June 2008, U.N. Doc. FCCC/SBI/2008/7, 20 May 2008, online: UNFCCC: <http://unfccc.int/resource/docs/2008/sbi/eng/07.pdf> (accessed 20 August 2008).

²⁶ UNFCCC "Recommendations for enhancing the implementation of the framework for meaningful and effective action to enhance the implementation of Article 4, paragraph 5, of the Convention", in "Development and transfer of technologies under the Subsidiary Body for Scientific and Technological Advice", Decision 3/CP.13, UN FCCC, 13th Sess., U.N. Doc FCCC/CP/2007/6/Add.1 at Annex 1, subpara. 12(b). Available at: <http://unfccc.int/documentation/decisions/items/3597.php?such=j&volltext=/CP.13#beg>

²⁷ Oliva, Maria Julia, "Draft: Climate Change, Technology Transfer, and Intellectual Property Rights" International Centre for Trade and Sustainable Development (ICTSD) Background Paper, Trade and Climate Change Seminar, Copenhagen, Denmark, June 2008, at 4. Available at: <http://www.cop15.dk/NR/rdonlyres/32BFE6BB-8B93-4152-A370-0B886B61EAD2/0/ClimateChangeTechnologyTransferandIntellectualPropertyRights.pdf>

²⁸ UNFCCC "Summary of views expressed during the first session of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention on the development of the two-year work programme that was mandated under paragraph 7 of the Bali Action Plan: Note by the Chair", Ad Hoc Working Group on Long-term

Cooperative Action under the Convention, 2nd Sess. Bonn, 2-12 June 2008, U.N. Doc. FCCC/AWHLCA/2008/6 at Para. 48. Available at: http://maindb.unfccc.int/library/view_pdf.pl?url=http://unfccc.int/resource/docs/2008/awglca2/eng/06.pdf

²⁹ UNFCCC "Synthesis of views on elements for the terms of reference for the review and assessment of the effectiveness of the implementation of Article 4, paragraphs 1(c) and 5, of the Convention: Note by the secretariat", Subsidiary Body for Implementation, 28th Sess., Bonn, 4-13 June 2008, U.N. Doc. FCCC/SBI/2008/7, 20 May 2008, at Subpara. 22(f). Available at: <http://unfccc.int/resource/docs/2008/sbi/eng/07.pdf> (accessed 20 August 2008).

³⁰ *Id.* at Subpara. 22(d).

³¹ *Id.* at Annex.

³² *Id.* at Para. 32.

the UNFCCC.³³ This is a distillation of previous proposals which provides more detail on Technology Action Plans as well as what activities would be covered under the fund.

This proposal was intended to be a significant element of the discussion at the Poznan COP December 2008. However, despite the significant step forward that it represented, there remain some substantive gaps in the discussion. In particular, how would the issue of intellectual property be managed under the proposed mechanism?

VI. Where Does the Debate Stand After Poznan?

Going into Poznan, there were few submissions from industrialized countries addressing the element of the Bali Action Plan on "Enhanced action on technology development and transfer to support action on mitigation and adaptation." The G77 plus China proposal, in addition to separate submissions from China and India, remain the most developed.

Several decisions on the issue of technology transfer were made in Poznan. On recommendation from the SBI, the COP made several direct requests to the GEF, which included expanding and speeding up the initiation and approval of projects on technology transfer.³⁴ The COP also invited parties and other relevant organizations to make submissions on the terms of reference for the review and assessment of the effectiveness of the implementation of Article 4, paragraph 1(c) and 5, of the Convention. The AWG-LCA determined to move into full negotiating mode in 2009 and requested the chair to move towards preparing a negotiating text.³⁵ The vast majority of work in the AWG-LCA on technology transfer was carried out in an in-session workshop "Cooperation on

research and development of current, new and innovative technology, including win-win solutions"³⁶ in which the G77 plus China proposal was discussed.

The discussion in the workshop remained at a very general level. However, there was increasing convergence around the idea that joint research and development (R&D), combined with some measure of increased public financing, could go a long way to assisting developing and industrialized countries to reduce GHG emissions.³⁷ Some also pointed out that joint work would negate intellectual property issues as there would be joint ownership. Many parties also pointed to the lack of R&D and support for adaptation technologies.

However, many of the same issues also came up. Industrialized countries raised the issue of enabling environments such as strong IP protection. Debate also took place on whether IP was a barrier to transfer of technologies, and whether IP was a significant cost element of access to environmentally sound technologies.

The EC put forward proposals that called for the use of Technology Oriented Agreements, similar to those found in the Energy Charter Treaty. These Agreements focused largely on bilateral mechanisms or narrow multiparty technology agreements, which are outside of the UNFCCC process.

While industrialized country proposals focused on methodologies and processes outside the UNFCCC, developing country proposals focused on the necessary institutional structures within the UNFCCC to ensure technology development and diffusion. The G77 plus China presented their proposal but there was little engagement with it from industrialized countries. The workshop ended with agreement on areas of focus for further

³³ "Proposal by the G77 & China for A Technology Mechanism under the UNFCCC" Available at http://unfccc.int/files/meetings/ad_hoc_working_groups/lca/application/pdf/technology_proposal_g77_8.pdf

³⁴ "Draft COP 14 Decision on Development and Transfer of Technologies" Available at http://unfccc.int/files/meetings/cop_14/application/pdf/cp14_11.pdf

³⁵ "Report to the Conference of the Parties at its fourteenth session on progress made: Draft conclusions proposed by the Chair" FCCC/AWGLCA/2008/L.11 Annex. Available at <http://unfccc.int/resource/docs/2008/awglca4/eng/l11.pdf>

³⁶ "Report on the workshop on cooperation on research and development of current, new and innovative technology, including win-win solutions: Summary by the chair of the workshop" FCCC/AWGLCA/2008/CRP.8 Available at <http://unfccc.int/resource/docs/2008/awglca4/eng/crp08.pdf>

³⁷ "Report on the workshop on cooperation on research and development of current, new and innovative technology, including win-win solutions: Summary by the chair of the workshop" FCCC/AWGLCA/2008/CRP.8 Available at <http://unfccc.int/resource/docs/2008/awglca4/eng/crp08.pdf>

discussion: cooperative action on R&D; financing R&D; institutional arrangements for coordinating R&D.

