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DESK REVIEW OF THE INTERGOVERNMENTAL WORKING GROUP ON PUBLIC HEALTH, INNOVATION AND INTELLECTUAL PROPERTY FROM A RIGHT TO DEVELOPMENT PERSPECTIVE1

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INTRODUCTION

1. **This desk review has been commissioned by the High-Level Task Force on the implementation of the Right to Development**, in pursuance of its mandate to use the right to development to strengthen global partnerships for development as defined in Millennium Development Goal (MDG) 8. In accordance with this mandate, the Task Force has elaborated criteria for periodic evaluation of global development partnerships to be applied, on a pilot-basis, to selected partnerships.3

2. At its Fourth Session in January 2008, the Task Force decided to take up consideration of Target 17 of MDG8E, which aims to "in cooperation with pharmaceutical companies, provide access to affordable essential drugs in developing countries".4 The Task Force recognized that Target 17 bears on the realization of the right to development, since the inaccessibility of medicines "stands as a direct contradiction to the fundamental principle of health as a human right".5 **At its 2008 Session, the Working Group on the Right to Development recommended a work plan for the Task Force which gave priority to the issue of access to essential medicines in developing countries including through a desk review of the work of the Intergovernmental Working Group on Public Health, Innovation and Intellectual Property (IGWG). The Human Rights Council endorsed this work plan at its 9th session in September 2008.6**

3. **The IGWG process engaged WHO Member States, nongovernmental organizations, intergovernmental organizations and the pharmaceutical industry in an eighteen month process to produce a Global Strategy and Plan of Action to "provide a medium-term framework for securing an enhanced and sustainable basis for needs driven essential health research and development relevant to diseases which disproportionately affect developing countries, proposing clear objectives and priorities for R&D, and estimating funding needs in this area".7**

4. **The IGWG Global Strategy and Plan of Action (GSPA) aims therefore to meaningfully reform both the failure of global R&D to produce medicines for diseases of the developing world, as well as the intellectual property rights protected under international and bilateral trade agreements that have often constrained developing country realization of access to affordable medicines.** The GSPA may therefore offer a critical milestone in global policy on medicines access in developing countries, with the potential to significantly advance the realization of MDG8E, the right to development and associated human rights to health, life and the benefits of scientific progress.

5. **Accordingly, this desk review was commissioned to assess IGWG and the GSPA from a right to development perspective, documenting the IGWG process leading to the adoption of the GSPA, and mapping the Task Force's right to development criteria against the GSPA**. In particular, the review was asked to (1) explore areas of potential synergy between the IGWG process and GSPA and the right to development, (2) suggest right to development criteria for inclusion in the GSPA, and (3) identify lessons learned from the IGWG process that can aid efforts to refine and develop right to development criteria in relation to MDG8E.
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… **B. Regional Consultations and the Second Web-Based Public Hearing**

27. **Regional and inter-country consultations were organized in August, September and October 2007 in all the WHO regions**, including AFRO in the Congo, AMRO/PAHO in Canada, EMRO in Egypt, EURO in Serbia, SEARO in the Maldives and WPRO in the Philippines. The consultations brought together Member States, NGOs, and experts from the regions to review the draft Global Strategy and Plan of Action. The most influential of these consultations took place in Rio de Janeiro, between Argentina, Brazil, Chile, Costa Rica, Cuba, Ecuador, El Salvador, Honduras, Mexico, Peru, Suriname, Uruguay and Venezuela. This meeting produced **the 'Rio document,' which came to have a significant influence on negotiations.52** The Rio document emphasized the importance of considering poverty, disease burdens and growing criticism "in developed and developing countries alike, on the barriers posed by proprietary rights over the access to medicines, in particular with regard to anticompetitive practices in the field of patent rights".53 **The Rio document also proposed rights-based principles for the Global Strategy that became the subject of considerable debate**. These principles stated that:

> (a) the right to health protection is a universal and inalienable right and it is the government's duty to ensure the means for its enforcement;
> (b) **the right to health takes precedence over commercial interests;**
> (c) the right to health implies equitable access to medicines, and;
> (d) **the promotion of technological innovation and the transfer of technology is a right of all States and should not be restricted by intellectual property rights.54**

28. The influence of the Rio document was apparent at the AMRO/PAHO consultation held in Ottawa, Canada from 22-23 October 2007. **Here, States debated the impact of intellectual property rights on access, and whether WHO should act as a lead actor in the plan of action**. Countries also debate the appropriateness of including Rio's principles on the right to health. 55 The consultation also introduced a new debate over whether the IGWG process could appropriately deal with diseases experienced primarily in developed countries.
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This discussion relied on the specific wording of WHA resolution 59.24 which drawing on the CIPIH report, focused on Type II diseases incident in both rich and poor countries but with a substantial proportion of cases in developed countries, Type III diseases overwhelmingly or exclusively incident in developing countries diseases, rather than Type I diseases incident in both rich and poor countries.56

29. **A second two-part web-based public hearing was held from 15 August to 30 September 2007, dedicated to comments on the strategy and plan of action, and responding to the 60th World Health Assembly's request to the Director-General to encourage the development of proposals for R&D, including incentive mechanisms.57 Approximately sixty-five contributions were received from a wide range of stakeholders, including governments and national institutions, civil society, academics, the private sector and patient's organizations.58** The second hearing saw a dramatic intensification of debates over the role of intellectual property rights, and the feasibility of innovative incentive mechanisms.59

30. A number of submissions analyzed and proposed new incentive mechanisms like patent pools, a medical R&D treaty, a comprehensive advance market commitment and prize funds.60 **Many submissions however disputed the need for new incentive mechanisms, arguing that strong intellectual property rights played a constructive role in providing incentives to medical innovation.61 Opponents of new incentives emphasized the need to instead adopt market-based mechanisms, including advance market commitments and public-private partnerships.62** Some submissions went so far as to suggest that IGWG sought to alter private innovation in ways akin to Soviet-style communism.63

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60 Frederick M. Abbott and Jerome H. Reichman, "Strategies for the Protection and Promotion of Public Health Arising out of the WTO TRIPS Agreement Amendment Process", Florida State University and Duke University; James Love, Knowledge Ecology International; Itaru Nitta, Green Intellectual Property Scheme System to impose a levy on patent applicants to establish a trust fund to facilitate eco-Aidan Hollis, A Comprehensive Advanced Market Commitment; Thomas Pogge, Track2.

61 Jeremiah Norris, Hudson Institute, USA; Harvey Bale, IFPMA; Ronald Cass, Centre for the Rule of Law; Wayne Taylor, Health Leadership Institute, McMaster University; Anne Sullivan, International Association for Business and Health; Hispanic-American Allergy Asthma and Immunology Association; the National Grange of the Order of Patrons of Husbandry; International Chamber of Commerce; Healthcare Evolves with Alliance and Leadership; and US Chamber of Commerce. 62 Harvey Bale, IFPMA; **Lawrence Kogan, Institute for Trade, Standards and Sustainable Development**; Tracy Haller, Novartis;; Lila Feisee, Biotechnology Industry Organization; Council Nedd, Tabetha B. Ralph and Leslie O. Anderson, Alliance for Health Education and Development, USA; **Lawrence Kogan, Institute for Trade, Standards and Sustainable Development**; Brendan Barnes, European Federation of Pharmaceutical Industries and Associations; Community Life Improvement Program and Alliance of Minority Medical Associations; Health Care Advocacy Alliance; and Bioventures for Global Health.

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