

INTELLECTUAL PROPERTY QUARTERLY UPDATE



AN INTERGOVERNMENTAL ORGANIZATION
OF DEVELOPING COUNTRIES



CENTER FOR INTERNATIONAL
ENVIRONMENTAL LAW

THE ROADMAP FOR PATENT COOPERATION TREATY REFORMS: PROCEDURAL STREAMLINING FOR SUBSTANTIVE HARMONIZATION?

I. Introduction

The Second Session of the World Intellectual Property Organization's (WIPO) Patent Cooperation Treaty (PCT) Working Group (WG), held on 4-8 May 2009 in Geneva, witnessed a clear division between developed and developing countries regarding the WIPO's roadmap for reforming the PCT system. The proposals

and the draft roadmap put forward at this PCT session outlined an ambitious plan to facilitate a *World Patent* regime by increasing the reliance by national patent offices on the PCT search and examination for grant of patents and by reducing the scope of the authority of national offices to conduct search and examinations in the national phase. This plan was strongly pushed by developed countries and a number of users groups that participated in the negotiation on virtually an equal footing with Member States. With elements that substantially depart from the existing PCT framework, these proposals will not only result in *de facto* substantive patent law harmonization, but also result in automatic

INSIDE

THE ROADMAP FOR PATENT COOPERATION TREATY REFORMS: PROCEDURAL STREAMLINING FOR SUBSTANTIVE HARMONIZATION.....	1
Introduction.....	1
About the PCT Reform.....	2
Consequences of PCT Reforms.....	4
Discussions during the Second PCT Working Group Session.....	5
PCT WG Negotiation. Coordination and Outcome	7
AN OVERVIEW OF RELEVANT DEVELOPMENTS IN THE VARIOUS IP FORA	10
World Trade Organization (WTO).....	10
World Intellectual Property Organization (WIPO).....	11
World Health Organization (WHO).....	15
Developments in Other Fora	16
World Customs Organization (WCO).....	16
Convention on Biological Diversity (CBD).....	17
Food and Agriculture Organization (FAO).....	18
United Nations Framework Convention on Climate Change (UNFCCC).....	18
World Summit on Information Society (WSIS).....	18
Regional and Bilateral Free Trade Agreements (FTAs) with Intellectual Property Provisions.....	19
FTAs Involving the United States.....	19
FTAs and Economic Partnership Agreements Involving European Union.....	19
Other FTAs	20
Other Related Processes.....	20
Proposed Anti-Counterfeiting Trade Agreement (ACTA)	21

patent grants in all Member States of the PCT. A draft resolution giving life to the roadmap was also suggested for adoption by the Assembly of the PCT Union in September 2009.

However, in the face of strong opposition from the developing countries, the PCT Working Group concluded with only a Chair's summary and a report of the proceedings to be sent to the PCT Assembly. No resolution on the roadmap was agreed upon due to concerns raised by developing countries. The effective coordination and participation of developing countries in raising these concerns was a key factor in this regard. Furthermore, under the pressure of developing countries, the implementation of WIPO Development Agenda was formally introduced into the agenda of the PCT WG. This article reviews the recent session of PCT and seeks to assist developing countries in addressing the emerging challenges on PCT reforms. While PCT reform is underway, developing countries should actively participate in the PCT negotiations process in the future.

II. About the PCT Reform

PCT reforms have been one of the three major pillars of the "WIPO Patent Agenda"¹, which has been accorded a top priority in WIPO's activities since 2001 with the ultimate goal of creating an international legal framework for a *World Patent* regime. A *World Patent*, or *Universal Patent*, describes an exclusive right granted to the applicant by one centralized institution, which once granted becomes legally binding for all states subscribing to the system. It would break fundamentally with the principle of territoriality as reflected in international patent law today. The major beneficiaries of a *World Patent* would be multinational companies who are seeking worldwide exclusive monopolies. Compared to the now-suspended discussions in the WIPO on the Substantive Patent Law Treaty (SPLT) in which there was an attempt by developed countries to eliminate existing TRIPS flexibilities and adopt TRIPS-plus

patent legislation², the ongoing PCT reform is receiving much less attention by developing countries in the context of its role in facilitating global patenting.

The PCT is essentially a patent filing procedure with some elements of patent examination procedure. However, the US and other developed countries would like to push for a major overhaul of the PCT system in order to promote global patenting. The PCT reform process was started by WIPO in 2000 based on a US proposal which proposed changing the PCT in two stages. First, it would include "modest, simplifying and PLT-based changes that would be targeted for implementation in about five years", and the second stage would contain "a radical departure from today's PCT system" that could include "a much more comprehensive overhauling of the entire PCT system that would result in a system bearing little resemblance to the PCT system of today".³ Against this background, driven by the US, the process of PCT reform was launched by the PCT Assembly in 2000. Not coincidentally, the first phase of PCT reform, with the establishment of the "Working Group on Reform of the PCT" in 2001, ended in 2007 after six years of negotiations, while the second stage of the reform, with the establishment of a "PCT Working Group", started in 2008 shortly after the completion of the first phase of PCT reforms.

The PCT of 1970

The PCT is a WIPO administered treaty concluded in 1970. 141 States, including many developing countries are parties to the Treaty. This Treaty provides patent applicants with the opportunity of filing an international patent application. Instead of filing separate applications in different countries, the applicant can file a PCT application with the International Bureau (WIPO) or any national or regional patent office. The date of this international filing is deemed as the date of filing in all national offices. Based on this application, national or regional offices that are designated by WIPO as International Search Authorities (ISA) conducts an international search for

¹ The three major pillars of the Patent Agenda are the PCT reform process, the PLT, and the draft SPLT.

² These discussions were suspended by the Standing Committee of Patent Law (SCP) at WIPO in 2004

³ See PCT/R/1/2.

prior art and issues an International Search Report (ISR), and the application is made public 18 months from the date of filing. This was a mandatory process under the PCT system as originally devised. Following the publication of the application and the issuance of the ISR, after the expiry of 20 months from the date of filing, the applicant had to transmit a copy of the application to a national office if he wished to obtain a patent in that country, unless he exercised his option to further delay national entry for another 10 months by electing for an international preliminary examination on patentability by a WIPO designated international examination authority. This option could be exercised only in respect of those countries which did not make reservations to chapter II of the PCT which provides for this additional international phase procedure. The international preliminary examination report (IPER) states whether the claims in the application meets the requirements of patentability i.e., novelty, inventive step and industrial application, as defined in the PCT Article 33.

Thus, PCT did not seek to harmonize the international patent system leading to the grant of a global patent based on PCT applications. Rather, it sought to provide an easy, single-window international facility for filing applications instead of requiring applicants to go through the arduous process of filing multiple applications in several countries. Moreover, the ISR and IPER was designed to serve as an information tool to enable applicants to sense whether their applications are likely to be granted patents if they enter the national phase. The ISR and IPER were non-binding reports and did not prevent national offices from conducting their own search and examination processes to determine the patentability of the application based on the substantive criteria in their national laws. Thus, it respected the territorial differences in substantive standards of patent laws in different countries. This is made clear under Article 27.5 of the PCT. National offices could base their decisions on the ISR or IPER if they found them reliable, but were not bound to do so.