The discussion on R&D seems to have taken place much later than would be expected given that the UNFCCC was signed in 1992. The focus on R&D essentially avoided a key issue of how to ensure that existing technologies, especially for adaptation, are transferred to developing countries. Part of what may be driving the focus on R&D may be mercantilist conceptions of who will come out ahead in technology development in any new carbon free economy. In particular, industrialized countries are concerned about losing their competitive advantage in technology in the same way they feel they may have lost it in manufacturing.

With respect to outcomes in the subsidiary bodies, a step forward appears to be the interim report from the EGTT on "Developing a strategy paper for the long-term perspective beyond 2012, including sectoral approaches, to facilitate the development, deployment, diffusion and transfer of technologies under the Convention."³⁸ The paper is aimed at providing an outline of a post-2012 strategy. It should therefore be an input to the ongoing SBI implementation processes, but also an input to the LCA negotiations for a post-2012 framework.

In terms of its methodology the paper will present a portfolio of technology development and transfer options, which are defined as ways and means of achieving technology scale-up. At the time of the Poznan COP only the framework was available, but draft papers have been completed for the February 2009 meeting of the EGTT. While little can be garnered from the framework paper, some concerns remain that the final paper may over-emphasize the work being done in other institutions and pre-judge the issue of having a mechanism under the UNFCCC. In addition, there may be a concern that **strong** IP protection is viewed as the primary way to **ensure** that private actors get involved in deployment and diffusion of technologies,

ignoring the anti-competitive and other anti-diffusion incentives that IP may present.

VII. Conclusions

Despite the AWG-LCA having enhanced action on development and transfer of technologies on its agenda, it is clear that the EGTT will continue to influence the treatment of these issues within the UNFCCC, if only as a fact finding mechanism. However, the negative role that it has played in delaying hard but necessary decisions suggests that unless quick results and reports are forthcoming, there will be little progress in the AWG-LCA.

So far, it is clear that some of the demand for technology transfer in the UNFCCC debate has been part of a strategy by some developing countries to avoid discussing mitigation until industrialized countries deliver measurable, reportable and verifiable amounts of technologies and financing. Industrialized countries must recognize the demand for technology transfer and finance as a serious demand from developing countries, not just a political chip to bargain for binding mitigation targets. On the other hand, developing countries must continue to work and elaborate their demands so as to lead to workable proposals for institutions and mechanisms while addressing related concerns about maintaining incentives for innovation.

³⁸ "Developing a strategy paper for the long-term perspective beyond 2012, including sectoral approaches, to facilitate the development, deployment, diffusion and transfer of technologies under the Convention: Interim report by the Chair of the Expert Group on Technology Transfer" FCCC/SB/2008/INF.8. Available at:

AN OVERVIEW OF RELEVANT DEVELOPMENTS IN THE VARIOUS IP FORA

Below is an overview of updates involving intellectual property issues in various fora for the last quarter of 2008.

The World Trade Organization (WTO)

General Council

The General Council held two meetings, in 14 October 2008 and 18 - 19 December 2008. Various countries which are part of the group of Proponents of the TRIPS related issues under the Doha Work Programme (GI register, TRIPS disclosure requirement and GI Extension) requested that TRIPS issues should be dealt with properly, noting that the draft modalities texts contained in document TN/C/W/52 had been co-sponsored by 110 Members who have requested that TRIPS-related issues be included as part of the horizontal process in Doha Round negotiations.

TRIPS Council and Annual Report

The Council on Trade-Related Aspects of Intellectual Property Rights (TRIPS Council) held a meeting on 28 October 2008 (IP/C/M/58). On 4 December 2008 the TRIPS Council produced its annual report (IP/C/51). Below are reports on specific agenda items discussed.

Review of article 27.3(b); Relationship between TRIPS and the CBD; and Protection of Traditional Knowledge and Folklore

Under the combined three agenda items, the disclosure requirement continues to be the main issue under discussion. The majority of developing countries have proposed an amendment to the TRIPS Agreement to require patent applicants to disclose the origin of biological material or traditional knowledge used in inventions (IP/C/W/474 Addenda 7-9). The future of the proposal for a disclosure requirement is now linked to the proposal of the EU for extended protection for geographical indications (TN/C/W/52). The United States remains the main opponent of both proposals.

Transitional Review on the Accession of China

The TRIPS Council undertook the seventh annual transitional review of the implementation by China of its WTO commitments (WT/L/432), and agreed that the Chair, acting on his own responsibility, would prepare a factual report on the review to the General Council (IP/C/50).

