

June 2007



منظمة الأغذية
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Organización
de las
Naciones
Unidas
para la
Agricultura
y la
Alimentación

Item 7.3 of the Draft Provisional Agenda

COMMISSION ON GENETIC RESOURCES FOR FOOD AND AGRICULTURE

Eleventh Regular Session

Rome, 11-15 June 2007

**COOPERATION WITH THE WORLD INTELLECTUAL
PROPERTY ORGANIZATION (WIPO)**

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COOPERATION WITH THE WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

I. INTRODUCTION

1. Cooperation between the World Intellectual Property Organization (WIPO) and FAO has a long-standing history, which began at the time when the negotiations of the International Treaty on Plant Genetic Resources began, and the WIPO work programme on genetic resources was being developed. Since that time, the two organizations have undertaken technical cooperation activities and held ongoing exchanges of information on technical matters of mutual relevance. This document has been prepared jointly by FAO and WIPO for the eleventh regular session of the Commission on Genetic Resources for Food and Agriculture, in order to report on the positive cooperation that has existed between the two organizations. The document introduces and contextualizes WIPO's on-going work and instruments that may be relevant to discussions on advancing future cooperation between WIPO and FAO, and in particular the FAO Commission on Genetic Resources for Food and Agriculture.

2. FAO is the main inter-governmental forum to form policy, and develop programmes, in relation to all aspects of food and agriculture. It hosts a number of crucial international instruments and programmes. FAO works with other organizations involved in natural resources management for food and agriculture, environment and trade, to represent the interests of the food and agriculture sector. Such collaboration is of growing importance, given the continued trend toward an inter-dependent and globalised world economy and the increasing need for common or integrated policies and regulatory frameworks.¹ FAO seeks to ensure that the specific needs and concerns of the food and agriculture, fisheries and forestry sectors are adequately reflected within relevant international instruments, and that appropriate policy advice is provided to the forums dealing with natural resources, environment and trade.²

3. In FAO, the main bodies conducting regular work of relevance to WIPO are the Commission on Genetic Resources for Food and Agriculture, and the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture. The Commission is now programming its future work, setting a framework of activities with regard to all sectors of genetic resources for food and agriculture and to cross-sectorial matters. Such a Multi-Year Programme of Work (MYPOW) may also benefit from WIPO's technical inputs, as it was the case during the negotiation of the International Treaty.

4. WIPO's role as the specialized United Nations agency responsible for intellectual property (IP), as set out in its agreement with the United Nations, identifies WIPO as "responsible for taking appropriate action in accordance with its basic instrument, treaties and agreements administered by it, *inter alia*, for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development."

5. In WIPO the main bodies conducting work that is relevant to genetic resources for food and agriculture include the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC), the Standing Committee on the Law of Patents (SCP), and the Union of the Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure. A number of WIPO programmes are also relevant, including broader capacity building programs on intellectual

¹ Strategic Framework for FAO 2000-2015, para. 52. <http://www.fao.org/strategicframework/default.htm>.

² Strategic Framework for FAO 2000-2015, para. 56.

property and traditional knowledge and genetic resources issues undertaken at the request of national governments and regional and other intergovernmental organizations, and the enhancement of patent information tools with application in the field of genetic resources for food and agriculture. WIPO also coordinates closely with the International Union for the Protection of New Varieties of Plants (UPOV) on matters concerning plant variety protection, recognizing that all matters relating to the legal protection of new plant varieties and plant breeders' rights are in the domain of UPOV.

6. At the last Session of the Commission, WIPO reported on its activities, noting the valuable contribution of the FAO to its work, particularly in relation to the WIPO IGC. The report highlighted how participation of the FAO in the IGC had helped underscore the distinct nature of genetic resources for food and agriculture for the members of WIPO. WIPO also informed the Commission on the progress on relevant cooperation activities between FAO and WIPO.³ A number of FAO technical programmes also deal with management of genetic resources for food and agriculture, including in the context of intellectual property rights. In underscoring the need for a coherent approach, at the international level, to the many issues relevant to genetic resources for food and agriculture, the Commission emphasized that FAO should continue to cooperate with WIPO.⁴ It also stressed that the Commission should strengthen mutual cooperation with other relevant organization in the context of its future work,⁵ including WIPO.