PCT Reforms: First Phase

The process of PCT reforms was initiated since 2000-01 as an integral part of WIPO's Patent Agenda initiative which sought to promote a globally harmonized patent system based on 3 pillars – a Substantive Patent Law Treaty (SPLT) harmonizing substantive patent law standards including criteria for novelty, inventive step and industrial application; conclusion of a Patent Law Treaty harmonizing formal procedures for patent applications at the national level, and reforming the PCT to make it suitable to a harmonized international patent system such that international patents can be granted based on PCT applications and PCT search and examination processes. Under the original US proposal for PCT reforms, the approach for realizing PCT reforms was based on the following milestones – adoption of the PLT in 2000, starting the process of PLT-based PCT reforms in 2000 and its implementation by 2005, followed by a complete overhaul of the PCT system.

To facilitate discussions on the first phase of the PCT reforms, the Assembly of the PCT Union established a Committee on Reform of the PCT in 2000 and on the recommendation of this Committee; a Working Group on Reform of the PCT was established in 2001. The Working Group held 9 sessions between 2001 and 2007 and carried out changes in PCT Regulations with significant implications. The original PCT system today stands changed in the following manner: instead of conducting a simple international search, an ISA also provides a written opinion (WOISA) on the patentability based on the application along with the ISR. Based on this ISR/WOISA, the WIPO issues an International Preliminary Report on Patentability (IPRP Chapter I) if the applicant does not opt for an international examination under chapter II of the PCT. However, the IPRP remains confidential till the expiry of 30 months from the filing date because national entry is now deferred to 30 months instead of 20 months. Thus, early national entry in 20 months that was possible under the original PCT is not possible now unless a country has made a reservation to that effect (many developing countries have made such reservations). If the applicant opts for international examination under Chapter II, an IPRP II is issued based on the

ISR/WOISA (making international examination faster) followed by national entry in 30 months. The PCT Regulations have also been amended in accordance with PLT provisions. For example, if international application is filed at a date after the priority period has expired but within 2 months of that date and the failure to file on time occurred in spite of due care or was unintentional, then the priority is restored. Originally, if a PCT application is filed 14 months after a national application on the same claims, the priority period of 12 months under the Paris Convention would be lost. The PLT provides for grounds for restoration of priority for late filing, and the PCT Regulation has been amended accordingly.

The Working Group also discussed proposals by the WIPO Secretariat for revision of the PCT and making greater use of international search and examination reports. In 2002, the Secretariat proposed that instead of revising the PCT through a standard treaty revision mechanism provided under Article 60 of PCT, the PCT may be revised by terminating the existing treaty and simultaneously concluding a new treaty or by concluding a new treaty and phasing out the existing treaty (PCT/R/WG/3/3). It was considered by the Working Group that though relevant, the proposal was premature and can be considered at a later stage. It must be noted that this was at a time when the adoption of a Substantive Patent Law Treaty was a distinct possibility. In keeping with the buoyant spirit from the possibility of an SPLT, the Secretariat proposed in 2003 the adoption of protocols to the PCT under which national offices will rely on PCT search and examination reports for grant of patents in most cases (PCT/R/WG/5/9). However, as the SPLT faced stringent opposition in WIPO and discussions on SPLT became dormant, these proposals also received less attention and the mandate of the Working Group expired without any progress on these issues.

Revival of discussions on PCT Reforms: The New Working Group

In 2007, the Assembly of the PCT Union constituted a Working Group to discuss matters that needs to be submitted to the Assembly. Most commonly this involves matters of amendment of the PCT

Regulations. So far the Working Group has held 2 sessions. In its first session, the Secretariat submitted a proposal for enhancing the value of PCT search and examination to ensure that national offices rely on those reports in their work and in most cases grant patents based on those reports, thus reducing unnecessary duplication of work (PCT/WG/1/3). This was a reintroduction of the 2003 proposal mentioned above (PCT/R/WG/5/9) with an important distinction that it did not propose any new protocol but suggested amending the regulations to this effect. This document called for work sharing between national offices and the international search and examination authorities and drew attention to such work sharing arrangements as the Patent Prosecution Highway (PPH) that have bilaterally established between US and Japanese patent offices (many other national offices are now a part of PPH). The PPH is a system outside the PCT. Under this system an application filed in one PPH office (say USPTO) is automatically deemed as filed in other PPH offices (JPO, EPO, etc). The search and examination by the USPTO then is relied upon by the other PPH offices for grant of patent. In the second session of the Working Group in 2009, the Secretariat presented a roadmap for PCT Reforms with the objective of reducing unnecessary duplication, eliminating reservations to the PCT and establishing a high presumption of validity for international search and examination reports. This was accompanied by a US proposal for comprehensive PCT reforms by developing a system under which an international search and examination report produced through work sharing between major patent offices becomes automatically binding on all national offices unless they are specifically rejected within a stipulated time (say 6 months). Developing countries vehemently opposed these proposals and hence these proposals were not recommended for adoption by the Assembly of the PCT Union. However, this issue is most likely to confront developing countries again in the PCT Working Group in future.

III. Consequences of PCT Reforms

Following their entry to the PCT, patent offices in developing countries have been

flooded with a massive number of PCT applications which are filed by foreigners and not local innovators. The extended deferral of national phase entry under the PCT system, which is 30 months unless a country has a specific reservation, means that till the expiry of 30 months the local innovators are not sure whether to go ahead with their innovations because if the PCT applicant decides to enter national phase after 30 months and a patent is granted, the local innovator may be held liable for patent infringement. If the PCT applicant does not pursue a national patent after 30 months, then the local innovation is delayed substantially. Many countries made reservations to chapter II of PCT to ensure early national entry in 20 months as originally stated in Chapter I (Article 22). Some countries have therefore, made reservations to the change which delays national entry under chapter I to 30 months. The proposals in the Roadmap seek to eliminate these reservations by making States committing to do so within stipulated time frames.

Secondly, PCT reforms seek to make international search and examination de facto binding on national offices. It seeks to commit national offices to rely on international search and examination reports and not to conduct search and examination in the national phase on the ground that they are unnecessary and duplicative. It needs to be noted here that national search and examination processes not only ensure more effective scrutiny of patent applications (because standards of patentability differ in countries and PCT search and examination, and PCT search and examination is based on prior art which is publicly disclosed in a written form and hence does not take into account traditional knowledge which may not be disclosed in written form) but also national procedures provide for pre-grant opposition mechanisms which is an important tool for safeguarding against the grant of bad patents. Moreover, increased reliance on PCT search and examination for grant of national patents will also increase the burden of post grant opposition and litigation, which may not be very feasible for generic companies and SMEs particularly in developing countries and LDCs.

During the discussions during the last session of PCT Working Group, the Secretariat tried to assure the developing countries that the reforms as envisaged in the roadmap were not designed to undermine the right of national offices to apply their own substantive criteria of patentability and conduct national search and examination procedures in that regard. Rather, the proposals in the roadmap sought to streamline the system to make it more effective by amending the PCT Regulations and not the Treaty. However, it needs to be remembered that what has been proposed in the PCT Working Group is merely a milestone in a long road to far reaching reforms for overhauling the system as envisaged in the original US proposal of 2000. Indeed, what has been proposed in the roadmap is a revival of earlier proposals by the Secretariat to the previous Working Group on Reform of the PCT. Therefore, the proposals in the roadmap must be viewed in context and developing countries should consider the long term implications of this strategy of gradual but incremental reforms.

