

# INTELLECTUAL PROPERTY QUARTERLY UPDATE



AN INTERGOVERNMENTAL ORGANIZATION  
OF DEVELOPING COUNTRIES



CENTER FOR INTERNATIONAL  
ENVIRONMENTAL LAW

## WHAT IS THE REAL RELATIONSHIP BETWEEN THE CBD WORKING GROUP ON ACCESS AND BENEFIT SHARING AND WIPO AND THE WTO?

### I. INTRODUCTION

From 21-25 January 2008, the Working Group on Access and Benefit Sharing (ABS) of the Convention on Biological Biodiversity (CBD) is meeting in Geneva, for the first time in its history.<sup>1</sup> In the seven years that it has been in operation the ABS Working Group has discussed how to enable and operationalize the primary mechanism for sustainable use established by the CBD – access and benefit sharing of genetic resources. While the ABS Working Group has had some undoubted successes, such as the *Bonn Guidelines on Access to Genetic*

*Resources and the Fair and Equitable Sharing of the Benefits arising from their Utilization*, it may have foundered on the next step in its work: negotiating an international regime on Access and Benefit-Sharing.

While there are significant elements unique to the CBD that have contributed to the difficulties of the working group, two issues of relevance to intellectual property (IP)-related discussions in Geneva stand out: requirements for disclosure of origin of genetic resources in patent applications, and protection of traditional knowledge. While these issues are framed differently in Geneva-based discussions at the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO), it is clear that there are substantive and political linkages between the way they are addressed at the CBD and the way they are addressed at WIPO and the WTO. It is difficult to escape the suspicion that the rea-

<sup>1</sup> At the time of writing, the ABS Working Group meeting in Geneva had not yet concluded its deliberations.

## INSIDE

WHAT IS THE REAL RELATIONSHIP BETWEEN THE CBD WORKING GROUP ON ACCESS AND BENEFIT SHARING AND WIPO AND THE WTO? .....	1
An Introduction to the Convention on Biological Diversity .....	2
The Development of the ABS Working Group's Mandate .....	3
How have WIPO and the WTO Participated in and Viewed the CBD ABS Working Group? .....	7
Should the CBD Seek to Strengthen Linkages with WIPO and the WTO? .....	10
AN OVERVIEW OF RELEVANT DEVELOPMENTS IN THE VARIOUS IP FORA.....	12
World Trade Organization .....	12
World Intellectual Property Organization (WIPO) .....	16
Other Multilateral Fora .....	17
Free Trade Agreements involving the United States .....	18
Free Trade Agreements involving the European Union.....	18

son that the ABS Working Group is coming to Geneva at this time is to try and build off perceived momentum and progress in the Geneva-based organizations, as well as to raise the profile of the ABS negotiations by linking them to more well-known and powerful institutions. In addition, it may also be an attempt for the CBD to claim back space on environmental and indigenous issues that has been somewhat usurped by WIPO and the WTO. This prompts the question of what is the exact nature of the relationship between the ABS Working Group and the WTO and WIPO and if there is any particular benefit for the ABS Working Group in strengthening those linkages.

This focus piece aims to examine the elements of the relationship between the CBD, and the Geneva fora (WIPO and the WTO) by: outlining the formal role that the Working Group's mandate envisioned for WIPO and the WTO in the ABS negotiations; and examining the actual nature and participation of WIPO and the WTO in CBD processes. It concludes with some thoughts on whether the ABS Working Group should strengthen its linkages with the WTO and WIPO.

## II. AN INTRODUCTION TO THE CONVENTION ON BIOLOGICAL DIVERSITY

The Convention on Biological Diversity (CBD) was opened for signature at the 1992 Earth Summit in Rio de Janeiro, and entered into force on 29 December 1993. It aims to preserve the genetic resources, habitats and species that embody the health and wealth of the environment through the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits derived from the use of genetic resources.

Under the CBD, preservation of biological diversity is not limited to preventing uses that deplete and damage biodiversity: it must encourage uses that add value to biological resources and ensure that economic actors have incentives to preserve biodiversity. This includes all activities along the economic value chain from research and development to end user product sales. One of the most important pillars of this approach is the concept of Access and Benefit Sharing: owners, custodians or hold-

ers of genetic resources/materials/samples commit to enabling access to resources by researchers and other economic actors and those economic actors agree to share the benefits of any added value or commercial activity that they carry out.<sup>2</sup>

In considering its relationship to other agreements, the CBD acknowledges the influence of intellectual property on the implementation of the Convention. Article 16(5)<sup>3</sup> imposes an obligation on countries to ensure that subsequent treaties related to intellectual property support the CBD and not run counter to its objectives. This includes treaties such as the WTO TRIPS Agreement.<sup>4</sup> In addition, Article 22.1 notes that "[t]he provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, *except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity*" (emphasis added). There is a clear intention that the CBD is meant to have priority over previous agreements, in some circumstances, and over subsequent agreements, generally. States are expected to interpret and perform their obligations in existing and future agreements accordingly.

A major advance of the CBD is that it recognizes the sovereignty of each member state over genetic resources within its borders.<sup>5</sup> This recognition is crucial as there is no possibility of actual benefit sharing unless the legal control of the owners/holders is acknowledged. However, this recognition entirely failed to acknowledge the ownership rights of indigenous and other local communities who are, generally, the primary owners/holders of biological resources within member states. The only recognition of such communities is Article 8j<sup>6</sup> (In Situ Conservation), focusing on the

<sup>2</sup> See preamble, Article 1, and Article 15, Convention on Biological Diversity. (<http://www.cbd.int/convention/convention.shtml>)

<sup>3</sup> The Contracting Parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of this Convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives.

<sup>4</sup> The TRIPS Agreement was only signed in April 1994.

<sup>5</sup> Article 3, Convention on Biological Diversity (<http://www.cbd.int/convention/convention.shtml>)

<sup>6</sup> Article 8j - Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embody-

knowledge, innovations and practices of such communities but not the biological resources that they hold. The coverage is limited to such knowledge only insofar as it is relevant to the conservation and sustainable use of biological resources. In addition, any such recognition is subject to national legislation, essentially failing to establish minimum conditions for how states should relate to indigenous communities. This has created an unfortunate dynamic in the CBD community placing developing countries and their indigenous communities at odds on important discussions, including the discussion on constructing an international ABS system under the CBD.

While the concept of ABS is central to the CBD, the treaty itself does not actually provide for an international ABS regime. Article 15 provides for the application of certain principles for access to genetic resources:

- Article 15(4): **Mutually Agreed Terms** - Access, where granted, shall be on mutually agreed terms and subject to the provisions of this Article.
- Article 15(5): **Prior Informed Consent** - Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.
- Article 15(7) **Fair and Equitable Benefit Sharing** - Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, [...] with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms.

---

ing traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;

While CBD provisions create the basis for national legislation and for contractual relationships between states parties, they do not translate into any international ABS obligation and do not require states to implement ABS obligations. In addition, there is no mention of disclosure of origin requirements that would enable proper tracking of the use of genetic resources so as to enable proper implementation of ABS obligations.