7. This document, prepared by the Secretariat and the International Bureau of WIPO, briefly introduces WIPO's activities of relevance to genetic resources for food and agriculture. It then describes joint activities for FAO and WIPO of relevance to the Commission, and concludes by summarizing on-going cooperation and seeking guidance from the Commission. It does not put a formal position on behalf of either organization nor their secretariats.

II. WIPO ACTIVITIES RELEVANT TO GENETIC RESOURCES FOR FOOD AND AGRICULTURE

On-going work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

8. At its Twenty-Sixth Session in 2000, the WIPO General Assembly established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) as a forum for discussions on intellectual property issues that arise in the context of: (i) access to genetic resources and benefit sharing; (ii) protection of traditional knowledge, whether or not linked with those resources; and (iii) the protection of expressions of folklore. The IGC's current mandate, renewed in 2005, requires a particular focus on the international dimension of its work, and raises the possibility of an international instrument or instruments.⁶ Participants in the IGC include WIPO Member States, intergovernmental organizations such as the FAO, and representatives of many other organizations accredited as observers. The FAO has taken an active role in the work of the IGC. The majority of the more than 150 *ad hoc* observers specially accredited to the IGC represent indigenous or local communities, or other holders of traditional knowledge (TK).

9. Over the course of five years, the WIPO IGC has distilled its extensive work on the protection of traditional knowledge into a set of draft Objectives and Principles for the Protection

³ CGRFA-10/04/REP, para. 66.

⁴ CGRFA-10/04/REP, para. 74.

⁵ CGRFA-10/04/REP, para. 88.

⁶ The working documents of the Intergovernmental Committee can be obtained from the Secretariat and are also available on WIPO's website at <<http://www.wipo.int/tk>>.

of Traditional Knowledge against misappropriation and misuse⁷ (informally termed ‘provisions’). The draft Objectives and Principles were commissioned by the IGC at its Sixth Session in March 2004, on the basis of draft working materials progressively developed over the five previous IGC sessions and the substance of the IGC’s discussions. At its Seventh Session, the IGC extensively reviewed the first drafts of the provisions,⁸ agreed on an open commenting process to run between its seventh and eighth sessions, and requested a redraft to be based on the comments received. Member States, indigenous and local communities, and other civil society organizations and interested parties submitted more than 200 pages of comments. All the comments were taken into account in the subsequent revision of the provisions. The revised draft provisions were circulated and reviewed very extensively by the IGC at its Eighth, Ninth and Tenth sessions, in June 2005, April 2006 and December 2006 respectively. The IGC established a second commentary process between the ninth and tenth sessions, which led to a further, extensive array of stakeholder inputs. The current draft of the provisions remains on the table as an IGC working document, and has also been widely used as a benchmark or reference point on the issues addressed and on possible approaches for the protection of TK.

10. Additionally, at its Tenth Session, in December 2006, the IGC identified ten core issues regarding the protection of traditional knowledge, and agreed on a further intersessional commentary process in which WIPO Member States and IGC observers were invited to submit comments on these issues. The extensive comments submitted on these issues have been collated and circulated as working documents for the forthcoming eleventh IGC session.

11. Regarding genetic resources, the IGC has addressed a range of issues including the enhanced recognition of genetic resources in patent procedures to reduce the possibility of erroneous patenting, provisions on IP aspects of access and benefit sharing from the use of genetic resources, including the creation of a database, and patent disclosure requirements relating to inventions making use of genetic resources and associated TK (including a first technical study prepared at the invitation of the Conference of Parties of the Convention on Biological Diversity (CBD COP); a second WIPO study on this question responding to a second CBD COP invitation was prepared by an *ad hoc* intergovernmental process distinct from the IGC.). At its most recent, tenth, session the IGC requested the WIPO Secretariat to prepare a document listing options for continuing or further work, including work in the areas of the disclosure requirement and alternative proposals for dealing with the relationship between intellectual property and genetic resources; the interface between the patent system and genetic resources; and the intellectual property aspects of access and benefit-sharing contracts; and a factual update of international developments relevant to the genetic resources agenda item. This document will be circulated in advance of the eleventh session for the consideration of WIPO Member States.

