



HIGHLIGHTS OF THE FOURTH INTER-SESSIONAL CONTACT GROUP MEETING FOR THE REVISION OF THE IU: 15 NOVEMBER 2000

The Fourth Inter-sessional Contact Group Meeting for the Revision of the International Undertaking on Plant Genetic Resources (IU), continued deliberations in morning and afternoon sessions. A representative of the World Trade Organization (WTO) provided initial comments on relevant provisions under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in regards to IU Article 14.2(d)(iv) and then answered delegates' questions. Delegates then continued discussions on Article 16 (Financial Resources), including Article 16.4(f), new 16.4 *bis* and 16.5. The small group on Article 16.4(c) continued its deliberations in an evening session, and a new "independent" group was formed to address Article 14.2(d)(iv).

WTO PRESENTATION & ARTICLE 14.2(D)(IV)

Chair Gerbasi opened the session, noting that the small group discussing Article 16.4(a) and issues relating to the financial mechanism and developed country commitments had not reached a resolution, and stated that they would continue consultations. A representative of the WTO then made a brief presentation and answered questions regarding issues under the IU's Article 14.2(d)(iv) related to TRIPS.

She first noted the limits of the WTO Secretariat on providing interpretations of the agreements and commenting on issues of policy, which is the purview of WTO Member States. She highlighted the procedures of the WTO's Dispute Settlement Body (DSB), which helps to interpret areas of ambiguity or questions regarding implementation. She noted issues for further clarification under the IU, including scope, coverage, the legal nature of the Multilateral System (MS) and the relation between States and users. Regarding patents, she explained that in the case of a dispute involving Article 14.2(d)(iv), a panel would examine whether patents in question fulfill the conditions of novelty, an inventive step and industrial applicability. She reviewed Article 27.1, which states that patent rights shall be enjoyable without discrimination regarding the place of invention, field of technology and whether products are domestic or imported. She elaborated that the exception to this provision is detailed in Article 27.3, which allows Members to exclude plants, animals and essentially biological processes from patenting if an effective *sui generis* system for their protection is provided. She noted that this is currently under discussion in the TRIPS Council.

She said that TRIPS Article 30 (Exceptions to Rights Conferred) allows for limited exceptions to the rights of a patent holder, provided they do not unreasonably conflict with exploitation of the patent or the interests of the patent holder. She added that this article was the subject of a recent panel decision regarding

a conflict between the EU and Canada in the field of pharmaceuticals. She also highlighted conditions cited within the WTO's Agreement on Technical Barriers to Trade which calls for technical regulations to be transparent, non-discriminatory and in accordance with the principle of proportionality.

Responding to questions on fields of technology, she noted that the Uruguay Round considered fields such as pharmaceuticals and agro-chemicals, although current interpretations might differ. A delegate stated that the MS would only apply to part of a field as some PGRFA would be within the MS and others outside. On permissible evidence within the DSB, especially regarding conflicts with other international agreements, the WTO representative noted that a panel would first examine the literal reading of a disputed provision and then, if necessary, look to the historical context of its negotiation. With regard to relations between agreements, she emphasized that newer agreements should be negotiated in a manner compatible with existing agreements, said relations with other international agreements should be clarified, and referenced provisions of the Vienna Convention on Treaties.

Responding to questions regarding royalties on patented PGRFA under the MS and whether they could be exempted from patent provisions, she noted that TRIPS does not address royalties except in the case of compulsory licensing, which is not relevant here. She stated that the issue of whether a tax might be a form of discrimination against patenting would have to be examined further by WTO Members. Regarding a question on whether research exemptions and plant breeding could be exceptions under TRIPS Article 30, she stated that such exceptions could not undermine the legitimate interests of the owner and had to take into account the interests of third parties.

Regarding a question of whether the provision for *sui generis* systems of protection under Article 27.3(b) could be an exception from non-discrimination obligations, she explained that there are different schools of thought on the issue, one of which would argue for respect of non-discrimination clauses. Responding to questions regarding patenting of materials in the public domain, she noted safeguards within the patent system, specifically referring to the novelty criterion and examination of applications by patent offices. She highlighted proposals within the TRIPS Council and the World Intellectual Property Organization (WIPO) on creating databases for information in the public domain or held by local communities (traditional knowledge). Regarding a question on whether plant variety protection is recognized as a form of IPR under TRIPS, she noted some consensus that it was considered as a type of industrial property protection, although farmers' rights, which is a separate concept, may be determined by individual countries.

She stated that she could not provide legal interpretation regarding questions on: whether the wording of 14.2(d)(iv) covers undisclosed information; whether the exceptions in Article 27.3(b) provide leeway for placing conditions on patent holders; discrimi-

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nation against sub-sets of fields of technology; and whether obligations for royalty payments would discourage patenting of PGRFA. Regarding a question on whether one country's violation of TRIPS would mean that the entire IU is in violation, she said this would be the competence of a dispute panel and would depend on the exact wording of that country's national legislation. Responding to a country listing exceptions under TRIPS Article 8 (Principles), she stated that Article 27.2 allows exceptions to protect public order or morality, while Article 8 serves as a general chapeau whose implementation must be consistent with TRIPS' more specialized provisions.