The issue of ABS was passed on to an Ad hoc open-ended Working Group by Decision V/26<sup>7</sup> of the CBD Conference of the Parties (COP) in 2000. The ABS Working Group of the CBD has been the primary arena of the struggle to ensure real and sustained implementation of Access and Benefit Sharing. The Working Group has had five meetings so far and has successfully produced the *Bonn Guidelines on Access to Genetic resources and the Fair and Equitable Sharing of the Benefits arising from their Utilization*, but has also struggled to reach any agreement on an international ABS regime. The most recent meeting, prior to the January 2008 Geneva meeting, was held in Montreal, Canada, from October 8 to 13, 2007. The meeting resulted in very little progress and in some areas, some perceived steps backwards as some states tried to renegotiate the terms of the mandate. The Secretariat and the co-Chairs of the ABS Working Group have accepted the Swiss invitation to hold the meeting in Geneva in January to try and push for some progress before the ABS Working Group has to report to the Conference of the Parties in May 2008 in Bonn, Germany.

### III. THE DEVELOPMENT OF THE ABS WORKING GROUP'S MANDATE

#### III.1 Mandate of the Working Group

The first mandate of the Working Group emphasized only the production of guidelines and further discussions of issues. The second mandate was established at the 2004 Conference of the Parties, where the ABS working group was explicitly mandated to negotiate an international regime on ABS. (COP decision VII/19)<sup>8</sup>. The key language was:

---

<sup>7</sup> <http://www.cbd.int/decisions/?dec=V/26>

<sup>8</sup> <http://www.cbd.int/decisions/?dec=VII/19>

“to elaborate and negotiate an international regime on access to genetic resources and benefit-sharing with the aim of adopting an instrument/instruments to effectively implement the provisions in [Article 15](#) and [Article 8 \(j\)](#) of the Convention and the three objectives of the Convention.”<sup>9</sup> The terms of reference included:

- A requirement to draw on “an analysis of existing legal and other instruments at national, regional and international levels relating to access and benefit-sharing, including: access contracts; experiences with their implementation; compliance and enforcement mechanisms; and any other options.”<sup>10</sup>
- A key statement that “the international regime could be composed of one or more instruments within a set of principles, norms, rules and decision-making procedures, legally-binding and/or non-binding.”<sup>11</sup>

There was a long list of elements that must be considered by the Working Group in discharging its mandate,<sup>12</sup> including for example,

- Facilitation of access to genetic resources;
- Compliance with Prior Informed Consent of indigenous and other local communities;
- Addressing the issue of derivatives of genetic resources and how benefit sharing might be applied to them;
- Internationally recognized certificate of origin/source/legal provenance;
- Disclosure of origin/source/legal provenance of genetic resources and associated traditional knowledge in applications for intellectual property rights;
- Customary law and traditional cultural practices of indigenous and local communities.

There were also relevant provisions of existing processes and instruments for the Working Group to consider,<sup>13</sup> such as:

- The UN Permanent Forum on Indigenous Issues (UNPFII);
- TRIPS;
- WIPO conventions and treaties;
- International Union for the Protection of New Varieties of Plants (UPOV); and
- African Model Law on the Rights of Communities, Farmers, Breeders, and on Access to Biological Resources.

At the 8th Conference of the Parties in 2006, the Working Group was directed to complete its work before the 10<sup>th</sup> COP planned for 2010.

### *III.1.1 Relationship to WTO and WIPO*

#### WIPO

WIPO was formally requested to take part in the CBD in the second mandate when it was invited “to examine, and where appropriate address, taking into account the need to ensure that this work is supportive of and does not run counter to the objectives of the Convention on Biological Diversity, issues regarding the interrelation of access to genetic resources and disclosure requirements in intellectual property rights applications, including, *inter alia*:

- (a) Options for model provisions on proposed disclosure requirements;
- (b) Practical options for intellectual property rights application procedures with regard to the triggers of disclosure requirements;
- (c) Options for incentive measures for applicants;
- (d) Identification of the implications for the functioning of disclosure requirements in various World Intellectual Property Organization-administered treaties;
- (e) Intellectual property-related issues raised by proposed international certificate of origin/source/legal provenance;

<sup>9</sup> COP [decision VII/19](#), Article D:11

<sup>10</sup> Annex to COP [decision VII/19](#), Section a(i)

<sup>11</sup> Annex to COP [decision VII/19](#), Section b

<sup>12</sup> Annex to COP [decision VII/19](#), Section d

<sup>13</sup> Annex to COP [decision VII/19](#), Section d(vxiii)



and regularly provide reports to the Convention on Biological Diversity on its work, in particular on actions or steps proposed to address the above issues, in order for the Convention on Biological Diversity to provide additional information to the World Intellectual Property Organization for its consideration in the spirit of mutual supportiveness;<sup>14</sup>

The Decision also notes the "Technical Study on Disclosure Requirements Concerning Genetic Resources and Traditional Knowledge prepared by World Intellectual Property Organization at the request of the Conference of the Parties in decision VI/24 C." WIPO had delivered this to the COP 7, in a process which caused some difficulties among member states at WIPO, many of whom complained of insufficient consultation and prejudging of issues that were still under discussion at WIPO.

## WTO

In contrast, the WTO is barely mentioned in the second mandate except to be invited, along with several other organizations, to cooperate with the ABS Working Group.<sup>15</sup>

### III.2 Discussion of WIPO and the WTO in the ABS Working Group

#### III.2.1 Third Meeting of the ABS Working Group, Thailand, February 2005

The third meeting of the ABS Working Group, the first under the second mandate, took place in February 2005 in Thailand.<sup>16</sup> At the time several countries (e.g. Korea) emphasized that the regime should be in line with international rules at WIPO and the TRIPS Agreement,<sup>17</sup> based on the presumption that these rules should trump the

fundamental sustainable development goals of the CBD.

Initial discussions were also plagued by disagreement as to whether the mandate to reach an international regime meant that such a regime should be binding and involve sanctions. Industrialized countries (Australia, Canada, Japan and the EU) refused to commit to a legally binding regime. A key demand of industrialized countries at the time was the request for a 'gap analysis' that would determine the scope of an instrument or instruments. They also called for further studies in several other areas. Many developing country representatives viewed this as a delaying tactic. For some actors, this was also reminiscent of the same kinds of delaying demands for "further study" being made in the WIPO discussions on traditional knowledge.

The meeting also reflected serious disagreement about the relationship of the negotiations for any ABS regime to the processes at the WTO and WIPO. The UNEP delegate caused significant controversy by stating that the TRIPS Agreement was in contradiction with the CBD and that it posed serious dangers for the preservation of biodiversity.<sup>18</sup> This statement was seriously questioned by several industrialized countries with Australia and the United States taking UNEP to task for what they viewed as stepping outside the boundaries of its competence.<sup>19</sup> In contrast, Brazil and Ethiopia (on behalf of the African Group) supported the statement, noting the need to amend the TRIPS Agreement.<sup>20</sup>

<sup>18</sup> Para. 12, "Report of the Ad Hoc Open-Ended Working Group on Access and Benefit-sharing on the Work of its Third Meeting" UNEP/CBD/WG-ABS/3/7, 3 March 2005. Available at

<http://www.cbd.int/doc/meetings/abs/abswg-03/official/abswg-03-07-en.pdf>

<sup>19</sup> Para. 176, 180, "Report of the Ad Hoc Open-Ended Working Group on Access and Benefit-sharing on the Work of its Third Meeting" UNEP/CBD/WG-ABS/3/7, 3 March 2005. Available at

