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## Landmark biodiversity, TK provisions accompany EFTA-Colombia FTA

By David Vivas-Eugui

Since the implementation of the WTO's Agreement on Trade-related Aspects of Intellectual Property (TRIPS) in 1996, several international fora have been working to agree upon the appropriate nature of the relationship between intellectual property provisions and the Convention on Biological Diversity (CBD). The debate expanded to other fora in the early 2000's when other international organisations - such as the World Intellectual Property Organization (WIPO)<sup>1</sup> and the Convention on Biological Diversity's Conference of the Parties (CBD COP)<sup>2</sup> - engaged in the discussion from different perspectives.

At the core of the debate is the fact that the intellectual property (IP) provisions in TRIPS may generate incentives for the incorporation or use of genetic resources, its derivatives, or associated traditional knowledge (TK) in new patentable inventions or breeders' rights. Also, there has been a lot of criticism linked to the fact that the TRIPS Agreement has not incorporated the necessary mechanisms to avoid illegal access and use of genetic resources and TK - so-called 'biopiracy' - and address low patent quality examination in biotechnological patents.

Recently, however, a few small steps addressing trade and biodiversity-related concerns have been seen in bilateral Free Trade Agreements (FTAs). For example, non-binding - yet valuable in terms of coverage - language can be found in the now ratified US-CAFTA, US-Peru FTA, the US-Colombia FTA (which is still in process), and Canada-Peru FTA, and the EU's Economic Partnership Agreement (EPA) with the Caribbean Forum for African, Caribbean, and Pacific States (CARIFORUM). In each of these trade agreements, certain objectives, limited implementing mechanisms, and some level of cooperation to improve patent quality were recognised. Nevertheless, there was reluctance and lack of will on the part of industrialised countries to effectively address biodiversity until the issue was addressed seriously for the first time in the recent FTA between the European Free Trade Association (EFTA)<sup>3</sup> and Colombia.

### Colombia, Peru sail into uncharted waters

One of the main reasons why so few FTAs between developed and developing countries contain provisions on the relationship between intellectual property and biodiversity is that developing countries never broached the subject. This silence on the part of developing countries is likely due to a lack of clarity on how to address the issue in a bilateral context. This suddenly changed during US FTA negotiations with Colombia and Peru, when the two Latin American countries made text proposals aimed at incorporating provisions on biodiversity-related issues into the chapter on IP. These proposals included the following measures:

- The recognition that IP rights should be granted in respect of CBD and national biodiversity and TK legislation;
- The incorporation of a disclosure mechanism for origin/source and evidence of prior informed consent (PIC) and benefit sharing arrangements;
- The inclusion of a mandate to develop at the national level an effective *sui generis* (of its own kind) system to protect TK, and;
- The incorporation of enforcement measures and cooperation arrangements in patent examination and exchange of information.



# Swiss IP office establishes unit on sustainable development

By Thomas Henninger

With climate change, influenza, biodiversity and food security dominating world headlines, Swiss intellectual property (IP) authorities are looking more closely at the relationship between IP protection and sustainable development. To that end, earlier this year the Swiss Federal Institute of Intellectual Property (IPI) established a unit on sustainable development.

According to Felix Addor, Deputy Director General of the Institute, this is likely the first time a national intellectual property (IP) office has ever officially introduced the concept of sustainability in its institutional structure. The move sets an interesting precedent for other national IP authorities.

The institute's statutory mandate is to ensure an appropriate and effective level of IP protection. In this context, the traditional tasks of IPI include drafting legislation, advising the Swiss Federal Council, representing Switzerland at the international level in IP deliberations, granting intellectual property rights (IPRs), and offering services in IPR research and information. However, the IP protection provided is also "to take into account in a balanced manner, as far as possible, the interests of the various stakeholders concerned, including not only industrial but also consumer, ethical, developmental and environmental aspects."

According to Addor, the Institute is getting increasingly involved in international discussions on environmental issues and with the new unit in place, it will now "be able to better reflect these and other developments" ..

The new 'Intellectual Property and Sustainable Development' unit is destined to be a contact point for the World Intellectual Property Organization's new division on global issues, recently established by WIPO Director-General Francis Gurry. Within the Institute, the new unit will take the lead on IP and sustainable development issues such as biodiversity, traditional knowledge, food security and climate change.

The Swiss institute had already dealt with issues of biodiversity and traditional knowledge and in that regard has collaborated with WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), the Trade Related Aspects of Intellectual Property Rights (TRIPS) Council, the Convention on Biological Diversity (CBD) and the International Treaty of the UN's Food and Agricultural Organization (FAO). In addition, Addor says "the Institute would like to participate more closely and actively in the activities of those fora studying scenarios for the future of intellectual property."

## Stakeholder involvement and collaboration with other initiatives on sustainable development

For the new unit on sustainable development to have a meaningful impact, it will be crucial for stakeholders to be involved at the national and international levels.