China reaffirmed that it continued to attach great importance to IPR protection but noted that "as a developing Member, China had only started building its IPR protection system less than 30 years ago and would need continued efforts before its IPR protection system could be as sophisticated and mature as that of some developed country Members which had been developed for over 100 years. In order to catch up, China needed time, understanding and support." (IP/C/50, Para 41)

China received over 80 questions from different member countries, including Canada, the EC, Japan and the US concerning copyright protection, the distribution of royalties, trademark registration, patents and confidential information, and IPR enforcement. China noted that several questions were closely related to the ongoing US-China WTO dispute "China — Measures affecting the protection and enforcement of intellectual property rights" (DS362) in which the US was the complainant and the EC, Japan, Argentina, Australia, Brazil, Canada, European Communities, India, Japan, Korea, Mexico, Chinese Taipei, Thailand and Turkey joined as third parties.

The WTO panel report examining the complaint was issued on 26 January, 2009 and will be discussed in the next edition.

Review of the implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health

On 28 October 2008 the TRIPS Council undertook the fifth annual review of the functioning of the system set out in the 30 August 2003 Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health – also known as the Paragraph 6 system (WT/L/540). The system aims to

facilitate the supply of medicines for public health objectives to countries with insufficient or no manufacturing capacities in the pharmaceutical sector by removing obstacles to the grant of compulsory licenses to export for this purpose. The annual review of the system is undertaken to ensure its effective operation. The 2008 review was reported to the General Council (IP/C/49).

Canada was the first WTO member country to make use of the system to export generic medicines. Canada notified the TRIPS Council that on 24 September 2008 the pharmaceutical company Apotex, Inc sent its first shipment of approximately seven million doses of Apo-Triavir produced under Canada's Access to Medicines Regime (CAMR) to Rwanda. A second shipment is scheduled for next year (IP/C/W/526).

During the 2008 review, Switzerland informed the TRIPS Council that it has adopted legislation to enable it to implement the system as an exporting country.

Rwanda was the first country to notify the Council for TRIPS of its intention to use the system to import medicines. No new notifications were made by eligible importing countries during the reporting period.

The annual review also reported on the number of countries who have ratified the Protocol to Amend the TRIPS Agreement. The protocol will come into force after two thirds of members have accepted it, and will replace the August 2003 decision, as set out in Paragraph 11 of the decision. The protocol is open for members to accept until 31 December 2009 or a later date if decided by the Ministerial Conference. As of 20 September 2008, 18 countries have notified their acceptance (IP/C/W/490/Rev.3).

Implementation of Article 66.2

Under Article 66.2 of TRIPS developed countries are required to provide incentives to their private sector and institutions to promote technology transfer to least-developed countries to enable them to create a sound and viable technological base. A mechanism was established in 2003 to monitor the full implementation by developed countries of their commitment under Article 66.2. This includes the

submission of detailed reports which are annually reviewed by the TRIPS Council (IP/C/28). The WTO Secretariat prepared for the annual review, at the request of member states, an update of the reports presented by developed countries to date (IP/C/W/522). During the TRIPS Council meetings developing countries have questioned whether the reports by developed countries are following the mandate of the mechanism, noting that some reports do not specifically target least developing countries or do not target technology transfer.

Technical Cooperation and Capacity-Building

The October 2008 meeting of the TRIPS Council held a special annual review on the activities of developed countries under Article 67 of the TRIPS Agreement. A document submitted by Brazil to the previous TRIPS Council meeting in June 2008 continued to be discussed (IP/C/W/513). Brazil proposed that the TRIPS Council take note of the 14 proposals of cluster A of the Development Agenda, acknowledge their relevance for the implementation of Article 67. Brazil also made a request to members that issues related to technical assistance and capacity building under article 67 be carried out from now on the basis of those recommendations. The proposal was supported by various developed countries but has not been adopted by the wider TRIPS Council membership.

At this session a submission by Sierra Leone on its priority needs for technical and financial cooperation was also discussed (IP/C/W/523), which followed an earlier communication by Sierra Leone (IP/C/W/500) and Uganda (IP/C/W/499). These submissions follow up on the request by the TRIPS Council for information concerning the individual priority needs of least developed countries (LDCs) as part of the 2005 Council's decision to extend the original transition period available to LDCs under Article 66.1 of the TRIPS Agreement to delay implementation of the agreement.

Special Session of the TRIPS Council

In the special session held on 29 October 2008, Ambassador Trevor Clarke of Barbados was elected as the new chair. The mandate of the special session is to advance negotiations on a multilateral register for geographical indications for wines and spirits, as per Art. 23.4 of the TRIPS Agreement. The coalition of proponents of GI extension (EU) and proponents of the TRIPS disclosure amendment (including various developing countries) requested that the special session also discuss these two proposals. The Chair reaffirmed that the mandate of the special session is limited to negotiations for a GI register, and hence will focus his efforts to advance such negotiations. Ambassador Clarke is a former Chair of the TRIPS Council.

4th WTO Workshop on the TRIPS Agreement and Public Health

On 2 – 4 December 2008, officials from twenty-four developing countries took part in the 4th workshop held in Geneva to assist countries to improve their understanding of how to make use of the flexibilities in the TRIPS agreement for public health purposes. The workshop provided an introduction to key elements of the TRIPS agreement and related WTO instruments mainly involving public health issues. The issues discussed included the use of compulsory licensing, and the paragraph 6 system to allow the export of medicines to least developed countries which cannot manufacture these themselves. Representatives from other organizations such as the WHO, WIPO, and UNDP also reported their related activities.

World Intellectual Property Organization

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

On 13 – 17 October 2008 the IGC held its thirteenth session.

Ambassador Rigoberto Gauto Vielman of Paraguay is the Chair for the duration of the current IGC mandate set to expire in 2009. The African group put forward a proposal on

further work, suggesting inter-sessional work by expert groups, including the participation of indigenous peoples and local communities. However, there was little progress as industrialized countries (Group B) did not agree to the concept of an expert group or to accelerated inter-sessional work. Francis Gurry, the new Director-General, participated in several informal discussions aimed at moving the discussion forward but finally, given the lack of progress, the African group decided to revert to its original proposal.