<http://www.cbd.int/doc/meetings/abs/abswg-03/official/abswg-03-07-en.pdf>

<sup>20</sup> Para. 178, 179, "Report of the Ad Hoc Open-Ended Working Group on Access and Benefit-sharing on the Work of its Third Meeting" UNEP/CBD/WG-ABS/3/7, 3 March 2005. Available at

<http://www.cbd.int/doc/meetings/abs/abswg-03/official/abswg-03-07-en.pdf>

<sup>14</sup> COP decision VII/19, Article E:8

<sup>15</sup> COP decision VII/19, Article D:5

<sup>16</sup> For the official report of the meeting see "Report of the Ad Hoc Open-Ended Working Group on Access and Benefit-sharing on the Work of its Third Meeting" UNEP/CBD/WG-ABS/3/7, 3 March 2005. Available at <http://www.cbd.int/doc/meetings/abs/abswg-03/official/abswg-03-07-en.pdf>

<sup>17</sup> Para. 28, "Report of the Ad Hoc Open-Ended Working Group on Access and Benefit-sharing on the Work of its Third Meeting" UNEP/CBD/WG-ABS/3/7, 3 March 2005. Available at

<http://www.cbd.int/doc/meetings/abs/abswg-03/official/abswg-03-07-en.pdf>

### *III.2.2 Fourth Meeting of the ABS Working Group, Granada, Spain, January-February 2006*

The second meeting under the second mandate was held 30 January to 3 February 2006 in Granada, Spain. A certain level of urgency was felt as the meeting was to report to the Conference of the Parties in Curitiba, Brazil, in March 2006.

Both WIPO and the WTO gave reports at the meeting. WIPO presented an update on a technical paper that it was preparing in response to the CBD request and updated the group on some of its work on traditional knowledge. The WTO outlined activities on negotiations and stances of different countries on the TRIPS-CBD relationship.

### *III.2.3 Fifth Meeting of the ABS Working Group, Montreal, Canada, October 2007*

At the third meeting under the mandate, held in Montreal, Canada, in October 2007, the ABS Working Group continued work based on directions from the March 2006 8<sup>th</sup> COP in Curitiba, Brazil, to complete its deliberations by the 10<sup>th</sup> COP and that this meeting and the subsequent one would constitute a single session, with no meeting report or recommendations until both the fifth and sixth sessions were concluded.

In the interim period since the previous ABS Working Group, the UN Declaration on the Rights of Indigenous Peoples had been adopted by the UN General Assembly. In addition, the African Group and the Least Developed Country (LDC) Group at the TRIPS Council had agreed to co-sponsor the proposed Amendment 29bis on disclosure of origin;<sup>21</sup> and the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) had its mandate renewed to accelerate its discussions.

The issue of disclosure was raised under compliance mechanisms, and New Zealand, Australia, Canada, Japan and the United

States stated that the CBD was not the right venue for discussing the issue and that it should be addressed at WIPO.<sup>22</sup> It should be noted that these same countries have stated in those venues that disclosure of origin was not needed and did not need to be addressed and are thus opposed to any such requirements being developed at WIPO or the WTO.

Discussions also took place on traditional knowledge, with the EU, Japan and Canada arguing that IP aspects of traditional knowledge should be addressed at WIPO and not the CBD.<sup>23</sup> It is again interesting to note that Japan has repeatedly stated in WIPO that it sees no need for any protection of traditional knowledge while both the EU and Japan have been part of the group of industrialized countries calling for further delays while studies are carried out.

The WIPO secretariat reported on activities that had been undertaken on traditional knowledge although this reflected little progress from previous reporting. An interesting comment on all references to WIPO and the WTO came from Argentina, which noted that many statements from delegates showed significant misunderstanding at the ABS meeting about what it is that was being done at WIPO and the WTO.<sup>24</sup>

At the conclusion of the Montreal meeting it was apparent that there was little agreement on the binding or non-binding nature of the regime, or even of basic definitions of misappropriation or what a minimum list of elements of an agreement should include. In addition, the lines of division varied significantly depending on the issue under discussion. There was, essentially, no starting point for negotiations. Canada even proposed that the group begin from scratch at the sixth meeting of the ABS Working Group in Geneva.<sup>25</sup>

### *III.2.4 The State of Play on the Relationship between the CBD and the WTO and WIPO in the Period Leading up to Geneva*

<sup>21</sup> The proposal seeks to amend the TRIPS Agreement to require patent applicants to disclose the whether they have used biological resources in their application, the origin of such resources, and whether they complied with local rules on Prior Informed Consent and Access and Benefit Sharing. For more information, see section IV.2 of this focus piece.

<sup>22</sup> Earth Negotiations Bulletin Volume 9, No. 390 (10 October 2007), p2

<sup>23</sup> Earth Negotiations Bulletin Volume 9, No. 391 (11 October 2007), p2

<sup>24</sup> Earth Negotiations Bulletin Volume 9, No. 390 (10 October 2007), p2

<sup>25</sup> Earth Negotiations Bulletin Volume 9, No. 393 (15 October 2007), p1

The Working Group has come to Geneva with little in the way of formal progress in its negotiations on an ABS regime. There is no starting point for negotiations, nor even any agreement on the problem to be solved. The Working Group shares that lack of progress with discussions on the protection of traditional knowledge at WIPO. At WIPO, and in the Working Group, there is no basic text on which to operate despite the production of several documents that could logically form the basis for negotiations.

The WTO is distinguished from the situation at WIPO and the CBD, by the fact that the biologically Megadiverse Countries, China, the African Group, and the least developed countries have coalesced around a specific, clear, fully fledged proposal. Only a few Latin American and Oceanic countries, the Europeans (with the exception of Norway and possibly Switzerland) and the North American states remain outside the unified position.

Nevertheless, for the difficult issues such as protection of traditional knowledge and disclosure of origin, the industrialized countries seem to favour a forum shifting approach that prioritizes WIPO over the WTO and the CBD. This may be based on a sense that, at WIPO, they have been successful in sidelining the issues into a committee with a narrow, but exclusive mandate where they can ensure that there is no progress. That assessment may however, have to be revisited given the recent successes in achieving a development agenda at WIPO as well as in increasing awareness of the forum-shifting stances industrialized countries have taken in other fora regarding the WIPO process. The increasing success of placing the disclosure of origin issue on the agenda of the WTO may also have contributed to fewer and fewer mentions of the WTO by industrialized countries, while developing countries such as Brazil have increasingly raised the issues of the Article 29bis amendment in the ABS Working Group context and tried to have the proposal included, at least as an information document. Proposals by Brazil and others to this effect have been opposed by Switzerland, the EU, and Australia.<sup>26</sup>

#### **IV. HOW HAVE WIPO AND THE WTO PARTICIPATED IN AND VIEWED THE CBD ABS WORKING GROUP?**

Both the WTO and WIPO have participated as observers in the deliberations of the ABS Working Group. However, both have generally kept a low profile within the CBD and have also been beneficiaries of the forum shifting by states of issues from the CBD to WIPO and the WTO.

