

ments. In its other recent FTAs, the US has specified that non-discriminatory regulatory actions by governments aimed at protecting public health, safety and the environment cannot be considered indirect expropriation ‘except in rare circumstances’. The Andean countries want the qualifier about rare circumstances dropped due to its unclear scope.

Investment and IPRs, as well as services, industrial market access and government procurement are on the agenda of the September negotiating session in Colombia.

## WIPO and Development: Big Decisions Ahead

In late September, the General Assembly of the World Intellectual Property Organisation faces crucial decisions on how – or even whether – to proceed with the WIPO Development Agenda launched a year ago. While the membership is divided on both substance and process, for many developing countries the outcome of the Assembly will be a key indication of whether the institution is capable of adequately addressing their concerns.

In September 2004, fourteen developing countries including Brazil and Argentina (the so-called group of Friends of Development<sup>1</sup>) proposed that a ‘development agenda’ be established for WIPO (WO/GA/31/11). In response, WIPO’s General Assembly created the Intersessional Intergovernmental Meeting (IIM) to examine this and other proposals related to development issues. The IIM was instructed to prepare a report for the consideration of the General Assembly in 2005.

At the heart of the proposal by the Friends of Development is the belief that WIPO needs to undergo fundamental reform in order to fulfil its role as a UN organisation guided by development goals, such as those set out in the Millennium Declaration. The proposal identified several ways to ensure that WIPO treats intellectual property as a tool for development, rather than simply promoting strict intellectual property standards. These substantive measures included a) amending the WIPO Convention to incorporate the development dimension; b) considering a treaty on access to knowledge and technology; c) establishing an Independent WIPO Evaluation and Research Office; d) adopting principles and guidelines for technical assistance; e) reforming WIPO norms and practices, including the development of principles and guidelines for norm-setting activities; f) making use of development impact assessments and g) encouraging wider civil society participation.

During the three sessions of the IIM, additional proposals have been put forward by the US, the UK, Bahrain and other Arab countries, and the African Group. These proposals address a range of issues from technical assistance to ways of bridging the ‘digital divide’ in information technology. However, lengthy procedural debates have meant that engagement on substantive issues has been limited and that some proposals have not yet been addressed at all.

### No Consensus on the Appropriate Body for Further Discussions

At the third session of the IIM, members agreed on the need for more discussion on the development agenda, but could not reach a consensus on the body in which those discussions ought to take place. Most developing countries, including the Friends of Development and the African Group, argued for an extension of the IIM process, while the US, Canada and Japan advocated moving the debate to the Permanent Committee on Co-operation for Development Related to Intellectual Property (PCIPD).

The choice between the two potential bodies reflects members’ different attitudes toward the very idea of incorporating a development agenda into WIPO. The IIM reports directly to the General Assembly, and has an explicit mandate to examine a wide range of proposals and issues related to development concerns. In contrast, the PCIPD is mainly concerned with technical co-operation rather than substantive matters. Neither body has a specific mandate to negotiate IP standards.

The US and Canada have indicated that concerns about the PCIPD’s mandate could be addressed either by reviewing its mandate or by means of a General Assembly statement confirming the Committee’s competence to examine development-related issues. However, a

difference in mandates is not the only issue at hand: some developing countries fear that a move to the PCIPD would marginalise development issues by confining them to a single, ineffective body, and result in a loss of political weight and momentum.

By the end of the third session, most countries had expressed support for continuing the IIM process in some form. However, the US, Canada and Japan objected to this proposal on the grounds that the PCIPD was a more appropriate WIPO body for conducting extended discussions. Despite extensive informal consultations by the Chair, Ambassador Rigoberto Gauto of Paraguay, no agreement was reached and the IIM therefore made no recommendation to the Assembly on the matter.

### Prospects for the General Assembly

The General Assembly will have to decide on how to fulfil the unfinished mandate of the IIM: either by extending the IIM itself in some form, or through specific instructions to different WIPO bodies, such as the PCIPD. In an effort to bridge the gap between leading proponents on how the process should continue, a series of consultations have been initiated by the Director General of WIPO, Kamil Idris.

These consultations have focused on the possibility of agreeing on a package of trade-offs among various WIPO processes that would include the advancement of the WIPO development agenda, the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore, and a fast-track harmonisation exercise in patents and copyright law. Reactions to these consultations have been mixed and

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results unclear due to the non-tradable nature and different treatment of the issues at stake. One trade source predicted that the September 2005 General Assembly would be a 'war of mandates'. There will be a strong political struggle to incorporate a development perspective in WIPO, particularly as similar processes have already taken place at other international fora, such as the WTO, the Monterrey Consensus on Financing for Development, or the UN Millennium Development Goals, just to name a few.