IV. Discussions during the Second PCT Working Group Session

Overall, the discussions in the PCT Working Group focused on two documents: (a) The proposal for *Comprehensive PCT Reform* made by the US, and (b) *The Future of the PCT* containing a *Draft Roadmap for the Development of the Future of the PCT* prepared by the WIPO Secretariat.

IV.1 About the US Proposal for Comprehensive PCT Reform (PCT/WG/2/12)

The proposal for *Comprehensive PCT Reform* (WIPO PCT/WG/2/12), tabled by the US, suggests the establishment of a new PCT regime (PCT II). It includes four major features, (a) combining international and national processing for more efficient processing in the international search authority/national office performing search and examination; (b) collaboration among international authorities in conducting search and examination; (c) allowing submission of prior art by the applicant; and (d) allowing third party prior art

submissions. According to the US proposal, the international search and examination reports prepared on the basis of searches done by three international search authorities (ISA) will become binding on national offices unless the national offices issue a notification of rejection of the same within a specific time period – e.g. 6 months.

The US proposal, if adopted, would have had far-reaching implications on patent grants in developing countries. Firstly, applications receiving a positive “PCT II Patentability Report” at the end of the international/national processing by the three ISAs would essentially result in automatic patent grants in all member States. Secondly, it will result in *de facto* substantive patent law harmonization through a protocol system, similar to a Hague (1999)-type system, whereby a member State would have a given amount of time following the issuance of a positive International Patentability Report to issue a notification of refusal indicating that the conditions for the grant of protection have not been met. Under the Common Regulations Under the 1999 Act, the 1960 Act and the 1934 Act of The Hague Agreement Concerning the International Registration of Industrial Designs, Rule 18.1 “Period for Notification of Refusal” elaborates Article 12 of the PCT Convention, stating national offices have 6 months in which to issue a notification of rejection. Thirdly, imposing a limited time for developing countries’ national offices to reject an international report implies most international patentability reports will be admitted without effective scrutiny, particularly for offices which already have immense backlogs.

IV. 2 About the Future of the PCT prepared by WIPO Secretariat

The document on *The Future of the PCT* (PCT/WG/2/3), prepared by the WIPO secretariat, sets out basic principles and a draft roadmap reflecting the actions that need to be taken to reform the PCT system. The document notes that while the PCT system has not been as effective in addressing certain issues, particularly, the number of applications exceeds the capacity of the national Offices to examine the applications, leading to large backlogs

in some States. On this basis, it seeks to establish some fundamental “principles”, e.g., duplication of work should be minimized; patents granted on the basis of international applications should have a high presumption of validity if examined; and unnecessary actions for Offices and applicants should be eliminated, etc. However, a number of principles were proposed without conceptual clarity. Developing countries requested that appropriate definitions of these principles be made. Notably, they sought clarity on what exactly was meant by “duplication” of work, noting particularly that Contracting States were entitled to prescribe their own conditions of patentability. The term “high presumption of validity” is open to different interpretations including legal presumption. It also lacks of clarity on the terminology “unnecessary actions”.

Despite not having any conceptual clarity about “duplication”, the proposed roadmap contained specific suggestions on reducing or eliminating duplication in the work of national Offices such as:

1. From 1 January 2010, national Offices acting as international search offices (ISA) should agree that international searches carried out by them as designated offices will be relied upon by them if the international application enters the national phase.
2. PCT Contracting States should seek to eliminate the approximately 150 reservations, notifications and declarations of incompatibility in force for various States under Article 64 of the PCT in respect of various PCT Articles, Rules and Administrative Instructions. The roadmap proposes that by January 2011, all PCT Offices should complete a review of reservations, notifications and incompatibilities with the PCT which apply to their Offices, identify the reasons for such reservations, and look at the possibility, mode and timeline for their elimination.
3. The roadmap calls for beginning by July 2010 a pilot project testing models for allowing examiners from at least 3 different patent Offices to work jointly on the same application to establish a single common report.

The roadmap suggests that if a PCT application satisfies the search and examination by a few offices, e.g., three offices, then it will be safe for any other office to consider that the application will also meet its examination requirements.

4. The roadmap calls for using international search and examination reports as a basis for national phase processing, pursuing an international application in preference to a national one, and a single common report having a high degree of presumption of validity.

Disagreements between developed and developing countries came up during the discussions on the draft roadmap in relation to its implications concerning substantial revisions of the PCT system. The major concerns raised by developing countries include:

- (i) The roadmap essentially views national search and examination of international patent applications as duplicative actions which leads to unnecessary delay for the patent applicants). Hence, it calls for reforms that will effectively turn most national patent offices into post offices for a few patent offices that are designated as International Search and Examination Authorities.
- (ii) By proposing the elimination of reservations by PCT member states, notifications and declarations of incompatibility in force for various States under Article 64, the roadmap goes against the right of Contracting States to make reservations to the PCT under Article 64. Removal of such reservations will make an international examination applicable where the applicant demands an international examination. Noting the international patents system is not a harmonized system, there are different standards of patentability that are followed in different countries, increasing reliance on examination done by some offices for raising a presumption of validity of international patent applications for grant of patent in other offices essentially facilitates substantial harmonization on which there has

been no general consensus in other forums in WIPO.

- (iii) The roadmap also suggests that international search and examination reports are to be substantially relied upon during the national examination phase, such that the national examination is accelerated. Thus, national offices should presume that an international search and examination report is valid and relying upon the same grant their approval to the patent application in the national phase without further examination unless it is necessary.
- (iv) The proposal in the roadmap constrains the autonomy of national patent Offices, including patent offices of developing countries which have become International Searching and Examining Authorities (ISEAs). Integrating this system to the PCT as suggested by the roadmap will lead the examination decisions of a small group of patent offices become binding on the other offices in the long run, and these selected offices will be responsible for granting monopolies over the world's most important technologies.

V. PCT WG Negotiation: Coordination and Outcome

South-South cooperation played a critical role in reshaping the dynamics of the PCT WG negotiation. The proponents of global patenting intended to adopt a fast-track approach in submitting a resolution giving life to the roadmap for adoption by the PCT Assembly in September 2009. However, effective coordination among developing countries foiled the attempt to adopt the resolution.

Developing countries also had major concerns about procedural aspects relating to the roadmap. These include:

- (i) Is the PCT WG session a member-driven, Secretariat-driven, a small member-driven or user groups-driven process? The document was released for the first time in February 2009 as a memorandum by the WIPO Director General for informal consultations with certain

PCT offices and users of the PCT system. Thereafter the document was presented at the 16th Session of the Meeting of International Authorities (MIA) in Seoul in March 2009. The present version of the document has been updated the memorandum to take into account some of the comments made at the 16th MIA.

- (ii) Is it appropriate for users groups to participate on an equal footing with Member States during the negotiations? In the course of negotiations, the user groups made interventions and expressed their strong dissatisfaction with those proposals from developing countries in the course of negotiations among member states. The American Intellectual Property Law Association (AIPLA) even asserted that member states in the Working Group should work for the users of the system who pay for it.