##### **IV.1 WIPO**

WIPO has a memorandum of understanding (MoU) with the Secretariat of the CBD,<sup>27</sup> signed in 2002, that guides the program of collaboration and work between the two organizations. Unlike the response to the CBD request, which involved all stakeholders, this MoU was essentially written by the Secretariat and simply placed for approval to the closed meeting of the WIPO Coordination Committee. The MoU has limited procedural and substantive breadth. Procedurally, it provides for participation and inputs into studies carried out by each organization. It pledges mutual support on projects such as compilation of databases of disclosed traditional knowledge. The primary tool is information sharing on activities. As part of the MoU, WIPO has consistently, if not in much depth, participated in ABS meetings. A repeated element of WIPO's statements at the CBD has been that it ensures that its activities are mutually supportive with the CBD, although there is no examination of how specific proposals in areas such as the IGC or the Standing Committee on the Law of Patents might fit into that approach.

The primary area in WIPO for discussion of disclosure of origin and traditional knowledge is the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). The committee has framework documents on traditional knowledge and folklore but discussions reflect some of the same arguments about whether an instrument for the protection of traditional knowledge is needed and a disagreement about

<sup>26</sup> Earth Negotiations Bulletin Volume 9, No. 310 (18 February 2005), p2

<sup>27</sup> WIPO Document WO/CC/48/2  
[http://www.wipo.int/documents/en/document/govbody/wg\\_gb\\_cc/pdf/cc48\\_2.pdf](http://www.wipo.int/documents/en/document/govbody/wg_gb_cc/pdf/cc48_2.pdf)

whether the extensive existing documents should serve as the basis for negotiations. Genetic resources have been largely left aside in the committee as it has proven difficult and divisive and some states view the process at the WTO as a better venue.

The divide with respect to traditional knowledge is largely between industrialized countries who do not see a need for any instrument (especially the United States and Japan), and developing countries that seek a binding instrument. Industrialized countries have spent much of the period of the committee calling for further studies to determine the necessity and scope of any action on traditional knowledge and folklore.

After the "Technical Study on Disclosure Requirements Concerning Genetic Resources and Traditional Knowledge prepared by World Intellectual Property Organization," which was an input the decision establishing the second ABS mandate, WIPO decided to respond to the invitation stated in the decision to examine the interrelation between genetic resources. It produced a response according to a consultative and participatory procedure that was hard fought for by developing countries and their civil society partners. The key elements were that it should reflect the state of discussions in its own bodies and the objectives and needs of the CBD, rather than imposing the WIPO Secretariat's own views on the organization.<sup>28</sup> The final document,<sup>29</sup> transmitted to the CBD Conference of the Parties in 2005, was broad in scope and a thorough examination of the state of the art at WIPO, having followed a process over almost two years. The document did not necessarily provide guidance to the CBD other than to make delegates aware of how difficult and fraught with tensions such discussions at WIPO were. It was transmitted with the understanding that:

"The [Study] has been prepared to contribute to international discussion

and analysis of this general issue, and to help clarify some of the legal and policy matters it raises. It has not been prepared to advocate any particular approach nor to expound a definitive interpretation of any treaty. It is to be regarded as a technical input to facilitate policy discussion and analysis in the CBD and in other fora, and it should not be considered a formal paper expressing a policy position on the part of WIPO, its Secretariat or its Member States."<sup>30</sup>

Another area in which there has been discussion of disclosure of origin has been the Swiss proposal to amend the Patent Cooperation Treaty to include disclosure as a procedural requirement, while not including patent invalidation as one of the penalties for lack of compliance. The proposal remains under discussion but has yet to draw significant co-sponsorship or support. The EU also has a proposal on the table to address the issue of disclosure of origin outside the confines of patent law.

In general, WIPO delegates from developing countries have not objected to the principles and aims of the CBD being brought into the WIPO process but have been extremely cautious about the transfer of WIPO principles and approaches into the CBD. This may be a reflection of the fact that, historically, developing countries have not been the dominant voices at WIPO. However, the WIPO Secretariat's strong support of indigenous group's participation in WIPO's IGC and its capacity-building work with them may present a somewhat different view of the role that WIPO may play in the CBD process. Nevertheless, until there is greater transparency and effective influence of developing country member states at WIPO, further participation by WIPO in the CBD e.g. capacity building on IP-related aspects of Access and Benefit Sharing during ABS Working Group meetings, may not be viewed positively by developing countries. In addition, industrialized countries have been content to keep the WIPO and CBD processes separate and continue to argue that IP-related CBD issues should be sequestered in WIPO's IGC where they have been successful in delaying progress.

<sup>28</sup> For a full analysis of the debate, process and comments on it see [CBD Request to WIPO on the Interrelation of Access to Genetic Resources and Disclosure Requirements: Establishing an adequate framework for a WIPO Response \(South Centre/CIEL\) \(Fall 2004\)](#) and [CBD Request to WIPO on the Interrelation of Access to Genetic Resources and Disclosure Requirements: Observations from the Center for International Environmental Law \(CIEL\) on the First Draft of the WIPO Examination of the Issues \(April 2005\)](#)

<sup>29</sup> In Annex to WIPO document WO/GA/32/8

<sup>30</sup> WIPO Document WO/GA/32/8, para 6



## IV.2 The WTO

The CBD has observer status at the WTO Committee on Trade and the Environment, but it does not have observer status in the TRIPS Council, the arena where the CBD's name has been most often invoked. In contrast, the following organizations, none of whose provisions form the basis for heated discussion in the Council, unlike the CBD, have observer status:<sup>31</sup>

- Food and Agriculture Organization (FAO)
- International Monetary Fund (IMF)
- International Union for the Protection of New Varieties of Plants (UPOV)
- Organization for Economic Cooperation and Development (OECD)
- United Nations (UN)
- United Nations Conference on Trade and Development (UNCTAD)
- World Bank
- World Customs Organization (WCO)
- World Intellectual Property Organization (WIPO)
- World Health Organization (WHO) (ad hoc observer status)

The primary arena with which the WTO has engaged CBD related issues has been through discussions on Article 27.3(b) and the review process for that article as well as the direction in paragraph 19 from the 2001 Doha Declaration to examine the relationship between TRIPS and the CBD. The review of the patenting of life forms (plants, animals, biological processes) has largely been a stagnant process with no formalised framework for a substantive outcome beyond the usual political discussions. It remains as one of the outstanding implementation issues about which no-one seems to have an idea where to properly begin and whether it should consider a ban on life-patents or whether it should only be a discussion about national experiences.

However, the impasse has resulted in a push based on paragraph 19, by several

large developing countries, with the support of others, to propose an amendment to the TRIPS Agreement to ensure a disclosure of origin requirement that would better enable ABS systems and to make the TRIPS Agreement compatible with the CBD

The Proposed Amendment Article 29bis was proposed initially by Brazil, China and India and a group of biologically Megadiverse Countries but is now supported by the majority of countries at the WTO including the African Group and the least-developed countries group.<sup>32</sup> The proponents have been careful to distinguish this from any negotiation on an international ABS regime, although they have noted that such requirements would be a necessary element of support of an international ABS regime.

Responses to this proposal include the EU approach of putting such a requirement outside of patent law so that any requirements or penalties would not affect validity, possibility of licensing or royalties agreements. The other is the Swiss proposal at WIPO to have disclosure of origin as a procedural requirement of international patent applications. All of these responses are based on some variation of the argument that there is actually no conflict between the TRIPS Agreement and the CBD and thus no real need for action within the TRIPS context.

At the CBD, the WTO Secretariat has largely limited itself to informational statements about the proposals on the table and the different positions taken.