12. The eleventh session of the Committee will be held in Geneva from July 3 to 12, 2007.

Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure and the Patenting of Micro-organisms

13. In 1977 the *Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for Purposes of Patent Procedure* (the Budapest Treaty) was concluded and the Budapest Union was established. The main feature of the Treaty is that a Contracting State that allows or requires the deposit of micro-organisms for the purposes of patent procedure must recognize, for such purposes, the deposit of a micro-organism with any “International Depository Authority” (IDA), irrespective of whether such authority is on or outside the territory of the said State. The operation of the Budapest Treaty is thus *inter alia* relevant to the use and patenting of

⁷ WIPO Publication No. WIPO/GRTKF/INF/1. For details on the draft WIPO Provisions, including the global commenting process on the Provisions, see http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html

⁸ Document WIPO/GRTKF/IC/9/5.

genetic resources for food and agriculture, including microbial genetic resources. The Treaty is open for ratification to States who are party to the Paris Convention for the Protection of Industrial Property (1883).

14. Enabling disclosure of the invention claimed in a patent application is a generally recognized patentability requirement, as a *quid pro quo* to the public for the grant of a patent title. Normally, an invention is disclosed by means of a written description. Where an invention involves a micro-organism or other biological material (hereinafter referred to as “micro-organisms”), or the use of it (in particular in agriculture, food and pharmaceutical industries), which is not available to the public, such a description is not always sufficient for disclosure within the meaning of patent law. That is why, in the patent procedure of an increasing number of countries, it is necessary not only to file a written description, but also to deposit with a specialized institution a sample of the micro-organism. Patent offices are not equipped to handle micro-organisms, whose preservation requires special equipment and expertise to keep them viable, to protect them from contamination and to protect health or the environment from contamination. Such preservation is also costly.

15. It is in order to eliminate the need to deposit a claimed micro-organism in each country in which protection is sought, that the Budapest Treaty provides that the deposit of a micro-organism with any IDA suffices for the purposes of patent procedure before the national patent offices of all of the Contracting States, and before any regional patent office (if such a regional office declares that it recognizes the effects of the Treaty).

16. What the Treaty calls an “IDA” is a scientific institution (typically a “culture collection”) that is capable of storing micro-organisms. On June 1, 2007, 37 such IDAs were notified under the Treaty.⁹

III. JOINT ACTIVITIES OF FAO AND WIPO RELEVANT TO GENETIC RESOURCES FOR FOOD AND AGRICULTURE

Study of how intellectual property rights may effect the availability and use of material from the International Network of *Ex situ* Collections under the Auspices of FAO and the International Treaty

17. At its ninth session, the Commission on Genetic Resources for Food and Agriculture requested “that WIPO cooperate with FAO in preparing a study on how intellectual property rights may affect the availability and use of material from the International Network and the International Treaty”.¹⁰ In response to this request, WIPO and FAO have cooperated to analyze how IP rights might affect the availability and use of plant genetic resources for food and agriculture.

18. WIPO provided a first progress report on its work regarding this request at the Second Meeting of the Commission acting as Interim Committee for the International Treaty, in November 2004, entitled *Preliminary report on work towards the assessment of patent data relevant to availability and use of material from the International Network of Ex-Situ Collections under the Auspices of FAO and the International Treaty*.¹¹ To commence work towards the request, this progress report only considered patents, rather than intellectual property more generally. One initial pathway to gaining insights on this question was to build up an information base on relevant patents and patent applications. To initiate this process, using existing patent search algorithms, sample searches were conducted in order to test the methods and broadly illustrate the type of information that could be generated, and on that basis to pose questions

⁹ For more information see: <http://www.wipo.int/treaties/en/registration/budapest/>.