Substantively, the five-day negotiation process can be divided into 3-phases:

(a). Phase I: from draft roadmap and resolution to non-paper

During this stage, developing countries raised a number of concerns about the draft roadmap, including lack of clarity on many fundamental concepts, no reference being made to TRIPS flexibilities, little participation of other stakeholders such as SMEs and generic pharmaceutical companies, no reference made to the recommendation 15 and 17 of the WIPO Development Agenda. In view of these concerns, the Secretariat released a non-paper (Paper No. 3 (E), May 5, 2009) amending the draft resolution and the general principles of the roadmap.

(b). Phase II: from non-paper to postponement of deliberation

While recognizing that the revised draft resolution and general principles of the roadmap marked a progress, developing countries raised a number of concerns sited above. A large number of developing countries including India, Brazil, South Africa, Egypt, Indonesia, the Philippines, Senegal, Angola, Burundi, El Salvador, stated that more time is needed to study

the contents of the roadmap before agreeing to any resolution or the roadmap itself. A resolution for adoption by the PCT Assembly in September 2009 will be acceptable only if the document is revised in accordance with the demands of developing countries. Suggested by the Chair, the Working Group agreed to discuss other proposals on the agenda first, in effect postponing the substantive discussion of the non-paper.

(c). Phase III: way forward with the roadmap

After the Working Group returned to discussing the way forward with the roadmap and the resolution, the Chair suggested three possible options for finding a way forward, and also invited suggestions for any other possible option. The options proposed by the Chair were: 1) sending the draft resolution and the roadmap with the amendments in non-paper 3 to the PCT Assembly for adoption; 2) sending the resolution and roadmap to the PCT Assembly for adoption after clarifying the concerns raised by the Member States; 3) sending a report of the discussions in the Working Group to the PCT Assembly.

While the developed countries favoured option 2, developing countries favoured option 3 or option 2 with certain conditions. Three groups from developing countries presented their positions: (a) the Latin American and Caribbean countries favoured option 2 subject to certain conditions, (b) The group of Like-Minded Countries (India, Indonesia, the Philippines, Sri Lanka, South Africa and Egypt) from the Asian and African groups, also proposed specific inputs for the Chair's summary under option 3, and (c) African Group submitted a proposal, i.e. that the Secretariat should carry out a study on all problems facing the PCT system and their solutions. All three groups stated that discussions for further improving and reforming the PCT system must take fully into account the 45 recommendations of the WIPO Development Agenda.

After intensive informal consultations between groups, it was decided that no resolution would be sent to the PCT Assembly. A Chair's summary accommodating the views of developing countries was adopted by the Working

Group which will be sent to the PCT Assembly together with a report of the proceedings. The adopted Chair's summary states that PCT bodies should continue their work to improve the PCT within its existing legal framework to deliver results which meets the need of applicants, Offices and third parties in all Contracting States, *without limiting the freedom of Contracting States to prescribe, interpret and apply substantive national conditions of patentability and without seeking substantive patent law harmonization or harmonization of search and examination procedures.* The relevant PCT bodies should discuss ways in which these objectives can be achieved by taking an incremental approach through a Member driven process involving broad-based consultations with all stakeholder groups, including regional information workshops, taking into account the WIPO Development Agenda recommendations.

Developing countries won an important battle through their active participation, effective coordination, and strong interventions. South Centre was able to provide some timely technical and political inputs, in addition to supporting proactive coordination of positions among developing countries on some crucial issues of substance and process. The solidarity and effective coordination between developing countries during the whole session was highly impressive. However, it is obvious that the proponents of patent law harmonization and a world patent regime were deeply disappointed by their failure. They are likely to keep on pushing their agenda that would be against the interests of developing countries. The road ahead will not be smooth and developing countries must remain united and coordinated, as they did during this May 2009 session of the PCT Working Group.

AN OVERVIEW OF RELEVANT IP DEVELOPMENTS IN VARIOUS FORA

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

The World Trade Organization (WTO)

General Council

The General Council held a meeting on 27-28 May 2009. It was decided that the Seventh Ministerial Conference of the WTO will be held in Geneva from 30 November to 2 December 2009 under the general theme "The WTO, the Multilateral Trading System and the Current Global Economic Environment".⁴

TRIPS Council

The Council on Trade-Related Aspects of Intellectual Property Rights (TRIPS Council) held a meeting on 8-9 June 2009 and a special session of the TRIPS Council was held on 10 June 2009. 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. It was decided to continue informal consultations on these issues.

Non-Violation and Situation Complaints

The issue of whether non-violation and situation complaints should apply to disputes pertaining to the TRIPS Agreement remained unresolved. Developing countries see such complaints as unnecessary and undesirable, and potentially threatening the use of TRIPS flexibilities for public health, nutrition, the transfer of technology and other issues of public interest in sectors of vital importance to socio-economic and technological development. Developed countries, on the other hand, supported the idea of non-violation and situation complaints.

Technical Cooperation and Capacity-Building

Many countries supported a suggestion by Egypt that all approaches to technical cooperation and capacity building should be development oriented, demand driven, neutral and transparent. A submission by Uganda on its experience with two capacity building projects funded by the EU was discussed. This submission follows 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 for implementation of the agreement.

Observer Status for Intergovernmental Organizations (IGOs)

Over 15 requests of observer status for IGOs are pending, including the request for observer status by the Convention on Biological Diversity (CBD) and the South Centre. This has important implications for discussions on the relationship between CBD and TRIPS. Only the US continues to be opposed to the observer status of CBD.

Seizure of Generic Drug Consignments at EC Ports

The issue of seizures of generic drugs consignments at EC ports was raised during discussions on 'Other Business' (Agenda Item "M") by India and Brazil. In their separate interventions they drew attention to continued incidents of seizure of shipments of generic medicines in transit in

⁴http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/WT/GC/W601R1.doc

EC ports with as many as 17 seizures by Dutch authorities in 2008 followed by the latest such seizure in Frankfurt, on the basis of EC Regulation 1383/2003. All of these consignments, which were eventually released, were seized on allegations of being counterfeit, fake, substandard, potentially dangerous, or in violation of patents, and points to an emerging pattern of creating barriers to legitimate trade of generic drugs and challenging the Doha Declaration on Public Health. India stated that no satisfactory response to India's formal communication on this matter was received from the EC nor has there been any review of the relevant EC regulation in question. The EC reconfirmed its commitment to the Doha Declaration on TRIPS and Public Health when the matter was raised at the last meeting of the TRIPS Council. India called upon the EC to urgently review Regulation 1383/2003 and bring it into conformity with the letter and spirit of the TRIPS Agreement, the rules-based WTO system and the Doha Declaration on Public Health.

Special Session of the TRIPS Council

A special session of the TRIPS Council was held on 10 June with Ambassador Trevor Clarke of Barbados as the 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) was requested to draft a legal text detailing how such a mechanism would function. The EU felt that this would be an unnecessary diversion from the real issues: the level of Member States' participation in the register and the consequences of the same.