The WTO Secretariat has contributed no technical studies or examination of disclosure of origin or protection of traditional knowledge. In part, this is a political decision not to get involved in an issue on which states have definite and diverging opinions, but also a reflection of the fact that the Secretariat simply does not have the internal expertise to actually carry out studies on these issues. The dominance of trade issues in the WTO means that there is little familiarity with the human rights, environment, intellectual property and indigenous issues related to disclosure of origin,

<sup>31</sup> See [http://www.wto.org/english/thewto\\_e/igo\\_obs\\_e.htm](http://www.wto.org/english/thewto_e/igo_obs_e.htm)

<sup>32</sup> For the full text of the proposed amendment see WTO Document IP/C/W/474 available at [http://www.wto.int/english/tratop\\_e/trips\\_e/art27\\_3b\\_e.htm](http://www.wto.int/english/tratop_e/trips_e/art27_3b_e.htm)

protection of traditional knowledge and the protection and sustainable use of biological resources. This suggests that while the WTO is a useful rule-setting body it is ill-equipped to formulate substantive standards for these issues. This is also why the proposed amendment article 29bis remains so focused, precise and limited in its ambitions because the proponents seem to have an understanding of the limits of the institution.

What the Secretariat and the WTO have contributed in terms of reports is a summary of the discussions and proposals on the issue. The most recent report<sup>33</sup> reflects the substantive stagnation of the issue at the WTO. It is meant to be issued whenever something new and substantive is added, but it appears that little has progressed beyond political discussions, since early 2006. This is also reflective of a lack of advance on the Doha Round in general.

The most recent summary report on the Review of Article 27.3(b) was in March 2006,<sup>34</sup> as was the most recent summary report on the Protection of Traditional Knowledge and Folklore.<sup>35</sup> On the issue of traditional knowledge, it seems that the viewpoint that it is best addressed in other fora has won out for the present, as there has been little activity or discussion on the issue, even from the African Group, who were the primary proponents of its consideration within the TRIPS Council.

The attitude within the TRIPS Council has been largely instrumentalist. While acknowledging the importance of the CBD and its implications for the work that the WTO is doing, there has been little interest in the aims and goals of the CBD itself. From all delegations, it stands as a symbol to be referred to within discussions, but it is not

seen as a preferred venue by many (industrialized countries prefer WIPO) and there is little appetite on the part of developing countries to import WTO concepts into the CBD ABS Working group beyond the Amendment 29bis proposal. In addition, there are no moves to import any substantive standards from the CBD into the WTO, in a way that prioritizes preservation of biological diversity and sustainable use.

## V. SHOULD THE CBD SEEK TO STRENGTHEN LINKAGES WITH WIPO AND THE WTO?

Both the WTO and WIPO are institutions that are too important to be left alone to address issues of such importance to the CBD. However, the key issue is the direction of the flow of influence and activity.

With respect to WIPO, it is likely that the flow has largely been in the wrong direction. Rather than WIPO making inputs into the CBD deliberations, it should be the CBD making greater inputs and interventions into WIPO deliberations, especially with the aim of ensuring that all of WIPO's future actions and norm-setting remain within and are mutually supportive of the goals of the CBD. To this end, there is a task to be done of educating and raising awareness amongst WIPO delegates and indigenous participants of the standards and norms at the CBD, the mandate of the ABS Working Group, and the obligations of actors at WIPO regarding the CBD and other environmental norms. Especially on disclosure of origin and protection of traditional knowledge, it is time that CBD delegates and the CBD Secretariat be more proactive and stop deferring to the WIPO Secretariat. These issues are as new to WIPO as they are to the CBD, and the CBD has the advantage of having all the relevant stakeholders at the table, not just a select group of patent lawyers, business interests and general purpose UN delegates and patent offices. It is a legitimate forum for discussion of these issues and has a legal right to ensure that subsequent treaties conform with its standards on issues related to conservation and sustainable use of biological resources, including intellectual property related discussions.

With respect to the WTO, a continuing problem is that the CBD is not yet an observer in the WTO TRIPS Council. While

<sup>33</sup> The Relationship between the Trips Agreement and the Convention on Biological Diversity: Summary of Issues Raised and Points Made (IP/C/W/368/Rev.1, 8 February 2006)  
[http://www.wto.int/english/tratop\\_e/trips\\_e/ipcw368\\_e.pdf](http://www.wto.int/english/tratop_e/trips_e/ipcw368_e.pdf)

<sup>34</sup> Review of the Provisions of Article 27.3(b): Summary of issues Raised and Points made IP/C/W/369/Rev.1 (9 March 2006). Available at  
[http://www.wto.int/english/tratop\\_e/trips\\_e/ipcw369r1.pdf](http://www.wto.int/english/tratop_e/trips_e/ipcw369r1.pdf)

<sup>35</sup> Protection of Traditional Knowledge and Folklore: Summary of Issues Raised and Points made IP/C/W/370/Rev.1 (9 March 2006). Available at  
[http://www.wto.int/english/tratop\\_e/trips\\_e/ipcw370r1.pdf](http://www.wto.int/english/tratop_e/trips_e/ipcw370r1.pdf)

the application may be pending, all efforts should be made to accelerate the process. The member countries of the CBD have an obligation to ensure that any subsequent treaties, agreements and proposals in the TRIPS Council do not run counter to the aims, goals and principles of the CBD and it is imperative that the CBD is in the room to remind them and provide information when needed. While the WTO has generated few technical studies on disclosure of origin and protection of traditional knowledge, the CBD Secretariat is under no such restriction and should continue to produce its own studies on the proper relationship between the WTO and CBD on disclosure of origin and on the relationship between intellectual property and genetic resources.

The issues of human rights and protection of the environment form part of the fundamental framework of international law. Intellectual property and trade law, while crucial, are largely instrumental treaties aimed at achieving the reduction of poverty, and ensuring economic growth. They are meant to enable rather than limit the application of fundamental substantive norms such as the right to life, health and self-determination. The influence of business interests and major industrialized economies has distorted the influence and place of trade and intellectual property law in international discussions and it is the responsibility of organizations, such as the CBD, to ensure that other international organizations respect fundamental human rights and environmental standards.

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

The following is an overview of developments in the various fora dealing with intellectual property (IP) issues during the fourth quarter of 2007.

### The World Trade Organization

During the fourth quarter of 2007, the Doha Round of trade negotiations continued to show promise of major progress in agricultural and non-agricultural goods negotiations. The revised modalities that were expected to be released in December 2007 were postponed until January 2008. There has been important progress on issues in the TRIPS Council.

### Progress in the Council for TRIPS during the fourth quarter of 2007

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

The TRIPS Council met during the fourth quarter of 2007, from 23-24 October 2007. Two important developments during this quarter relate to the request that the outstanding implementation issues from the Uruguay Round form part of the single undertaking of the Doha Round of negotiations.