¹⁰ CGRFA-9/02/REP, paragraph 31.

¹¹ CGRFA/MIC-2/04/Inf.5, <ftp://ftp.fao.org/ag/cgrfa/mic2/m2i5e.pdf>

about how such information could be refined and used to clarify understanding about the effects on availability and use. The main insight from these preliminary sample searches was to illustrate the choices involved in developing a search method, and the *type* of data that might be obtained through its use. It illustrated the limitations of the conclusions that can be drawn from broad-brush patent searching, and underscored the need for careful analysis of the content, scope and implications of specific patents before any substantive assessments can be made. Above all, the exercise illustrated the need for more extensive examination of the patent landscape, and the broader legal context that surrounds particular crops, before any practical assessment could be made about the effect on availability and use of material that may be covered by patents. The document ended by identifying options for such follow-up work. The Commission Acting as the Interim Committee “welcomed this Preliminary Report, which was of significant value to the agricultural community, and the continuing cooperation with WIPO”.¹² In its Report, the Interim Committee “looked forward to receiving the report of the next stage of this work, in line with the follow-up activities identified in the preliminary report”.¹³

19. WIPO provided a second progress report on the follow-up work identified in its first findings to the first session of the Governing Body of the International Treaty, entitled *Progress Report on Work Towards the Assessment of Patent Data Relevant to Agricultural Biotechnology and the Availability and Use of Material from the International Network of Ex-Situ Collections Under the Auspices of FAO and the International Treaty: A Draft Patent Landscape Surrounding Gene Promoters Relevant to Rice*.¹⁴ This Progress Report contained a factual description of the international patent landscape surrounding gene promoters relevant to rice. Rice had been selected by FAO and WIPO for the draft patent landscape because of its crucial importance for food security. FAO selected gene promoters as an illustrative technology for the initial set of patent searches and analysis. Gene promoters regulate the transcription of genetic information from DNA (gene expression), and are therefore key tools in agricultural biotechnology and in the use of plant genetic resources for food and agriculture in research and development. Some initial observations that arose from this progress report included a first review of trends in research and development on these key research tools, including the comparative degree of public and private sector activity, the emergence of research collaborations, and the genes and the traits they express that are of interest to the research community. The Progress Report noted that similar searches would be conducted for maize, potato and soybean, and would subsequently be added to the Report.

20. Further work is continuing to consolidate and extend the scope of this analysis, with a view to producing a preliminary report for peer review and further consultation, with a consolidated draft expected in the course of 2008.

Case studies on small and medium-sized enterprises in the seed industry in developing countries

21. In October 2000, WIPO Member States endorsed a proposal to establish a substantial new programme of activities, focusing on the intellectual property-related needs of Small and Medium-sized Enterprises worldwide. WIPO’s *Programme of Activities for Small and Medium-sized Enterprises (SMEs)* aims to encourage a more effective use of the intellectual property system by SMEs worldwide. The programme seeks to raise awareness of the relevance of intellectual property for small and medium-sized business and promotes initiatives to make the IP system more accessible, less cumbersome and more affordable for SMEs. Recent programme activities have focused on the collaborative development of Case Studies on SMEs in the seed industry in developing countries, with a focus on IP issues relating to innovations in plant

¹² CGRFA/MIC-2/04/REP, paragraph 31.

¹³ Ibid.

¹⁴ IT/GB-1/06/Inf.17.

breeding and agricultural biotechnology, as described under the relevant substantive heading below.

22. Following the Twenty-fourth FAO Regional Conference for Africa, held in Bamako, Mali, from 30 January to 3 February 2006, FAO expressed an interest to understand possible IP-related conditions for a more favourable development of the seed industry and agricultural biotechnology sector in the countries of the region. Recognizing that to date no systematic study on the effect of IP practice and policy on SMEs in the seed sector in developing countries had been undertaken, WIPO agreed to prepare case studies, in collaboration with FAO and UPOV. These aimed to elucidate how small seed companies operate in the new regulatory and business environment, shaped by new innovation patterns in plant breeding and agricultural biotechnology. In particular the case studies would examine how innovation takes place within the sector in different countries and how the IP system is used by the different actors in this sector to protect new plant varieties, breeding methods and agro-biotechnological inventions, whether in the public or private sectors.