The next meeting of the IGC will be held on **29 June – 3 July 2009**.

Standing Committee on Copyright and Related Rights (SCCR)

The SCCR held its seventeenth session on 5-7 November 2008.

On the issue of limitations and exceptions to copyright, as requested by the SCCR in March 2008, the WIPO Secretariat commissioned an additional study on limitations and exceptions for the benefit of educational activities, including distance education and its trans-border aspect (SCCR/17/2) and organized an information session on existing and forthcoming studies on limitations and exceptions which was held on 3-4 November. This was the first time the studies were presented by the authors to SCCR members.

The committee decided that in its forthcoming sessions it will give priority to the outstanding issues of limitations and exceptions, the protection of audiovisual performances, and the protection of broadcasting organizations.

The next meeting of the SCCR is scheduled to be held in the **second half of 2009**.

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

The SCT held its 20th session from 1 - 5 December 2008.

Representation of Non-Traditional Marks – Areas of Convergence

The areas of Convergence include (1) One view of three-dimensional mark is enough for the granting of filing date; (2) registration of colour mark requires a sample of the colour in application or electronic form; (3) the registration of hologram mark must consist at least one view of holographic effect; (4) an application for registration of multimedia mark must contain still pictures of the multimedia; (5) a single view of position mark is required for registration; (6) registration of gesture mark requires a single picture as a figurative mark or several pictures as motion mark; and (7) registration of sound mark requires musical notation in the application on a stave (SCT/20/2). The SCT introduced a footnote to the term of non-traditional marks with the following texts: "The Resolution by the Diplomatic Conference Supplementary to the Singapore Treaty on the Law of Trademarks and the Regulations there under refers to three-dimensional marks, hologram marks, motion marks, colour marks, position marks and marks consisting of non-visible signs as 'new types of marks'". A new Note 1.02 with the text: "In some jurisdictions, the scope of protection will be restricted to those characteristics disclosed in the original representation." will be added to the document as well.

Trademark Opposition Procedures – Areas of Convergence

The second sentence of Note 7.02 will be amended to: "This could be considered a positive or negative feature depending on the case and the overall design and management of each specific trademark system." (SCT/20/3) Article 6ter of the Paris Convention was also agreed to be considered for its next session and Members are required to submit any proposal by March 2009.

Program and Budget Committee (PBC)

The PBC held its thirteenth session from Dec 10, 2008 to Dec 11, 2008 to review and finalize the Program and Budget 2008/2009.

At the request of various developing countries including Egypt, Pakistan and Tunisia, several modifications were introduced to the Revised Program and Budget 2008/2009 (WO/PBC/13/4), including: 1) allocation of 4.6 million Swiss

francs to sum a total of up to 8 million Swiss francs for the implementation of five recommendations of the Development Agenda (2, 5, 8, 9 and 10), 2) allocation of 1 million Swiss francs to continue the activities of WIPO Academy, and 3) change of the description of Program 17 on "Building Respect for IP" to shift the focus of the program away from IPR enforcement (A/46/10 REV.).

With these modifications, the Program and Budget Committee recommended that the extraordinary session of the WIPO Assemblies approve the Revised Program and Budget 2008/2009.

The Advisory Committee on Enforcement (ACE)

The ACE did not convene during this quarter. However, informal consultations were held among group coordinators and the Secretariat concerning future topics for the next session of the committee. At the previous session in November 2007 there was no agreement on the topic and hence the ACE decided that countries would submit proposals (WIPO/ACE/4/10). This follows concerns from developing countries on the process for selecting topics and the speakers at the ACE which is undertaken by the Secretariat without prior consultations with the ACE members. Three formal proposals were submitted to the Secretariat, including one by the Group of Latin American and Caribbean Countries (GRULAC).

GRULAC proposes that the discussions in the ACE be based on the recommendation 45 of the Development Agenda that requires that WIPO and its member countries "approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns, with a view that "the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations", in accordance with Article 7 of the TRIPS Agreement."

However, developing countries have also made other suggestions for topics in previous ACE sessions, including enforcement questions related to the piracy of biological resources and traditional knowledge and the implementation of limitations and exceptions for access and use of knowledge goods.

The next session of the ACE is scheduled for the **first half of 2009**.

Committee on Development and Intellectual Property (CDIP)

The CDIP did not convene during this quarter.

The next meeting of the CDIP will be held on **27 April - 1 May 2009**

Standing Committee on Patents (SCP)

The SCP did not convene during this quarter.

The next session of the SCP will be held from **23 - 27 March 2009**.

WIPO Assemblies Regular Session

The 45th series of meetings of the WIPO Assemblies was held 22 – 30 September 2008. The major decisions adopted were the appointment of a new Director General and new resources allocated to the implementation of the Development Agenda.

Appointment of a New Director General

The General Assembly appointed Francis Gurry of Australia as the WIPO Director-General on 22 September 2008 for a 6-year term starting on 1 October 2008. Mr. Gurry replaced Dr. Kamil Idris who had served in WIPO for 25 years.