1. The European Communities, Guinea, India, Jamaica, Kenya, the Kyrgyz Republic, the Former Yugoslav Republic of Macedonia, Madagascar, Morocco, Pakistan, Sri Lanka, Switzerland, Tanzania, Thailand and Turkey submitted a communication on 30 November 2007 (JOB(07)/190) proposing the following language:

*Members agree to the extension of the protection of Article 23 of the TRIPS Agreement to geographical indications of all products. Negotiations shall be undertaken, in Special Sessions of the TRIPS Council and as part of the Single Undertaking, to amend the TRIPS Agreement in order to extend the protection of Article 23 of the TRIPS Agreement to geographical in-*

*dications of all products as well as to apply the exceptions provided in Article 24 of the TRIPS Agreement mutatis mutandis.*

2. The *Disclosure Group* in the TRIPS Council (consisting of the sponsors of the proposal for the amendment of Article 29 of the TRIPS Agreement in order to introduce mandatory disclosure of biological resources and associated traditional knowledge) also circulated a non-paper proposing the following language:

*Members agree to the inclusion in the TRIPS Agreement of a mandatory requirement for the disclosure of origin of biological resources and/or associated traditional knowledge in patent applications. Text based negotiations shall be undertaken in Special Sessions of the TRIPS Council, and as an integral part of the single undertaking, on an amendment to the TRIPS Agreement establishing an obligation for Members to require patent applicants to disclose the origin of biological resources and/or associated traditional knowledge, including Prior Informed Consent and Access and Benefit Sharing.*

The chairman of the trade negotiation committee reported that discussions took place on the proposed language for geographical indications (GIs) and the relationship between TRIPS and the Convention on Biological Diversity (CBD) during the informal consultations that took place on 30 November and 3 December 2007.

With respect to the proposed amendment of Article 29 of the TRIPS Agreement (IP/C/W/474), the Dominican Republic (IP/C/W/474/Add.5) and Lesotho on behalf of the least-developed countries in the TRIPS Council (IP/C/W/474/Add.6) submitted their respective communications in order to be co-sponsors of the proposal.

Japan submitted a document entitled "The Patent System and Genetic Resources" (IP/C/W/504) that provides as an annex the document submitted by Japan to the eleventh session of the Intergovernmental Committee on Intellectual Property and Ge-

netic Resources, Traditional Knowledge and Folklore (IGC) of WIPO held in July 2007. In its submission Japan requested that the work of the TRIPS Council take into account the relevant work being carried out by WIPO to avoid the duplication of efforts.

In November, Peru submitted its response (IP/C/W/484) to comments on its previous submission (IP/C/W/458) from the United States. Peru welcomed the comments presented by the United States delegation and underscored that:

1. its submission does not deal with isolated cases that have arisen only recently. Rather, there are a considerable number of cases that underlie the concerns of many countries and are related to the effective protection of the patent system;
2. countries have sovereign rights over their natural resources and have the power to regulate access to genetic resources. This legal obligation is enforceable *erga omnes* and the legal right protected is the resource itself. In this connection, the disclosure of source and/or origin would make it possible – first of all – to identify those cases in which a resource native to Peru is being used outside its jurisdiction and thereby to verify the legality or illegality of access to the biological resource and/or traditional knowledge that was used as the source for development of the process or product to be patented;
3. the disclosure requirement would make it possible not only to ascertain the physical origin – the first level of compliance with the Peruvian State's obligations under the CBD – but also to comply with the second-level obligation to take into account and, consequently, to respect the associated traditional knowledge, which is understood to constitute the prior art and which in many cases may not be known by the examiner;
4. a third level of analysis should enable a State to check – if an application or a patent involves a resource of Peruvian origin that satisfies the patentability criteria – that compliance has also been secured with another of the obligations laid down by the CBD: obtaining the prior informed consent of the resource holder

and fair and equitable benefit-sharing, in accordance with existing national rules on the subject;

5. the existence of a disclosure requirement would serve to dispel any doubts concerning the legal provenance of the resource and, where appropriate, to determine that the resource was obtained legally and through commercial channels, ruling out any presumption of illegal acquisition.

### **Annual Report on the Implementation of Article 66.2 on Technology Transfer**

At the end of the fourth quarter of 2007, several developed countries reported on their implementation of the transfer of technology requirements under article 66.2, which requires “[d]eveloped country Members [to] provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.” The reports are the result of a 2003 decision of the TRIPS Council (IP/C/28) requiring developed countries to report on their implementation of their obligations under the article.

In its report, the European Communities (EC) underscored that it considered that relevant incentives for technology transfer that can be used to fulfil its obligation under Article 66.2 of the TRIPS Agreement are those that: (i) promote projects such as direct investment, licensing, franchising, and sub-contracting; (ii) improve access to available techniques and industrial processes; (iii) support joint research projects; (iv) provide training in technology management and production methods; (v) more indirectly, improve the absorption capacity of Least Developed Countries (LDCs) (capacity building); and (vi) encourage trade in technological goods.

**Accordingly, in its report, the EC illustrated its efforts to promote and encourage technology transfer that describe only incentives that have a strong link with at least one of the aforementioned objectives. However, the EC's report also notes that no technology transfer program is specifically dedicated to LDCs as such.**



New Zealand also noted in its report that technology transfer is interpreted broadly to include training, education and know-how, along with any capital component. Using the United Nations' definition, New Zealand sees four key modes of technology transfer: (i) physical objects or equipment; (ii) skills and human aspects of technology management and learning; (iii) designs and blueprints which constitute the document-embodied knowledge on information and technology; and (iv) production arrangement linkages within which technology is operated. Although the New Zealand Agency for International Development (NZAID) is entrusted with the task [of ensuring compliance with Article 66.2 [I don't think it's clear what "entrusted with the task under Article 66.2" means], New Zealand made it clear that the NZAID does not provide any direct incentives to New Zealand organisations to promote technology transfer to LDCs (IP/C/W/497/Add.3, 3 December 2007).

In its report, Norway provided an update of the relevant facilities provided by the Norwegian Agency for Development Cooperation (Norad) and the Norwegian Investment Fund for Developing Countries (Norfund). These activities include incentives for technology transfer to developing countries, including LDCs through (i) its facilities for investment support, (ii) its financing mechanisms for import to developing countries, and (iii) support to export-related activities in developing countries. In conducting these activities, Norway gives priority to LDCs and Norway's partner countries (see IP/C/W/497/Add.4, 3 December 2007).

The United States took a slightly different approach to the implementation of Article 66.2 than the EC, New Zealand, and Norway, confining its report "to activities that are specifically targeted to providing incentives for technology transfer to LDC Members." The report places particular emphasis on incentives provided for technology transfer in the health sector. Accordingly, it reports on incentives related to health technologies, tax incentives, and programmes on science and technology, trade capacity building in Africa, and activities of various United States government agencies. The report also provides additional illustrative country specific activities.

Other annual reports on the implementation of Article 66.2 of the TRIPS Agreement include those submitted by Switzerland

(IP/C/W/497), Japan (IP/C/W/496/Add.1), Canada (IP/C/W/497/Add.6) and Australia (IP/C/W/497/Add.7).

### **Annual Report on Technical Cooperation Activities under Article 67**

WIPO submitted its report on technical assistance within the framework of the provisions of the Agreement between WIPO and WTO which entered into force on 1 January 1996 (IP/C/W/495/Add.2). WIPO indicated that it continued to provide demand-based legal-technical assistance to developing countries and LDCs in support of their efforts in implementing obligations deriving from the TRIPS Agreement. The assistance extended covered, among others, the areas of legislative advice, awareness building and human resource development, institution and capacity building, modernization of the intellectual property systems as well as enforcement-related activities. WIPO emphasized that its advice on draft laws took into account flexibilities that LDCs could use to make IP protection more development-friendly and less costly, while preserving its value as a tool for ensuring legal security as regards IP assets.