Dispute Settlement Body

China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights (DS362)

In a letter to the DSB dated 15 April 2009, China notified the DSB that it intends to implement the recommendations and rulings of the DSB in this dispute and stated that it would need a reasonable period of time for implementation.⁵ On 12

May, China communicated to the DSB that, in order to allow sufficient time for the parties to discuss a mutually agreed period for implementation, China and the US agreed to the following: 1) in the event an arbitration under Article 21.3(c) of the DSU is requested, it shall be completed no later than 60 days after the date of the appointment of an arbitrator, unless the arbitrator, following consultation with the parties, considers that additional time is required; and (2) any award of the arbitrator (including an award not made within 90 days after the date of adoption of the DSB recommendations and rulings) shall be deemed to be an award of the arbitrator for the purposes of Article 21.3(c) of the DSU in determining the reasonable period of time for China to implement the recommendations and rulings of the DSB.

United States – Section 110(5) of the US Copyright Act (WT/DS160)

On 9 June, the US submitted a report to the DSB reiterating its commitment to continue to confer with the EC in order to reach a mutually satisfactory resolution regarding the implementation of the recommendations and rulings in this case.

World Intellectual Property Organization

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

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

An update on the IGC will be published in the next issue of the IP Quarterly Update.

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

The SCT held its twenty-first session on 22-26 June 2009.

Discussions on possible areas of convergence in industrial design law and practice, grounds of refusal of all types of marks, and technical and procedural aspects of the registration of certification and collective marks will continue at the

⁵http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/362-11.doc

next session of the SCT. The WIPO Secretariat was requested to prepare a revised working document on these issues. The Secretariat was also requested to prepare a separate working document examining the possible extension of the WIPO Digital Access Service for Priority Documents to industrial designs and trademarks and the creation of a dedicated webpage to allow users to identify SCT reference documents by subject matter. The SCT also decided that the draft questionnaire to be prepared by the Secretariat on the protection of official names of States against unauthorized registration or use as trademarks should also make reference to the concept of geographical deceptiveness. The questionnaire will be circulated to SCT Members after its consideration by the next session of the SCT. Responses to the questionnaire will be considered at the twenty-third session of the SCT.

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

Standing Committee on Copyright and Related Rights (SCCR)

The SCCR held its eighteenth session on 25-29 May 2009.

On the issue of limitations and exceptions to copyright, the SCCR agreed to continue its work on the outstanding issues of the limitations and exceptions, as decided at the seventeenth session of the SCCR, taking into account development-related concerns and the need to establish timely and practical result-oriented solutions.

Brazil, Ecuador and Paraguay submitted a proposal for a draft Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons prepared by the World Blind Union (WBU). This proposal, together with other possible proposals and contributions from Members of the SCCR, will be taken up for discussion at the next session of the SCCR. The Secretariat also submitted an interim report on the work carried out by the Stakeholders Platform established by the Secretariat, as requested by the previous session of the SCCR. The SCCR encouraged the Secretariat to continue the work of the Platform ensuring effective participation,

particularly of stakeholders from developing countries and LDCs, and to report on its activities during the nineteenth session of the SCCR.

The WIPO Secretariat was asked to complete and provide before the next session of the SCCR, the study on limitations and exceptions for the benefit of educational activities, including distance education and its trans-border aspect (SCCR/17/2), which was requested by the SCCR in March 2008. The SCCR also requested the Secretariat to prepare analytical documents, identifying the most important features of limitations and exceptions in the various domains based on all of the previous studies, as well as addressing the international dimension and possibly categorizing the main legislative solutions. In addition, delegations were requested to submit their comments to a draft questionnaire on limitations and exceptions by 15 July 2009, from which the Secretariat will present a revised questionnaire at least one month before the next session of the SCCR with the aim of reaching final approval in that session.

On the issue of protection of broadcasting organizations, the SCCR will continue its work on updating the international protection of broadcasting organizations on a signal-based approach, as mandated by the 2007 General Assembly. The SCCR requested the Secretariat to commission a study on the socio-economic dimension of the unauthorized use of signals, including the impacts of a lack of access and the need for effective protection for broadcasters. The study is to be made available for discussion at the twentieth session of the SCCR. The Secretariat was also invited to organize regional and national seminars, upon the request of Member States or regional groups, on the objectives, specific scope and object of protection of a possible draft treaty.

On the issue of protection of audiovisual performances, the SCCR decided to continue its work and requested the WIPO Secretariat to prepare a background document on the main issues and positions and to organize informal, open-ended consultations among all members of the Committee on possible solutions to the current deadlock.

The dates of the nineteenth session of the SCCR will be announced after consultation with the Director General of WIPO.

Committee on Development and Intellectual Property (CDIP)

The CDIP held its third session on 27 April – 1 May 2009.

The CDIP reviewed and discussed selected recommendations in the Secretariat's Progress Report (CDIP/3/5) on the status of the 19 recommendations slated for immediate implementation in WIPO and requested modifications. For instance, in respect of Recommendation 7, Brazil, India, Egypt and Nigeria suggested that there should be comprehensive guidelines for WIPO technical assistance activities. Egypt suggested the need for a follow-up mechanism to evaluate the efficiency of projects and activities undertaken by WIPO. The CDIP also discussed proposed projects for recommendations 2, 5 and 8 (CDIP/3/INF/2), for which activities had been agreed by the second session of the CDIP. The Committee requested some adjustments in respect of these projects, which will be incorporated by the Secretariat. There was no discussion on proposed projects in respect of Recommendations 9 and 10 in CDIP/3/INF/2. The Secretariat presented an update on activities for the implementation of Recommendation 12 as requested by the second session of the CDIP as well as revised proposed activities under Recommendations 20, 22 and 23 (CDIP/3/3). Implementation of Recommendations 20 and 23 was discussed as part of the discussion on the thematic projects on "IP and the Public Domain" and "IP and Competition Policy" (see below).

There was no agreement on a coordination mechanism between the CDIP and other WIPO bodies or modalities for the CDIP to monitor, assess, and report to the GA on the implementation of the DA recommendations.

The main decisions of this session of the CDIP are captured in the "Summary by the Chair."⁶ The CDIP will present the Chair's summary to the next General Assembly in

September 2009, without any recommendations.

Thematic Approach

The WIPO Secretariat proposed a new methodology for discussing the recommendations in the CDIP and arriving at agreed projects/activities. The proposed approach would change the current approach of discussing recommendations individually, and rather group recommendations that address the same or similar subject matter, i.e. themes. On this basis, the Secretariat would prepare thematic projects to address each recommendation that has been included in the thematic group. Then, Member States could discuss and broadly agree on projects and other activities.

Based on the initial proposal from various developing countries, including Brazil and India, for conditions and/or guidelines on use of the thematic approach, the thematic approach was approved by the CDIP with the understanding that: each recommendation would be discussed first, in order to agree on the activities for implementation; recommendations that dealt with similar or identical activities would be brought under one theme, where possible; and implementation would be structured in the form of projects and other activities, as appropriate, with the understanding that additional activities may be proposed.