Mr Gurry expressed his priorities in his acceptance speech, calling for WIPO to address a number of challenges affecting the institution of intellectual property which he suggested risk impairing its capacity to deliver on its basic mission of stimulating innovation and creativity and contributing to market order:

- 1) the increase in number of patent filings which is putting pressure on the ability of the international system for patent filings (PCT) and patent offices to address the demand;
- 2) the threat posed by the convergence in digital technology and the Internet to the twentieth century model for the creation of content and creative works;
- 3) the role of WIPO in tackling counterfeiting of goods including illegal downloads from the Internet;
- 4) how intellectual property can contribute to development: translating the Development Agenda into concrete and effective projects, reviewing WIPO capacity building activities and improving its empirical research work;
- 5) achieve concrete outcomes in the protection of traditional knowledge and traditional cultural expressions,
- 6) promote engagement of WIPO on finding solutions to global challenges including climate change, desertification, epidemics, access to health care, food security and the preservation of biodiversity. WIPO will focus on the contribution that intellectual property can make and cooperate with other UN agencies.

Decision on the Committee on Development and Intellectual Property (CDIP)

During the General Assembly all members who spoke reaffirmed their commitment to achieving the full implementation of the agreed recommendations of the Development Agenda. Developing countries highlighted the need for WIPO to make available the necessary resources to promptly implement the work program of the CDIP and the totality of the Development Agenda recommendations. They also recalled that the Development Agenda must be mainstreamed throughout all the WIPO bodies, recalling that the mandate of the CDIP is cross - cutting in nature and not restricted to a particular area.

The General Assembly reviewed the report presented by the CDIP on the current status

of its work towards implementing the 45 agreed recommendations that make up the WIPO Development Agenda and approved the work program in respect of the adopted Development Agenda recommendations (contained in Annex II of WO/GA/36/4 Rev.). The General Assembly approved new human and financial resources to implement the recommendations and encouraged all Member States, the Secretariat and other relevant WIPO bodies to effectively implement the adopted recommendations.

The General Assembly also discussed the proposal for a donor conference in 2009 to support mobilizing additional costs to establish new trust funds or other voluntary funds and continue to finance activities in Africa. The General Assembly approved the initiation of consultations in Geneva concerning the program and other details of such a donor conference and asked the secretariat to submit the budgetary requirements to the next Program and Budget Committee, with a view to convening a Donor Conference in 2009.

Discussion on the work of the Standing Committee on Patents (SCP)

Most countries during the General Assembly expressed their satisfaction with the new work mode of the SCP which provides for more balanced discussions. Having moved away from the dominant topic of discussion of patent law harmonization on which there was no consensus to move forward, the SCP undertook a comprehensive study on various issues concerning the current functioning of the patent system which were selected by countries, and on that basis developed a non-exhaustive list of topics to be discussed in the next sessions of the SCP. To begin the discussion, four topics were chosen for further study in the next session, but do not take priority over the other topics: dissemination of patent information, exceptions from patentable subject matter and limitations to rights, patents and standards, and client-attorney privilege.

Various developing countries also noted that they look forward to the conference, as decided in the past SCP, on patents and their relationship with various public policy areas, including examining the implications

of patents in health, climate change, the environment and food security.

Discussion on the work of the Intergovernmental Committee on Intellectual Property and Generic Resources, Traditional Knowledge and Folklore (IGC)

The General Assembly did not provide new guidance to the work of the IGC. During the General Assembly, developing countries consistently recalled the need for appropriate binding international instruments that address the international dimension of genetic resources, traditional knowledge, and folklore. It was stressed that the treaty should be the outcome of the work of the IGC, and for this, a robust and focused action plan must be established for the IGC.

WIPO Assemblies Extraordinary Session

Due to the need to approve a revised version of the program and budget 2008/2009, an extraordinary session of the WIPO Assemblies was held on 13 December 2008.

Approval of Revised Program and Budget 2008/2009 with Modifications

The WIPO Assemblies approved the Revised Program and Budget for the 2008/09 that includes changes introduced by the new Director General (WO/PBC/13/4) and by the Program and Budget Committee on 11 December 2008 (A/46/10 REV.). The revised program and budget was approved quickly during the meeting, following the extensive debates that took place in the two days prior to the Program and Budget Committee.

Approval of new safety and security standards and dossier for new conference hall

The WIPO Assemblies also approved a proposal to upgrade the safety and security standards for existing WIPO buildings, including 7,600,000 Swiss francs from the reserves. It also approved the updated and consolidated budget for the new construction project and authorized the use of 20,000,000 Swiss francs, from the WIPO

reserves for this purpose. Furthermore, the Assemblies approved the proposal to examine the complete architectural and technical dossier for a new conference hall project, and the proposed detailed financing, to decide on the issue in September 2009.

Preparation of the 2010/11 Program and Budget

The WIPO Assemblies also noted the new mechanism to further involve member countries in the preparation and follow-up of the program and budget (WO/PBC/13/7) and requested the Secretariat to include in the timelines the distribution by mid-February 2009 of a Circular Letter and Questionnaire to member countries, inviting their contributions on the priorities for the Program and Budget for the 2010/11 biennium. The new mechanism to further the involvement of countries in the program and budget process is a response to the concerns that many countries had expressed concerning the very active role that the WIPO Secretariat played in setting and overseeing the implementation of the overall program and budget for the organization. Various developing countries expressed their support for the new mechanism and expressed their interest to work more closely with the Secretariat to provide their input to defining the next program and budget 2010-2011 and the WIPO medium-term plan 2010-2015.

WIPO Arbitration and Mediation Centre

With the recent Internet Corporation of Assigned Names and Numbers (ICANN) consensus, generic Top Level Domain Names are freely opened to anyone to apply to be a registrar. In addition, ICANN has introduced a number of internationalized domain names. There are concerns that this may cause an increase in domain name disputes as more domain names will be available.