Other reports from international organisations include those by the International Union for the Protection of New Varieties of Plants (UPOV) (IP/C/W/495/Add.1) and the Food and Agricultural Organisation (FAO) of the United Nations (IP/C/W/495/Add.3).

With respect to country reports pertaining to Article 67, the United States submitted its communication (IP/C/W/496/Add.5) attaching a table providing information on the United States' technical cooperation activities in the area of intellectual property, covering the period from 1 October 2006 to 30 September 2007. The United States stated that its Intellectual Property Rights (IPR) Training Coordination Group is comprised of United States government agencies and industry associations that provide IPR-related informational programmes, training, and technical assistance to foreign officials and policy makers. The training programmes are offered to help developing countries comply with their obligations under TRIPS. These programmes also help the United States meet its TRIPS obligation to provide technical assistance to developing and least-developed members of the WTO.

Other countries also reported their technical assistance activities under Article 67 of the TRIPS agreement during the year 2007. Canada's report (IP/C/W/496/Add.6), for example, provides information regarding training courses offered in conjunction with WIPO; a project on trade and health policy coherence at the national, regional, and international level led by the World Health Organization (WHO) and the North-South Institute; developing a diagnostic tool on trade and health destined for use in low-income countries led by Centre for Trade Policy and Law (CTPL) and the Canadian Public Health Association (CPHA). Additional Article 67 reports came from Australia (IP/C/W/496/Add.7), the EC (IP/C/W/496/Add), and Japan (IP/C/W/496/Add.1).

### **Priority Needs Assessment for Least Developed Countries**

In line with paragraph 2 of the November 2005 Decision on the Extension of the Transition Period under Article 66.1, LDC Members are expected to submit "priority needs for technical and financial cooperation in order to assist them taking steps necessary to implement the TRIPS Agreement." And, as reported in the third quarter of 2007, Uganda and Sierra Leone had submitted their descriptions identifying those needs. In response, during the October TRIPS Council meeting, the United States encouraged Uganda and Sierra Leone to consider looking to organizations such as WIPO for technical assistance and also urged other LDCs to follow suit (IP/C/M/55, par. 192). China stated that information on action taken to address priority needs identified by LDCs should be essential components of future notifications from developed country Members of the Council.

Lesotho, speaking on behalf of the LDC Group in the WTO, called on LDCs to provide to the Council for TRIPS, preferably by 1 January 2008, as much information as possible on their individual priority needs for technical and financial cooperation in order to help them take necessary steps to implement the TRIPS Agreement. At the same time, the LDC Group requested that flexibilities be extended to those LDCs that might not be able to submit their needs assessment by January 2008 so that they could submit even after this deadline. The LDC Group "requested the developed country

Members to provide LDCs with the requisite technical and financial assistance and technology transfer that the individual LDC's country-specific needs assessment had identified." Lesotho also emphasized that technical assistance should address the actual specific needs that would enable LDCs to build the necessary infrastructure which was a major basis for actual implementation of the Agreement.

### **Enforcement**

In a communication in preparation for the October year-end meeting of the TRIPS Council, Japan took up the issue of enforcement (IP/C/W/501) previously presented by the United States and the EC at earlier meetings of the TRIPS Council. The communication aims to share Japan's recent experiences with enforcement. The issue of enforcement remains a priority for developed countries at the WTO with continuing attempts to make it a permanent agenda item on the TRIPS Council and further moves to bring the issue to dispute settlement

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

On 8 October 2007, Canada issued a notification (IP/N/10/CAN/1) under paragraph 2(C) of the Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health. Under the notification, Canada confirmed that it has provided authorization to Apotex Inc., in order to produce drugs requested by Rwanda under the latter's notification dated 17 July 2007 (IP/N/9/RWA/1). Canada also announced that the information on the shipment (quantities and distinguishing features) will be posted on the licensee's website.

The General Council released its report on the Annual Review of the Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health (IP/C/46). By the fourth quarter of 2007 there were 11 member countries that had accepted the Protocol [this is probably a stupid question but the "Protocol" isn't defined; what is it exactly?] out of which four are from Asia and one from Latin America. There are no African countries that have ratified the Protocol. The TRIPS Council also agreed to extend the period for acceptance

of the Protocol Amending the TRIPS Agreement by two more years.

**The next meeting of the TRIPS Council will be held from 13-14 March 2007. However, informal consultations pertaining to the outstanding implementation issues under the TRIPS Agreement and the Doha work programme could be held in the intervening period.**

### **World Intellectual Property Organization (WIPO)**

The 2007 third quarter IP Quarterly update contains information on the Assemblies of the Member States of WIPO that took place from 24 September – 3 October 2007.

During the fourth quarter of 2007 WIPO organised an **International Conference on Intellectual Property and the Creative industries** in Geneva on 29 and 30 October 2007. During the meeting R. Keith Sawyer, Professor of Psychology at Washington University, outlined how creativity occurs in collaborating groups, individual minds, and broadly distributed social networks. He concluded that the implications of the results of the research on the process of creativity on intellectual property rights are dramatic and profound, because in many countries, the IP regime is not designed to foster the natural flow of the creative process at any of the three levels: group, individual, or social network (WIPO/IP/IND/GE/07/1). Speaking on “a new economics for creative industries and development,” Professor Stuart Cunningham, Director of the Australian Research Council Centre (ARC), explored how evolutionary economic analyses could be developed in the light of possible models of the relationship between creative industries and the wider economy, and where new, mobile and Internet media might fit into those models. Other presentations were made on the contribution of cultural economics to the analysis of the creative industries, and Creative Enterprises Development. WIPO also organised a **Symposium on Intellectual Property and Life Sciences Regulation** in cooperation with the **Stockholm Network** on November 16, 2007. The symposium considered presentations on protection of test data, linkage between product regulation and the patent system, and linkage between generic entry and the

patent system.<sup>36</sup> On 12 December 2007, WIPO organized a **High-level Forum on Intellectual Property for Least-Developed Countries: Building Capacity and a Knowledge Base for Wealth Creation, Social and Cultural Development**. Although the work programme of the meeting shows various discussions, there is only a press release and no report on the outcomes of the meeting.

The **Eighteenth Session of the Standing Committee on the Law of Trademarks Industrial Designs and Geographical Indications (SCT)**, was held from 12 – 16 November 2007. The summary by the Chair of the SCT included a request to the WIPO Secretariat to finalize its work on trademark opposition procedures, and possible areas of convergence in such procedures. The SCT also requested the Secretariat to invite the World Health Organization (WHO) Secretariat to make a presentation for the next meeting on the application of the relevant WHO resolutions relating to the non-appropriation of proposed and recommended *International Nonproprietary Names for Pharmaceutical Substances* (INNs).

The **Fourth Session of the Advisory Committee on Enforcement** was held on 1 - 2 November 2007. The committee extensively discussed procedural matters and enforcement of intellectual property rights, and received a request to consider the recommendations of the WIPO Development Agenda on enforcement. However, the Committee could not agree on its future work. The Chair invited members for further consultation and to provide the WIPO Secretariat with a proposal on the topic, as well as on the procedure to be applied for selecting future topics, **by the end of February 2008**.