Given the polarised positions on the IIM, it is difficult to predict the outcome of this year's General Assembly. The fact that some proposals, such as that put forward by the African Group, are yet to be discussed could lead to a reopening of the substantive debate. This would not only reduce crucial negotiation space for process-related matters, but could also result in individual country positions isolating each other; at this stage it seems important to keep the focus of the negotiations on mandate and process, rather than substance.

Four potential outcomes from the General Assembly appear possible:

- The IIM process could be extended for a limited time in order to find options for action or consensus on how to integrate development into WIPO's activities and mandate. This option is clearly favoured by the Friends of Development, many other developing countries and some developed countries.
- Second, the debate could be moved to the PCIPD, along the lines argued by the UK and Canada, among others. This could include a broadening of the PCIPD mandate so as to issue recommendations or negotiations.
- Third, there could be an attempt to find a compromise solution, such as prolonging the IIM process for perhaps an additional year with no changes in the mandate. However, the danger of this option is that discussions could easily be blocked until the extension ends. Hence the continuation of a limited process only makes sense if there is a true willingness to engage and negotiate by all parties, which currently does not seem to be the case.
- Fourth, the General Assembly could end in no agreement on how to proceed. This would freeze the process for an indefinite period, and it is not clear whether it could ever be taken up again. The stagnation

could potentially affect other processes, such as those on patent and copyright harmonisation. A mutual blockage could impact the functioning of WIPO and create undesirable temptations to initiate negotiations elsewhere.

### Conclusion

The debate on a WIPO Development Agenda is uncontroversial but, as Joseph Stiglitz recently observed, hopes for an IPR regime responsive to development concerns are high: *"Hopefully, in WIPO's reconsideration of intellectual property regimes, the voices of the developing world will be heard more clearly than they were in the WTO negotiations; hopefully, WIPO will succeed in outlining what a pro-developing intellectual property regime implies; and hopefully, the WTO will listen: the aim of trade liberalisation is to boost development, not hinder it."*<sup>2</sup>

Many feel that an orthodox view about intellectual property is struggling to survive in a new context where innovative approaches on promoting invention and investment must be balanced with development concerns and the defence of the public interest. A continuation of the debate on a WIPO Development Agenda and, more specifically, the IIM does not guarantee that this balance can be found, but at least it would provide a space where these issues could be discussed and incorporated into international IP policy-making.

### ENDNOTES

<sup>1</sup> The Friends of Development are Argentina, Brazil, Bolivia, Cuba, Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, United Republic of Tanzania, and Venezuela.

<sup>2</sup> In *Intellectual Property Rights and Wrongs*, Daily Times Pakistan, August 17 2005. See [http://www.dailytimes.com.pk/default.asp?page=story\\_16-8-2005\\_pg5\\_12](http://www.dailytimes.com.pk/default.asp?page=story_16-8-2005_pg5_12)

## Brazil Reconsiders Compulsory Licensing

Brazil has reopened negotiations with three US pharmaceutical companies in an effort to bring down prices for AIDS treatment. A resolution on compulsory licensing only needs the health minister's signature to enter into force.

In July, the Brazilian government and the US-based Abbot laboratories announced that a compromise had been reached on the price of the AIDS drug Kaletra (a combination of lopinavir-ritonavir) and thus Brazil would not issue a compulsory license for it, as it had threatened to do (Bridges Year 9 No.6-7, page 15). However, a new Health Minister, Jose Saraiva Felipe, took over only days later and demanded a bigger price cut per capsule (Abbot had agreed to decrease the price gradually from US\$1.17 to 72 cents by 2010). Minister Felipe said that a privately-owned Brazilian company had offered to manufacture generic Kaletra for 41 cents, i.e. less than two-thirds of the price (68 cents) previously quoted by the state-run FarManguinhos. The potential for savings to the country's widely-praised AIDS treatment programme made reopening the negotiations necessary, Mr Felipe said. In addition to Abbot, Brazil is negotiating price reductions with Merck and Gilead.

On 11 August, Brazil's 20-member National Health Council unanimously approved a resolution drafted by Minister Felipe that would allow generic production of patented brandname AIDS medicines immediately upon signature. Negotiations were still underway when this issue of Bridges went to press, but according to Brazilian sources the decision to issue compulsory licenses would be made if a deal was not concluded relatively soon.

Under the WTO's intellectual property rules, all Members may issue compulsory licenses to supply their domestic markets in case of health emergencies, provided that the production is for non-commercial purposes and an attempt to was made to obtain the right-holder's consent. The right-holder should be paid "adequate remuneration in the circumstances of each case, taking into account the economic value of the authorisation." Prior to the now-discarded Kaletra deal, Brazil had proposed Abbot a three-percent royalty payment.