23. The information gathered from the case studies is intended as an input for agricultural policy-makers in developing countries. In order to produce the cases studies, in 2006 WIPO held seminars in cooperation with the authorities of several Member States with the goal of developing the case studies. These workshops were held in cooperation with government agencies of Brazil and India, with the input and participation also of the FAO, and were convened with the assistance of organizations such as the Biotechnology Consortium India Limited (BCIL), and the Brazilian Agricultural Research Corporation (EMBRAPA). The seminars were held in 2006, and the cases identified during the seminars as possible subjects of studies are currently being documented, with the stakeholders concerned. Subject to the provision of appropriate information by the concerned stakeholders in the countries, it is expected that the case studies would become available in 2008.

IV. CONCLUSIONS AND GUIDANCE SOUGHT

24. WIPO and FAO have cooperated over a long period of time and in mutual respect for their respective mandates in a wide range of substantive areas, at the interface between agricultural policy and IP policy. Several activities arising from this cooperation are currently ongoing, and WIPO will report in due course to the CGRFA on progress and outcomes.

25. Given the growing cooperation between both organizations, and in line with similar arrangements being developed within the United Nations, a draft Agreement of Cooperation was developed to provide a formal framework for cooperation between WIPO and FAO. The draft was approved by the FAO Conference at its Thirty-Third Session, held from November 19 to 26, 2005,¹⁵ following earlier consideration and clearances of the draft by the Committee on Constitutional and Legal Matters (CCLM) and the FAO Council.¹⁶ Following the approval of the draft Memorandum by the FAO Conference, it was then submitted to the Fifty-Fifth Session of the WIPO Coordination Committee, held from September 26 to October 3, 2006.¹⁷ The Coordination Committee noted the document and postponed consideration of it.

26. Within their respective competences, and subject to the directions and guidance of their respective Member States, cooperation between the two organizations can be further enhanced. Different mechanisms could be explored, such as: representation in the relevant meetings and processes of the other organization; exchange of information on technical and policy matters of mutual concern; the provision of relevant technical information, and input to support the work of the other organization; the coordination of databases and, where appropriate, the coordinated

¹⁵ C 2005/LIM/6; C2005/REP, para. 103 and Appendix E.

¹⁶ CL 128/5, Appendix II.

¹⁷ WO/CC/55/2, para 2 and Annex I.

development of information systems; and joint programmes of work that address issues of mutual relevance, and which are initiated at the request of either organization.

27. Based on the experience of the past eight years, and subject to the distinct program directions for the two organizations approved by the respective Member States, the possible areas of cooperation that may be discussed may include : information and analysis on patterns and trends of intellectual property use in the food and agriculture sector; Farmers' Rights and the legal protection of traditional knowledge; agricultural biotechnology; the management of genetic resources for food and agriculture; promotion of innovation and the effective capture of benefits from public investment in research; access to, and transfer of, technology in the food and agriculture sector; plant protection and production; ethical issues in food and agriculture; and the creation, development and dissemination of agricultural information and data.

28. A number of technical and institutional activities have been established in recent years to enhance collaboration between the two organizations, and to put such work on a par with similar cooperation with other UN agencies. It is therefore likely that, in the context of the Commission's MYPOW, cooperation between the two organizations will continue.

29. This document has introduced on-going work of WIPO and its cooperation with FAO, which the Commission may find useful in defining its future work. The Commission may therefore wish to welcome progress in cooperation between the two organizations, express its views on the cooperation activities reported, and make suggestions that FAO can take into account. It may also wish to consider possibilities of strengthening mutual cooperation with WIPO, when planning for its future work.