### **Upcoming WIPO meetings in the first quarter of 2008**

- Twelfth Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 25 – 29 February 2008;
- Eighth Meeting of the WIPO Audit Committee, 18 - 21 February 2008;

<sup>36</sup> See WIPO website ([www.wipo.int](http://www.wipo.int)): Symposium on Intellectual Property and Life Sciences Regulation.

- First Session of the Committee on Development and Intellectual Property (CDIP), 3 – 7 March 2008;
- Sixteenth Session of the Standing Committee on Copyright and Related Rights, 10 - 12 March 2008

## Other Multilateral Fora

### World Health Organization

The second meeting of the Intergovernmental Working Group on Public Health, Innovation and Intellectual Property (IGWG) was held from 5 – 10 November 2007. During the meeting the IGWG was able to make progress on the draft Global Strategy and Plan of Action (A/PHI/IGWG/2/Con.Paper No.1 November 10 2007). The IGWG will meet from **28 April to 3 May 2008**. Members are requested to submit comments on parts of the text that have not yet been discussed by **31 January 2008**.

### United Nations Climate Change Conference - Bali, 3 - 14 December 2007

The conference adopted the *Bali Action Plan/Road Map* that established the Ad Hoc Working Group on Long-term Cooperative Action under the Convention to launch negotiations towards a new climate change regime (Decision -/CP.13, Bali Action Plan). The decision targets 2009 for conclusion of the negotiations bringing about a new climate change regime that should enter into force when the existing Kyoto Protocol expires in 2012. The negotiations would include action for adapting to the negative consequences of climate change, reducing greenhouse gas emissions, facilitating widespread deployment of climate-friendly technologies, and financing both adaptation and mitigation measures. Other key decisions of the conference include:

1. Extending the mandate of the Expert Group on Technology Transfer for a further five years, with new terms of reference and sets of recommendations to enhance technology transfer (Decision -/CP.13, Development and transfer of technologies under the Subsidiary Body for Scientific and Technological Advice);
2. Funding adaptation projects in developing countries, financed by the Kyoto Protocol's Clean Development Mechanism (CDM), under the management of the Global Environment Facility (GEF) (Decision -/CP.13, Development and transfer of technologies under the Subsidiary Body for Implementation); and
3. Scaling up the level of investment and kick starting strategic programmes for the transfer of needed mitigation and adaptation technologies to developing countries.<sup>37</sup>

### United Nations Conference on Trade and Development (UNCTAD)

**UNCTAD-ICTSD Roundtable - Is Product Patent Protection Necessary in Developing Countries for Innovation? R&D by Indian Pharmaceutical Companies after TRIPS**, was held on 11 October 2007 in Geneva. The discussion was based on the presentation by Professor Sudip Chaudhuri, Indian Institute of Management, Kolkata, India, on the subject.

**Science, Technology, Innovation and ICTs for Development: UNCTAD XII pre-event**, 6 December 2007: the meeting focused on measures by government to encourage technology and innovation for development and partnership with businesses, universities, international agencies and donors.

The preparatory meetings for UNCTAD XII continue under various clusters. Currently, delegates are considering the draft consolidated text of the Chair on UNCTAD XII that attempts to define the objectives, policy response and actual tasks of UNCTAD on various issues, including intellectual property, science and technology and investment.

### The UN Internet Governance Forum (IGF)

The second meeting of the Internet Governance Forum (IGF), the forum for multi-stakeholder policy dialogue on the future and governance of the Internet, was held from 12 to 15 November in Rio de Janeiro, Brazil. The IGF is an outcome of the second phase of the World Summit on the Informa-

<sup>37</sup> United Nations Climate Change Conference - Bali, 3 - 14 December 2007, UN Press Release, 15 December.

tion Society. Following the mandate of the Tunis Agenda for the Information Society, the UN Secretary-General convened the first IGF meeting on 30 October – 2 November 2006 in Athens. The second meeting of the IGF was a follow up to the Athens meeting. The IGF is led by an Advisory Group composed of 45 individual representatives from different stakeholder groups, including government, academia, civil society, political and technical intergovernmental organisations and businesses. The second element of the structure of the IGF is “dynamic coalitions”. It encompasses multi-stakeholder groups on different issues under discussion in the IGF. The IGF annual meetings are organized in formal sessions on each of the five thematic areas, in addition to open forums, best practices dialogues and workshops organized by the various dynamic coalitions. The results of the workshops are reported back to the main sessions.

At the Rio de Janeiro meeting, there were seven main sessions organized as interactive multi-stakeholder panels. Over 80 meetings took place in parallel with the main sessions. The discussions were organized around five themes: Critical Internet Resources; Access; Diversity; Openness; and Security. The Chair of the IGF, Nitin Desai, the United Nations Secretary-General's Special Adviser for Internet Governance released a summary report of the meeting in his individual capacity. Among other issues, the Chair's report identified that it was clear that issues of access needed to remain as a core agenda item. In addition, the report noted possible areas for the agenda of the next IGF included a focus on Internet rights and indicated that another area of development could be to allow greater scope for stakeholders to express commitments, and that these commitments would be part of demonstrating the relevance and contributions of the IGF to the Internet community. The report clearly shows the continued dilemma on structuring and formalizing the IGF process.<sup>38</sup>

**The session concluded with a formal invitation to the delegates to the third IGF meeting in New Delhi, 8 - 11 December 2008.**

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

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

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

The fourth quarter of 2007 was marked by controversies over the approval of FTAs with Colombia, Ecuador, Korea and Panama. During the fourth quarter, the US-Peru FTA was finally approved by the United States Senate. There has been no major progress with respect to FTAs still under negotiation. Negotiations for an FTA with the United Arab Emirates are reportedly not going to be resumed under the current United States administration.<sup>39</sup>

### **Free Trade Agreements involving the European Union**

Many of the negotiations with the **African, Caribbean and Pacific Countries (ACP)** on Economic Partnership Agreements (EPAs) concluded with interim agreements on trade in goods by 31 December 2007. The EU and ACP are expected to continue to discuss the rest of the trade and investment pact, although intellectual property rights have increasingly become a controversial topic. It is only Cariforum that has signed an EPA with provisions on an Innovation and Intellectual property chapter.

The EU-Mercosur FTA negotiations are expected to resume in 2008. Other consultations and negotiations are under way with India, Korea, the Gulf Cooperation Council, ASEAN, Central American Countries, and the Andean Community.

<sup>38</sup> See the report at [http://www.intgovforum.org/Rio\\_Meeting/Chairman%20Summary.FINAL.16.11.2007.pdf](http://www.intgovforum.org/Rio_Meeting/Chairman%20Summary.FINAL.16.11.2007.pdf).

<sup>39</sup> Safura Rahimi, “US puts UAE free trade deal on ice”, posted at [www.bilaterals.org](http://www.bilaterals.org) December 23, 2007.



## 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 organisations, 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 organisations. 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.



17-19, Chemin du champ d'Anier  
POB 228, 1211 Geneva 19  
Switzerland  
Tel. +4122 791 8050  
Fax. +4122 798 8531  
[south@southcentre.org](mailto:south@southcentre.org)  
[www.southcentre.org](http://www.southcentre.org)



Center for International Environmental Law  
15 rue des Savoises,  
1205 Geneva, Switzerland  
Tel. 41-22-789-0500  
Fax. 41-22-789-0739  
[info@ciel.org](mailto:info@ciel.org)  
[www.ciel.org](http://www.ciel.org)