Changes in the Madrid System

The working Group on the Legal Development of the Madrid System for the International Registration of Marks amended a number of rules concerning accessibility of information continuing from the 5th Session

in May 2008. Under a new rule of "tacit acceptance", member states have to submit "statements of grant of protection" to WIPO no matter whether the trademark office of a contracting party designated in an international registration decides to protect the trademark in question in the territory of the contracting party or not. All contracting parties still have until 1 January 2011 to implement the obligation. There will also be a study to determine the feasibility of adding more official languages to the Madrid system.

Reducing fees for Least Developed Countries (LDCs) for the Hague System for the International Registration of Industrial Designs

The Assembly of the Hague Union amended a number of rules governing the Hague system, including a fee reduction scheme to help intergovernmental organizations in which a majority of members are from LDCs (H/A/26/4). The fee will be reduced to 10% of the prescribed fees. The reduction is aimed to benefit creators from LDCs when filing design applications under the system. The Hague Union Assembly will also study the possibility of adding Spanish as the third official language of the system.

World Health Organization (WHO)

13th International Conference of Drug Regulatory Authorities (ICDRA)

The Conference took place in Bern, Switzerland from 16 - 19 September 2008 hosted by the Swiss Agency for Therapeutic Products (Swissmedic) and WHO. It was aimed at providing guidance to regulatory authorities, the WHO, and interested stakeholders regarding national and international regulation of medicines, vaccines, biomedicines and herbals. ICDRA is an important venue for the harmonization of regulations on the efficacy and quality of medicines among WHO Member States. The issue discussed at the pre-conference was paediatric medication, particularly the development of drugs and dosages for children. The ethical issues concern clinical trials on children. The risks and need to clarify the concept of counterfeit drugs was also raised. The Chairman noted that

intellectual property rights could not be as important as children's health. Drugs may be considered counterfeit for being presented in a different package and may raise the issue of intellectual property infringement but some of these drugs are not substandard and are still ethically acceptable as compared to those that have no medical worth or are toxic. Another concern during the conference was the sale of medicines online which is difficult to regulate. In such cases consumers have no way to know the origin of the medicines or whether they have treatment value or not.

Another issue discussed was the development of drugs and the need to standardize their formulation and quality. The issue of price differentials between countries was also raised as a problem which could be a contributing reason for both counterfeiting and parallel importation of medicines. A solution proposed was to register a different trade name for the same drug in different regions such as in Switzerland where a drug for anti-malaria is sold for \$72 and in developing countries where the same drug was sold for only \$2.

The Global Ministerial Forum on Research for Health

The Forum was held in Bamako, Mali from 17 to 19 November 2008 to assess how national health research systems can be adjusted to address the need to tackle diseases that affect developing countries, particularly Africa. The forum was sponsored by WHO, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Bank, the Global Forum on Health Research, and the Republic of Mali. The participants included representatives from Ministries of Health, Ministries of Science and Technology, scientific researchers, representatives from foundations, as well as the private sector. The conference focused on information on diseases in order to make assessments about their demography and evaluate actions to address them, including through international cooperation.

At the end of the conference, attending parties made recommendations but a "call for actions" was expected in the coming World Health Assembly in May 2009. the WHA discussion and call for action will

involve the various important dimensions of research for health, and seek to strengthen coordination and joint actions in the areas of health where many issues, such as innovation and intellectual property overlap. Accordingly, implementation of an International Expert Group on Biotechnology Innovation and Intellectual Property was proposed so as to encourage governments to pay attention to innovation environments; health and environmental regulation; laboratory facilities; and standardization and transparency of patent offices, for example. A clip of the conference is available at <http://www.youtube.com/watch?v=dEw2as2jt2w>.

WHO Pandemic Influenza Preparedness Intergovernmental Meeting

From 8 to 13 December 2008, the meeting was held in Geneva by WHO to critically discuss Pandemic Influenza Preparedness (PIP) for sharing virus materials and ensuring access and benefit sharing. The meeting struggled to find an agreed definition of the 'Biological Materials' to be shared and made subject to access and benefit sharing. The chair of the meeting provided a definition of biological materials but was opposed by the US who proposed that it be replaced with a shorter definition with narrower scope to avoid conflicts of intellectual property rights. However, other Member States worried that a narrower definition might decrease the outcome of the meeting because the meeting would have focused only on the definition of the disease. In addition, the South East Asian Region (SEAR) countries which suffer from the H5N1 virus the most, argued that the meeting was too focused on the structure and mechanisms of virus sharing and was neglecting benefit sharing. The meeting did not agree on a definition of the disease. (See <http://www.ip-watch.org/weblog/index.php?p=1362>)

WHO Executive Board

The 124th Session of the WHO Executive Board took place on **19 - 27 January 2009** in Geneva, Switzerland. The outcomes of the meeting will be covered in the next edition.

World Health Assembly

The 62nd World Health Assembly will take place in Geneva, Switzerland on **18 – 27 May 2009**.

Other Fora**World Customs Organization (WCO)***The 4th SECURE Working Group*

The WCO held the 4th meeting of the SECURE (the Provisional Standards Employed by Customs for Uniform Rights Enforcement) Working Group in Brussels from 30 to 31 October 2008. The discussion on the Draft Terms of Reference (TOR) was included as an agenda item for discussion before any discussion on substantive issues for the first time. SECURE represents one of the most significant initiatives to establish TRIPS-plus-plus initiatives on IP enforcement. The key content is the revision of customs regulations to expand the authority of customs administrations on IP. The discussions reached a stalemate with no consensus on the TOR of the Working Group.