The CDIP approved the grouping of selected recommendations and projects into themes, subject to the conditions above. The approved themes are:

- 1) IP and the Public Domain (recommendations 16 & 20);
- 2) IP and Competition Policy (recommendations 7, 23, & 32);
- 3) IP, Information and Communication Technologies, the Digital Divide and Access to Knowledge (recommendations 19, 24, & 27).

Developing countries asked that recommendation 19 be kept separate, under the theme of Access to Knowledge and IP, but the proposal was not agreed upon by the CDIP.

The implementation of projects approved under these three themes will begin in

⁶
http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_3/cdip_3_summary.pdf

2010, once the Program and Budget committee makes the necessary financial allocations for their implementation. Other projects will be discussed again in the next session of the CDIP in November, 2009, and those agreed upon would begin to be implemented in late 2011. Equitable geographical balance shall be maintained in implementation activities, and further modifications and additions may be suggested in the future, provided that they do not significantly alter the project budget.

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

Program and Budget Committee (PBC)

The PBC did not convene during this quarter.

An informal meeting of the PBC was held on 20-22 July 2009.

The Advisory Committee on Enforcement (ACE)

The ACE did not convene during this quarter.

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

Standing Committee on Patents (SCP)

The SCP did not convene during this quarter.

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

Patent Cooperation Treaty Working Group

The second session of the Patent Cooperation Treaty (PCT) Working Group was held on 4-8 May 2009.

Most of the Working Group's discussions focused on a document prepared by the WIPO Secretariat, entitled *The Future of the PCT* (PCT/WG/2/3), which contains a "Draft Roadmap for the Development of the Future of the PCT." The document suggested some basic principles and time-bound actions that need to be taken by PCT Member States to reform and streamline the PCT system. The roadmap sought to address the following deficiencies of the

PCT system: duplication of work between national Offices and International Search Authorities; a lack of reliance on international search reports or written opinion of ISAs in the national phase; and delays in processing applications due to unnecessary actions in national offices. Thus, the roadmap proposed reducing or eliminating these deficiencies by suggesting that: national offices reduce or eliminate actions in the national phase which are duplicative of actions in the international phase; national offices eliminate taking unnecessary actions; withdraw reservations to the PCT and its Regulations, increase reliance on international search and examination reports by presuming them to be valid.

Developing countries pointed to a number of concerns about the roadmap and a lack of clarity in many of its fundamental concepts. They pointed out that currently there is no single international patent system. Moreover, countries are free to apply and use their own substantive criteria of patentability, and to conduct national phase examination and prior art search by following procedures that enable sound and effective determination of the patentability of a claim. They pointed out that the roadmap assumes that national search and examinations are duplicative actions and contains certain unnecessary actions, it requires withdrawal of reservations which States have under Article 64 of the PCT, it requires international search and examination reports to have a high presumption of validity in the national phase. This seems to facilitate substantive harmonization by regarding national examination procedures as duplicative and unnecessary actions and requiring international search and examination reports to have a high presumption of validity contrary to the non-binding nature of current PCT reports.

In view of these concerns raised by developing countries, it was agreed that the PCT-related bodies should continue their work to improve the PCT within its existing legal framework to deliver results which meets the need of applicants, Offices and third parties in all Contracting States. This should not limit the freedom of Contracting States to prescribe, interpret and apply substantive national conditions of patentability or seek to harmonize

substantive patent law standards or search and examination procedures. It was also agreed that discussions in relevant PCT bodies shall take into account the WIPO Development Agenda Recommendations and take into consideration the topics addressed in the draft roadmap, subject to the discussions in the Working Group, including the concerns and suggestions of Member States.

This work should be informed by an in-depth study, factoring in the following elements: the consideration of the background of the PCT reform process; the identification of existing problems and challenges facing the PCT system; the analysis of the causes underlying the identified problems; the determination of possible options to address the identified problems; the evaluation of the impact of the proposed options; and the definition and clarification of concepts, such as duplication and unnecessary action. It was recommended that this study be prepared and submitted to the Working Group at least two months before the next meeting of the Working Group.

The Working Group agreed on the importance of fee reductions and capacity building measures, including in patent drafting and filing and agreed that the relevant PCT bodies should prepare proposals for the same to increase access to the PCT for independent inventors and/or natural persons, SMEs and universities and research institutions, in particular from developing countries and LDCs. It was recommended that technical assistance be enhanced for national and regional offices of developing countries and LDCs so that they may fully benefit from the PCT system.

Earlier, the Working Group discussed a proposal by the US for a comprehensive reform of the PCT system, which suggested that an international search or examination report should become automatically binding on national offices, unless rejected within a specified period. Many countries raised concerns that the proposal would be in effect, amount to substantive patent law harmonization, and the sovereignty of States to prescribe substantive conditions of patentability was reiterated.

The report of the Working Group will be presented before the PCT Assembly in September 2009.

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

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

The last meeting of the working group was held on 7-10 July 2009.

World Health Organization (WHO)

WHO Executive Board

The 125th Session of the WHO Executive Board took place on 23 May 2009 in Geneva, Switzerland. No substantive issue was discussed as the duration of the EB was shortened in view of the swine flu (H1N1) outbreak.

The next meeting of the Executive Board will be held on **14-15 January 2010**.

World Health Assembly

The 62nd session of the World Health Assembly (WHA) was held from 18-22 May 2009.

At the WHA, discussions took place on finalizing the outstanding components of the Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property (GSPOA). Agreement was reached on a plan with time frames, progress indicators and funding needs for facilitating R&D and access to drugs needed by developing countries (WHA 62.16). Developing countries were very keen to have discussions towards a Biomedical Research and Development Treaty (R&D Treaty) include the WHO as a stakeholder in this process, noting that the WHO was not included as a stakeholder in this regard in the Secretariat's report on proposed stakeholders (A 62/16 Add.3). The WHO Secretariat felt its non-involvement would not prejudice the process but developing countries were concerned that this could make the process less inclusive and take

negotiations on the R&D Treaty away from the multilateral level.

Differences over outstanding elements of the PIP framework, particularly the SMTA, remained unresolved. A group of developing countries proposed a resolution which requested the DG to carry forward the agreed parts of the PIP framework and to facilitate and support further negotiations on the remaining elements of the framework, including the SMTA. Developing countries also insisted that the process should be open and inclusive. Developed countries were not keen to carry forward negotiations under the IGM process and requested the DG to work on the remaining elements. It was finally agreed that the DG will facilitate a transparent process to finalize the remaining elements, including the Standard Material Transfer Agreement (SMTA) and report to the WHO Executive Board (EB) in January 2010.

Though discussions on reports prepared by the Secretariat on Counterfeit Medical Products, as requested by the EB meeting in January 2009, were excluded from the agenda due to an abbreviated WHA session, the issue of counterfeit medical products featured in connection with discussions on the Medium Term Strategic Plan (MTSP) 2008-2013 (A62/4 Add.2). Strategic Objective (SO) 11.2 pointed to unprecedented growth in counterfeit medical products and called for combating the same. Elaborating on SO 11.2, the Secretariat's draft Medicines Strategy (2008-2013) referred to 'supporting countries in implementing the IMPACT strategy' and the proposed Programme Budget gave a projection of 50 million USD to support activities in connection with this strategy. Developing countries reiterated concerns raised in the January 2009 EB meeting. They called for removing the references to IMPACT and also stated that the record should reflect that, in view of the fact that the Secretariat's report on counterfeit medical products has not been considered by the WHA, the MTSP should not prejudice the Members' views on this issue. The MTSP and the Programme Budget was adopted and the DG clarified that the concerns raised by the developing countries will be reflected.