In this respect, Addor states that the Institute has been and will continue to hold formalised public stakeholder consultations on new legislation as well as informal contacts with all stakeholders, including civil society and industry. For instance, such stakeholder consultations took place when Switzerland introduced a requirement for patent applicants to disclose the source of genetic resources and traditional knowledge in revised patent law. Martin Girsberger, the head of the new unit, confirms that the institute "intend[s] to continue and deepen existing contacts with stakeholders, for example those active in the area of biodiversity and traditional knowledge." He added that the institute was particularly interested in establishing additional contacts in newly emerging areas such as climate change.

Girsberger points out that Switzerland made two considerable donations to the WIPO Voluntary Fund, which supports the participation of Indigenous and Local Community representative in WIPO discussions on traditional knowledge. "In the same vein, the Institute, together with the International Centre for Trade and Sustainable Development (ICTSD), organised a workshop with indigenous representatives in February 2008," reports Addor.

Beyond coordinating with other units and facilitating the finding of balanced solutions within the institute through mutual "checks and balances," Addor stresses that the unit will collaborate with other Swiss government agencies that are responsible for sustainable development. He also says the institute is "aware of activities at the international level, such as plans of WIPO to establish a new Global Challenges Division, and the joint project by the European Patent Office (EPO), UN Environmental Programme (UNEP) and ICTSD to examine the role of patents in the development and transfer of environmentally sound technologies."

## Swiss initiatives on biodiversity issues at WTO and WIPO

The establishment of the this new unit on sustainable development comes in the context of series of initiatives and proposals taken by Switzerland in past years to engage more actively in international discussions on IP, trade and biodiversity. To that effect, the Swiss Institute, on behalf of Switzerland, drew up several proposals for the WTO and WIPO that departed from some of the earlier positions that Bern had taken with respect to these issues in earlier discussions.

*“The establishment of the this new unit on sustainable development comes in the context of series of initiatives and proposals taken by Switzerland in past years to engage more actively in international discussions on IP, trade and biodiversity.”*

For instance, Switzerland is a key partner in a huge coalition at the WTO that wants to adopt ‘draft modalities’ on bio-diversity and geographic indications. In July 2008, Switzerland – along with Brazil, the EU, and India – proposed that the TRIPs Agreement be amended so as to require that patent applicants disclose the origin or source of the genetic resources and associated traditional knowledge contained in an application. The proposal, which is now supported by more than 110 WTO members, would improve patent quality and ensure fulfilment of the objectives of the CBD. Beyond TRIPS, Switzerland has proposed a similar disclosure proposal to the Patent Cooperation Treaty (PCT) at WIPO.

Furthermore Switzerland made a proposal to WIPO IGC to establish an international internet portal on traditional knowledge. This portal would electronically link existing local and national databases on traditional knowledge, and could facilitate access by patent authorities to traditional knowledge contained in such databases.

This tendency of Swiss policy to address biodiversity-related concerns is reflected as well in a recent free trade agreement (FTA) concluded between Colombia and the European Free Trade Association (EFTA) – made up of Liechtenstein, Iceland, Norway and Switzerland. This FTA contains for the first time a chapter on biodiversity in its IP provisions, and provides for the disclosure of origin for patent applications and criminal sanctions in case of infringement (see related story, this issue).

Some observers say they hope Swiss authorities will continue to signal further initiatives and measures towards ultimately ensuring that global IP rules and policies are made supportive of public policy objectives in areas such as biodiversity, climate change, and food security.

A presentation of the tasks and mandate of the Institute can be found at: <http://www.ige.ch/en/institute/institute.html>.

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### WTO documents

- IP/C/W/400/Rev.1 (available at [https://www.ige.ch/fileadmin/user\\_upload/Archiv/e/jurinfo/documents/IP-C-W-400.pdf](https://www.ige.ch/fileadmin/user_upload/Archiv/e/jurinfo/documents/IP-C-W-400.pdf))
- IP/C/W/423 (available at <http://docsonline.wto.org/DDFDocuments/t/IP/C/W423.doc>)
- IP/C/W/447 of May 2005.

## Bridges Trade BioRes Review

Published by:

The International Centre for Trade and Sustainable Development

Chief Executive:  
Ricardo Meléndez-Ortiz

Editor: Andrew Aziz  
Address: 7 Chemin de Balexert  
1219 Geneva, Switzerland  
Tel: (41-22) 917-8492  
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Email: [aaziz@ictsd.ch](mailto:aaziz@ictsd.ch)  
Web: [www.ictsd.net](http://www.ictsd.net)

Additional support was provided by Lindsay Bass and Malena Sell

This publication is made possible through the financial contribution of the Government of the United Kingdom (DFID) and the Dutch Ministry of Foreign affairs (DGIS).

The opinions expressed in the signed contributions to the BioRes Review are the authors' and do not necessarily reflect the views of ICTSD. Manuscripts offered for publication are expected to respect good journalistic practice and be compatible with our mission. Guidelines for contributors are available on request.

Material from the BioRes Review can be used in other publications with full academic citation.

ISSN 1996-9198