The 60th Session of the Policy Commission

Held in Argentina from 9 to 10 December 2008, the Policy Commission was informed that the SECURE Working Group had difficulties with its Terms of Reference especially regarding intellectual property enforcement standards. Some states argued that these were far higher than the standards required by the TRIPS Agreement. The Policy Commission agreed: (a) The SECURE Working Group would not meet again pending a decision by the Council at its June 2009 Session on the way forward; and (b) the Secretariat would prepare draft Terms of Reference for a new WCO body to deal with customs IPR issues, which would be finalized by the Policy Commission prior to their submission to the Council. Therefore, while developing countries have been able to forestall further discussion on the Provisional SECURE Standards in the SECURE Working Group by questioning its legitimacy and mandate, there is a possibility that the discussion on TRIPS plus substantive standards in the form of best

practice or others may be revived through a new body by having the matters discussed in the SECURE Working Group as a basis for discussions.

Internet Governance Forum*The 3rd Internet Governance Forum*

Between 3rd and 6th December 2008, the United Nations organized the 3rd Internet Governance Forum in Hyderabad, India. The Forum was attended by government, business sector, international and nongovernmental organizations including the International Telecommunication Union (ITU), UN Educational, Scientific and Cultural Organization (UNESCO), WIPO, Organization for Economic Co-operation and Development (OECD), and ICANN. The IGF discussions covered a broad range of topics from internet related issues and child protection to free speech and climate change. Unfortunately, the meeting was held just after the Mumbai terrorist attack incident. Therefore, 5 workshops and other meetings were cancelled. Participants were satisfied with the Forum as almost every aspect of Internet issues were raised. The next Internet Governance Forum will be in Vilnius, Lithuania in 2010.

South Centre*2nd South Centre International Symposium on Examining Intellectual Property Enforcement from a Development Perspective*

The Symposium was held on 16 September 2008 in Geneva, Switzerland at the Palais des Nations. The symposium brought together different stakeholders from developing country governments, intergovernmental organisations, academia and civil society to discuss the policy challenges that developing countries face on IP enforcement. Coverage of the event is available at http://www.southcentre.org/index.php?option=com_content&task=view&id=687&Itemid=119

Training Workshop for Developing Country Delegates on Intellectual Property - Geneva, 9 Oct. 2008

The training was held on 9 October 2008 in Geneva, Switzerland at the Palais des Nations. The training covered a number of topics, including the following:

- Overview of the relationship between intellectual property and development
- Structure, functioning and procedural rules of multilateral organizations
- Key international treaties administered by multilateral organizations
- Substantive items in the agendas of the main bodies of multilateral organizations
- Negotiation dynamics and strategies.

Convention on Biological Diversity (CBD)

Notification for 7th Meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing (ABS WG-7)

The notification was sent out on 12 December 2008 to notify member countries of the CBD about the 7th meeting of the ABS Working Group. The meeting will take place in the UN Educational, Scientific and Cultural Organization (UNESCO) Headquarters in Paris, from **2-8 April 2009**.

Food and Agriculture Organization (FAO)

On 16 – 17 October 2008, the Ad Hoc Advisory Committee on the Funding Strategy of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) held its third meeting. The committee discussed the status of the implementation of the funding strategy for effective functioning of the multilateral system established under the Treaty to facilitate access to the genetic resources of the crops and forages covered under the treaty, including contributions to the benefit-sharing fund of the treaty. The committee is also developing a strategic

plan for the implementation of the funding strategy.

The objectives of the ITPGRFA are the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of benefits derived from their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security. The treaty commits the countries that are party to it, currently 119 since the treaty came into force in June 2004.

The next session of the Committee will be held in Rome from **11 – 13 March 2009**.

The 3rd Session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture will be held in Tunis, Tunisia from **1 - 5 June 2009**.

United Nations Framework Convention on Climate Change (UNFCCC)

The United Nations Climate Change Conference, 14th Conference of the Parties

The meeting was held in Poznan, Poland from 1 - 12 December 2008.

Member Countries at the meeting were committed to negotiate a more effective international response to climate change and to agree to a new framework by the end of 2009 at COP 15 meeting in Copenhagen, Denmark between 30 November 2009 and 11 December 2009. The issues of relevance to intellectual property are covered in the focus piece of this quarterly update.

The 5th Session of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention will be held in Bonn, Germany from 29 March to 8 April 2009. One of the IP issues discussed will involve the enhancement of action on technology development and transfer to support action on mitigation and adaptation.

Regional and Bilateral Free Trade Agreements with Intellectual Property Provisions

FTAs involving the United States

FTA with Peru

In the second half of 2008, the executive branch of the Peruvian government under President Alan Garcia, issued 102 legislative decrees, most of these related to allowing the implementation of the US – Peru FTA. While the U.S. Congress approved the FTA with Peru in December 2007, the FTA had been delayed in the US Congress over concerns from Democrats regarding environmental and labor protection in Peru. The US Congress reached an agreement "A New Trade Policy for America" which prevented the US president from bringing the FTA into force until Peru introduced changes to its labour, intellectual property and environment standards.

FTA with Colombia

The FTA with Colombia is still pending approval in the US Congress.

FTA with Singapore, New Zealand and Brunei

The US agreed to join Singapore, New Zealand, Chile and Brunei in a FTA which would give impetus to a long term initiative with Asia-Pacific Economic Cooperation (APEC) countries. A future FTA with APEC would comprise such nations as the United States, China, Russia, Chile, Japan, Canada, Australia and Southeast Asian countries which, taken together, could constitute nearly half of world trade.