The next meeting of the World Health Assembly will be held on **17-22 May 2010**.

WHO Pandemic Influenza Preparedness Intergovernmental Meeting (IGM)

The resumed session of the "WHO Intergovernmental Meeting on Pandemic Influenza Preparedness: Sharing of Influenza Viruses and Access to Vaccines and Other Benefits" was held on 15-16 May 2009. The Director-General (DG) of the WHO submitted a report on the preparatory work undertaken by the Secretariat, as requested by the IGM in its meeting in December 2008 (A/PIP/IGM/13). Agreement was reached on most elements of the Pandemic Influenza Preparedness (PIP) framework, but differences remained between developed and developing countries on the issue of a Standard Material Transfer Agreement (SMTA). Hence, while there was agreement on the benefit-sharing section of the PIP framework, there was no agreement on reflecting the same in the SMTA. At the IGM, Brazil read the Declaration of the Group of Like-Minded Megadiverse Countries that was previously made at the Access and Benefit Sharing negotiations of the Convention on Biological Diversity (CBD) on 8 April 2009 in Paris. The Declaration recognized the sovereign right of States over their biological resources, including viruses and other pathogenic organisms, and stated that the WHO negotiations on virus sharing should be consistent with the objectives of the CBD.

DEVELOPMENTS IN OTHER FORA

World Customs Organization (WCO)

WCO Council

The 113/114 Annual Session of the WCO Council was held in Brussels from 25-27 June 2009, followed by the 61st Policy Commission of the WCO held in Brussels from 22-27 June.

The Council approved the establishment of WCO Counterfeiting and Piracy (CAP) Group and adopted its Terms of Reference (TOR). The establishment of CAP is in accordance with the instructions from the 60th session of the WCO Policy Commission that the SECURE Working Group be suspended and the WCO Secretariat prepares draft TOR for a new WCO body to deal with Customs IPR

issues. The TOR which has been approved by the WCO Council was formulated on the basis of three informal meetings with interested Members held by the WCO between the December 2008 session and the June 2009 Policy Commission and Council sessions. The draft TOR was produced at the last informal meeting on 4 June 2009 and included representatives from 22 Members. The TOR states that that the CAP will constitute a dialogue mechanism on border measures on trademark counterfeiting and copyright piracy. In its discussions the group will respect the national legal regimes of members, the levels of their commitments in international agreements like TRIPS, and shall not engage in norm setting, or in making recommendations or in adopting particular measures. In a footnote, it clarifies that the term "norm-setting" encompasses any kind of provisions (binding or non-binding), irrespective of the name, such as standards, best practices, recommendations, guidelines or any other denomination. It limits the key deliverables of the Group to a factual report to the Permanent Technical Committee after each session. It will limit itself to an exchange and discussion of views, experiences, practices and initiatives of Customs Administrations and discussions on WCO Capacity Building activities for Members requesting assistance. Its membership will remain open to all WCO Members and it will report to the Permanent Technical Committee of the WCO.

The WCO Council also "clarified" the TOR of the Enforcement Committee with reference to firearms and health and safety. Several developing countries made reservation to the inclusion of health and safety. Brazil submitted that inclusion of "health" in the TOR of the Enforcement Committee is premature and a decision on including "health" in the TOR needs to be based on clarification as to the value this would add to the improvement of customs work and enhanced coordination between customs and national health agencies. Without any discussion on this aspect, inclusion of the term "health" in the TOR of the Enforcement Committee will send wrong signals to the outside community in view of the silence of the WCO to the issue of wrongful seizures of generic medicines in transit by customs authorities in the EU. Thus, Brazil requested that the issue be

referred back for further discussions in the Enforcement Committee.

Convention on Biological Diversity (CBD)

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

The 7th Meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing was held in the UNESCO Headquarters in Paris from 2-8 April 2009. Negotiations on an international regime on ABS will continue focussing on an operational text on objective, scope, compliance, fair and equitable benefit sharing and access issues. Negotiating documents were adopted on each of these elements. There was difference between regional groups on whether countries' submissions would be categorised under the existing structure of categorising submissions in respect of components that were agreed as forming part of the regime (bricks) or components that required further consideration (bullets). The Working Group decided to abandon the bricks and bullets structure and work directly on the negotiating text.

The Contact Group on Scope witnessed a debate on whether or not to include viruses and pathogens within the scope of the regime. It adopted a bracketed document stating that the international regime applies to all genetic resources, biological resources, viruses and pathogens, as well as potentially pathogenic organisms and genetic sequences regardless of their origin, derivatives and products, associated traditional knowledge, and genetic resources of migratory species (UNEP/CBD/WG-ABS/7/L.3).

The Working Group is mandated to finalize the international ABS regime and submit the same for consideration and adoption to the tenth session of the Conference of the Parties to the CBD (COP 10), to be held in Nagoya, Japan, on **18-29 October 2010**.

The eighth meeting of the Working Group will be held in Montreal, Canada, on **9-15 November 2009**.

Food and Agriculture Organization (FAO)

Third Session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)

The Third Session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture was held in Tunis, Tunisia, on 1-5 June 2009.

The Governing Body agreed to establish two contact groups on developing (1) a funding strategy, and (2) a compliance mechanism. A resolution on implementation of the funding strategy was adopted. An intersessional Working Group was established to finalize the procedures and operational mechanisms on issues of compliance. The Governing Body agreed to a set of outcomes for implementation of the funding strategy, including a financial target of US\$116 million for the period July 2009 to December 2014. Also, an intersessional Advisory Committee on implementation issues was established under a resolution on implementation of the multilateral system. Resolutions were also adopted on farmers' rights and procedures for the Third Party Beneficiary. The biennial programme and budget was adopted. There was agreement on the urgent need to finalize the outstanding financial rules at the next meeting of the Governing Body.

United Nations Framework Convention on Climate Change (UNFCCC)

The Sixth Session of the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA) and the Eighth Session of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) was held in Bonn, Germany on 1-12 June 2009.

Discussions in the AWG-LCA were based on a negotiating text (FCCC/AWGLCA/2009/8) drafted by its Chair, Mr. Michael Zammit Cutajar of Malta. The negotiating text addresses key elements of the Bali Action Plan (BAP) (Decision 1/CP13) – a shared vision for long-term cooperative action, mitigation, adaptation, finance and technology. On the chapter on Enhanced

Action on Finance, Technology and Capacity Building in the Chair's negotiating text, developing countries stressed the need for public sector funding for technology transfer, particularly for adaptation technologies, due to the lack of private sector interest. Developing countries also stated that the IPR system was a barrier to effective technology transfer and called for modification or suspension of the IPR regime under the WTO. Developed countries insisted that the IPR regime promotes technology transfer and opposed its modification. A revised negotiating text was adopted which contains three options with alternatives on measures to address IPR issues and concerns.