A WIPO representative discussed: work on digital libraries documenting traditional knowledge-based inventions; the International Patent Classification Treaty and its relevance to fields of technology and agriculture; and the application of copyright models to benefit-sharing for genetic resources. He announced that Member States agreed to convene an intergovernmental committee meeting in early 2001 to discuss: protection of traditional knowledge; the expression of folklore; and intellectual property and access and benefit-sharing (ABS), including contractual agreements, legislation to regulate ABS, protection of biotechnological inventions and a multilateral system for facilitating ABS which could address linkages to Article 14.2(d)(iv).

One developing country noted that a *posteriori* fees on patents do not inhibit one's right to apply for patents. An observer clarified a proposal made in Tehran that served as the basis for Article 14.2(d)(iv) on binding and voluntary contributions. A developed country questioned if Article 14.2(d)(iv) was consistent with TRIPS, and stated that if implementing countries' obligation to pay royalties under trade secrets is unenforceable, a reference excluding trade secrets could be the solution. A developing country noted that obligations addressed in 14.2(d)(iv) were on right holders and not Parties.

A developing country suggested, with support from a developed country, inserting text stating that Article 14.2(d)(iv) shall be interpreted and implemented in a manner consistent with the provisions of all relevant international agreements. Two countries asked FAO's legal counsel for an assessment of the conformity of Article 14.2(d)(iv) with TRIPS. The FAO legal counsel stated that he should stay neutral, but requested clarification from an independent expert. The expert said that the IU was not incompatible with language in TRIPS Article 27.1, stating that there should not be discrimination as to the place of invention, the field of technology and whether products are imported or locally produced; nor with Article 28 (Rights Conferred) on the rights of the patent holder to exclude a third party. He stated that under Article 27.3(b) a country could grant a patent system to certain conditions like contributions or royalties. He noted that according to TRIPS Article 8.1, countries can adopt measures to protect public health and nutrition, and can therefore require contributions provided that they are consistent with TRIPS and the patent holders' rights. A developed country stated that interpretations of compatibility would differ from one lawyer to the next. He stated that the DSB could clarify this issue, but called for avoiding such a situation.

Following a lunchtime Bureau meeting, Chair Gerbasi acknowledged that countries from three regions had voiced reservations on Tehran language for Article 14.2(d)(iv). Debate ensued over whether this language was open for negotiation. A regional group of developed countries stated that while they accepted the text on a general basis, they were willing to negotiate. Several developing countries emphasized their view that the text was not open for negotiation. A regional group of developed countries suggested, with support from a number of developed and developing countries, that delegates submit and consider written improvements to enhance or clarify the text, and if no agreement could be reached, the text should remain as drafted. Chair Gerbasi then set up a small, "independent" working group comprised of a

balanced representation of participants to evaluate such possibilities, and called for written submissions that would be considered by the group later.

One observer stated that insufficient compensation and restriction of resource flows threaten food security and voiced opposition to the possibility of patenting living organisms as contained within this provision.

ARTICLE 16 (FINANCIAL RESOURCES)

ARTICLE 16.4(f): On this provision, which addresses voluntary contributions, a group of developed countries proposed adding text stating that the Governing Body shall consider modalities of a strategy to promote such contributions. Several developing countries preferred to place this amendment in Article 17.2, on the functions of the Governing Body, but after some discussion the original text with the proposed addition was agreed.

ARTICLE 16.4 bis: A group of developing countries proposed language for a new sub-paragraph under Article 16.4 to draw attention to farmers in developing countries, stating, "Parties agree that priority support will be given to the implementation of agreed plans and programmes in support of farmers in developing countries embodying lifestyles relevant to the conservation and utilization of PGRFA." Several developed countries proposed, and all agreed to consider the text as new subparagraph 16.4 bis. One country proposed, with mixed response, including reference to countries with economies in transition (EIT). Delegates then engaged in extensive debate on: the UN classification of developing countries, least developed countries, EIT countries and the OECD classification of low income countries; their inclusion; their location within the text; and parallel formulation in other articles. The text was generally agreed upon, although a footnote expressed the reservation of four countries regarding reference to EIT countries and the need to complete Article 4 (Relationship of the Undertaking with Other International Agreements).

ARTICLE 16.5: This provision states that the Governing Body shall develop arrangements with other relevant financial institutions and organizations to secure their participation in the funding strategy. Chair Gerbasi recalled the proposal of a developing country to include this provision in Article 17 (Governing Body) and noted that it seemed to duplicate Article 17.2(h). Several countries supported deleting Article 16.5. A developed country stated that Article 17.2(h) was very general and that Article 16.5 was drafted to support the means of communication between the IU and other potential funding organizations regarding the details of the funding strategy. Another developed country proposed deleting Article 16.5 and adding a reference to Article 17.2(h) stating that cooperation with other international organizations should include their participation in the funding strategy. Delegates agreed, and the text was accepted.

IN THE CORRIDORS

Wednesday's question and answer period with the WTO and subsequent discussion highlighted the subjective nature of legal interpretation. While most agreed that there will be as many interpretations as there are lawyers, others pointed to the necessity of looking at the impact of other articles on the provisions for commercial benefit-sharing. One participant opined that without agreement on the MS's scope, specifically whether listed crops referred to all their genuses throughout the world or simply designated PGRFA, whether *in situ* or *in ex situ*, there would be no hope of resolving the question of Article 14.2(d)(iv).

THINGS TO LOOK FOR

The Contact Group will reconvene at 10:00 am to begin discussion on Article 12 (Coverage of the MS). Expect reports on the results of small group discussions on Article 14.2(d)(iv) and 16.4(c).