FTAs and Economic Partnership Agreements (EPA) involving European Union

EPA with CARIFORUM

The CARIFORUM is the first group of countries to sign an EPA with the European Union. CARIFORUM countries include Antigua & Barbuda, Bahamas, Barbados, Belize, Dominica, Dominican Republic,

Grenada, Guyana, Haiti, Jamaica, St. Kitts & Nevis, St. Lucia, St. Vincent, Suriname, Trinidad & Tobago. The agreement was signed on 15 October 2008 in Barbados. The EPA is far-reaching, covering trade, investment, technical assistance and notably, an extensive intellectual property chapter. The EPA introduces binding TRIPS-plus standards on the Caribbean including the obligation to ratify the WIPO internet treaties and expand protection to a number of EU geographical indications.

EPA with West Africa

The EU signed an interim agreement with Cote d'Ivoire on 26 November 2008. The interim agreement can be extended for a longer period or become a permanent agreement.

EPA with the African, Caribbean and Pacific Group of States (ACP)

The ACP Assembly had its 6th Summit of the ACP Heads of States and Governments on 2 – 3 October 2008 at Accra, Ghana. During the Summit, the leaders discussed EPAs at length. The leaders expressed uneasiness with the EPA process because undue pressure was put on some ACP States to sign and ratify EPAs. However, some interim agreements for individual countries have been signed. EPAs with other ACP regions are still under negotiation. (Source: http://www.acpsec.org/en/jpa/png/pr3_24-11-08_e.htm)

FTA with the Andean Community

In December 2008, the EU officially announced it will pursue an FTA with Peru and Colombia, despite reservations from the other members of the Andean Community (CAN); Bolivia and Ecuador. Colombia and Peru want to move forward quickly on the FTA with the EU and thus requested the EU to negotiate bilaterally with them. Bolivia has stated that it will only participate in the negotiations with the EU if it negotiates with the CAN as a group and breaks off bilateral negotiations. The negotiating position of Colombia and Peru differs significantly from that of Bolivia and Ecuador, largely because the former have already concluded FTAs with the US.

EU – India

In June 2007 the EU and India started negotiations for an FTA. The FTA would cover various areas including trade in goods, trade in services, investment, intellectual property, competition policy and government procurement. The EU is India's largest economic partner with trade doubling from USD 40.81 billion in 2003 to USD 78.48 billion in 2007. So far, five rounds of the negotiations have been completed and a proposed sixth round which was meant to take place in New Delhi in November was postponed. This is partly due to strong concerns of Indian organizations representing NGOs, farmers groups, trade unions, health groups and peoples' movements about the impact of the FTA on rural livelihoods, food security and access to healthcare.

The latest negotiation was due to take place in New Delhi in November 2008 but was postponed.

Other FTAs

China and Singapore FTA

On 23 October 2008, China and Singapore signed an FTA in Beijing, China to, *inter alia*, promote and catalyse the process of establishing the China-ASEAN Free Trade Area as well as to facilitate and enhance regional economic cooperation and integration.

ASEAN and Japan FTA

Effective as of 1 December 2008, ASEAN countries which include Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam entered into an FTA with Japan. It is the 8th Japanese FTA. Each country's bilateral agreement with Japan would be pushed forward individually later.

Other Related Processes

Proposed Anti-Counterfeiting Trade Agreement (ACTA)

As reported by the Ministry of Economic Development of Japan, a third and fourth

round of discussions on the proposed Anti-Counterfeiting Trade Agreement (ACTA) were held in Tokyo on 8 - 9 October 2008 and in Paris on 15 – 18 December 2008.

The countries participating included Australia, Canada, the European Union presidency (France), EU member states, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland, and the United States.

The stated goal of the treaty would be to combat global infringements of intellectual property rights by increasing international cooperation, strengthening the framework of practices that contribute to effective enforcement, and strengthening IPR enforcement measures.

During the two meetings different proposals were discussed, focusing on criminal enforcement of intellectual property rights and fighting IPR infringements on the Internet.

At the December meeting the participating countries confirmed their intention to conclude the agreement as soon as possible.

The next meeting is scheduled to take place in Morocco in **March 2009**.

Summit of the India-Brazil-South Africa (IBSA)

The Third Summit of the IBSA Dialogue Forum took place on 15 October 2008 in New Delhi led by the Prime Minister of India, H.E. Dr. Manmohan Singh, the President of Brazil, H.E. Mr. Luiz Inacio Lula da Silva and the President of South Africa, H.E. Mr. Kgalema Petrus Motlanthe, known in the forum context as "the leaders".

The IBSA Dialogue Forum was created in 2003 to strengthen trilateral cooperation and for closer coordination on global issues, promoting the interests of developing countries, enhancing cooperation in sectoral areas and improving their economic ties.

On the issue of intellectual property, the leaders agreed on the need to establish trilateral cooperation in this field with the aim of promoting a balanced international intellectual property regime and to make a meaningful contribution to the economic and

social progress of developing countries, ensuring access to knowledge, health care and culture. Moreover, they agreed that the countries should hold consultations on a regular basis on the evolution of the international agenda.

On the issue of climate change and intellectual property, the leaders noted that the intellectual property rights regime must move in a direction that balances regards for innovators and the global public good. On biodiversity, the leaders stressed the importance of a timely and successful conclusion of the ongoing negotiations of a

legally binding international regime on access to genetic resources and benefit sharing. They reaffirmed the urgent need for an adequate legal framework at the international level to prevent biopiracy, ensure that national rules and regulations on ABS are fully respected across borders and recognize the value of biological resources and of traditional knowledge as an additional tool to promote sustainable development.

The next Summit will be held in Brazil on **8 October 2009**.

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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