Developed countries supported proposals by Russia and Belarus seeking to replace the Kyoto Protocol with a new climate architecture, and called for merging the AWG-LCA and the AWG-KP processes. Developing countries insisted that the two track process should be retained, keeping the two Working Groups separate, and the work of the AWG-LCA must be restricted to the mandate of BAP to focus on the implementation of the UNFCCC. Developing countries also called for the negotiating text to have more balance and greater conformity with the UNFCCC and BAP. A revised negotiating text was completed, with a further informal session in August 2009 to be further discuss next steps on the Document.

The Seventh Session of the AWG-LCA and the Ninth Session of the AWG-KP will be held from **28 September to 9 October 2009** in Bangkok, Thailand.

World Summit on Information Society (WSIS): WSIS Follow-Up

Commission on Science and Technology for Development (CSTD)

The twelfth session of the CSTD was held in Geneva on 25-29 May 2009. The CSTD met to review the progress made in the implementation of and follow-up to the WSIS outcomes at the regional and international levels, and to hold discussions on development-oriented policies for a socio-economically inclusive information society, including access, infrastructure and an enabling environment; science,

technology and engineering for innovation and capacity-building in education and research; and presented reports on science, technology and innovation policy reviews.

The CSTD recommended to the Economic and Social Council (ECOSOC) for the adoption of draft resolutions on "Assessment of the Progress Made in the Implementation of and Follow-up to the Outcomes of the World Summit on Information Society" and "Science and Technology for Development." The resolution notes that large disparities remain in access to information and communication technologies (ICTs) and knowledge, and stresses on the need for further work on bridging the digital divide. It calls upon all stakeholders to continue efforts to implement the WSIS vision of people-centred, inclusive and development-oriented information society. The resolution requests the CSTD to organize a substantive discussion progress made in the implementation of the WSIS outcomes, including consideration of modalities of WSIS implementation and follow-up in its thirteenth session. The resolution on science and technology for development encourages governments to mainstream science and technology promotion and investment in their national developmental plans, and calls upon governments and UN agencies to support innovation capacity.

WSIS Forum 2009 - ITU, UNESCO, UNCTAD and UNDP

The WSIS Forum was organized by ITU, UNESCO, UNCTAD and UNDP in Geneva on 18-22 May 2009. Various stakeholders participated in a number of meetings on WSIS implementation and follow-up in various high level panels, facilitation meetings and thematic workshops. Six high-level panels addressed critical issues pertaining to ethical and innovative ways of sharing and creating knowledge, implications of the financial crisis on ICT sector development, threats and challenges to cyber security, the role of ICTs in respect of climate change, and the role of ICT applications in creating better living conditions. Facilitation meetings were organized to discuss the 11 action lines contained in the 2001 Geneva Declaration on Principles and Plan of Action.

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

FTAs involving the United States

FTA with Colombia

The FTA with Colombia is still pending approval in the US Congress. In the face of strong opposition from US environmental and labour organizations, the US President has instructed the USTR to revise the agreement to resolve the outstanding issues pertaining to it.

FTA with Singapore, Chile, New Zealand and Brunei

The first round of negotiations on a Trans-Pacific Strategic Economic Partnership Agreement (SEP) between the US, Singapore, Chile, New Zealand and Brunei which was to be held in March 2009 has been postponed until the US completes a review of the its trade policy. Australia, Peru and Vietnam also intend to participate in the negotiations.

FTAs and Economic Partnership Agreements (EPAs) involving European Union

EU – India FTA

Six rounds of negotiations have been held so far on the EU-India FTA. A draft text on IPRs suggests that the EU is seeking greater levels of IPR protection from India, going beyond the requirements of the TRIPS Agreement. It particularly seeks that India provide patent protection for five additional years for medicinal products to compensate for the time required for obtaining marketing approval. This has raised concerns that such TRIPS plus standards can compromise access to medicines. The last round of negotiations was held in July 2009.

EU – ASEAN FTA

The EU-ASEAN FTA negotiations have been temporarily suspended. The decision was taken by the ASEAN Meeting of Economic Ministers in Siem Reap, Cambodia, on 4-5 May 2009. Efforts will continue to find

common ground for both parties to agree on before negotiations can resume.

EU - African, Caribbean and Pacific (ACP) Nations EPA

Negotiations between the EU and individual ACP countries and subgroups of countries continue with the objective of concluding full regional EPAs.

No Central Africa-EU negotiation meeting has taken place since February 2009. The joint technical negotiating meeting between the EU and the Central African region, which was scheduled to be held in Brussels in April 2009, has been postponed at Central Africa's request.

On 12-15 May 2009, the West African ministers also called for resolving all contentious issues as soon as possible at the highest political level. In the SADC region, Botswana, Lesotho and Swaziland signed an interim EPA in June 2009.

In the Eastern and Southern Africa (ESA) region an interim ESA-EU EPA is expected to be signed in June 2009. In the CARIFORUM region, an EPA Implementation Road Map is being prepared and several countries are setting up national implementation units.

No decision has been taken on which organization will be in charge of coordinating the implementation at the regional level. The ACP Group President Ambassador Joseph Maàhanua from Solomon Islands reported to the ACP-EU Joint Ministerial Trade Committee meeting on 5-7 May 2009 that the Pacific ACP (PACP) countries requested of the EU a resumption of EPA negotiations and a response will be forthcoming shortly.

FTA with the Andean Community (CAN)

The EU has been negotiating for an FTA with Peru and Colombia despite reservations from the other members of the Andean Community (CAN) - Bolivia and Ecuador. On 17 May 2009, Peru's Minister for Foreign Trade and Tourism, Mercedes Aràoz said that the CAN-EU FTA could be signed in the fourth quarter of 2009 depending on the progress that each country can make. It is reported that a

flexible framework agreement has been reached so as to allow all countries to negotiate on a short or long term basis, separating the political and commercial sides of the agreement with the hope that Bolivia and Ecuador will join on the political side if not the commercial side. The agreement aims to cover both political and commercial cooperation. 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.

Other FTAs

ASEAN – India FTA

The ASEAN – India FTA is expected to be signed at the ASEAN Trade Minister's meeting in August 2009 or at the ASEAN Summit in October 2009. The negotiations which began in 2001 were concluded in 2008 but new differences arose on methods of breaking customs' barriers. It is reported that these issues have been resolved.

Vietnam-Japan EPA

Vietnam has ratified a comprehensive EPA with Japan. The agreement will take effect from July 2009.

OTHER RELATED PROCESSES

Proposed Anti-Counterfeiting Trade Agreement (ACTA)

The US Trade Representative Ron Kirk said on 15 June 2009 that the US will move forward with the ACTA negotiations, despite objections raised by over 100 public interest organizations around the world over the secrecy around ACTA negotiations. Negotiations were postponed in March 2009 at the request of the US to enable the USTR to review the progress made to date. The ACTA is being negotiated by Australia, Canada, the European Union, Japan, Jordan, South Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland, the United Arab Emirates and the United States.

The 5th round of negotiations for ACTA took place in Rabat, Morocco on 16 - 17 July 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.



17-19, Chemin du champ d'Anier
POB 228, 1211 Geneva 19
Switzerland
Tel. +4122 791 8050
Fax. +4122 798 8531
south@southcentre.org
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
www.ciel.org