



SOUTH CENTRE AND CIEL IP QUARTERLY UPDATE: SECOND QUARTER 2004

INTELLECTUAL PROPERTY AND DEVELOPMENT: OVERVIEW OF DEVELOPMENTS IN MULTILATERAL, PLURILATERAL, AND BILATERAL FORA

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I. INTRODUCTION

1. Developing countries face complex challenges in the evolving scenario of international intellectual property policy-making. Multiple fronts of discussions and negotiations require a coordination of strategies and positions that is not always easy to achieve. Nonetheless, since the shift in fora has been carefully designed by developed countries to take advantage of these difficulties and thus attempt to circumvent the options, flexibilities, and unresolved issues present at the multilateral level, it is crucial to develop a global view of international intellectual property standard-setting and to take the larger context into consideration during any negotiation or discussion.
2. The South Centre and CIEL IP Quarterly Update is intended to facilitate a broader perspective of international intellectual property negotiations by providing a summary of relevant developments in multilateral, plurilateral, and bilateral fora. Moreover, each IP Quarterly Update focuses on a significant topic in the intellectual property and development discussions to demonstrate the importance of following developments in different fora and the risks of lack of coordination between the various negotiations. Thus, Section II of the present note will analyze the upcoming WIPO General Assembly and highlight the issues relevant to the intellectual property and development debate. Then, Section III will provide a brief factual update of intellectual property-related developments in a number of different fora in the previous three months.

II. WIPO GENERAL ASSEMBLY: DECISIONS TO BE (AND NOT TO BE) MADE

A. Introduction

3. When the General Assembly, the supreme organ of the World Intellectual Property Organization (WIPO), meets in September, it will be asked to provide direction on issues crucial to developing countries and civil society organizations. Topics such as the inter-relationship of the different fora addressing the issues of genetic resources and traditional knowledge, the protection of broadcasting organizations, and the future of the Substantive Patent Law Treaty (SPLT), all which raise serious concerns from a development perspective, will be among the issues considered by Member States as they discuss the upcoming work of WIPO. In addition, though developing countries and non-governmental organizations (NGOs) have become increasingly involved and influential in WIPO discussions, their effective participation at the General Assembly level, where it is more difficult to determine the relevant issues and how they relate in a broader context, remains a challenge.

4. The purpose of this note is therefore to highlight and briefly analyze key issues likely to be discussed in the General Assembly, thus facilitating an adequate consideration of topics relevant to the intellectual property and development agenda pursued by developing countries and NGOs. Section B starts by providing a brief explanation of the WIPO General Assembly, its functions, and procedures. Section C then expounds on the matters relating to discussions at the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), at the Standing Committee on Copyright and Related Rights (SCCR), and at the Standing Committee on the Law of Patents (SCP) that may be put forth to the General Assembly. Finally, Section D summarizes the main points and highlights the need for a coherent and coordinated participation by developing countries and civil society organizations.

B. The WIPO General Assembly

5. The General Assembly, as one of the main pillars of decision-making in WIPO, has a significant role in determining the work of the organization, but also allows considerable room for subsidiary bodies to establish their own agendas. Its functions include, for example, reviewing and approving the reports of the Director General and providing him with all the necessary instructions.¹ The last session of the General Assembly, for instance, extended the mandate for the IGC and approved the transmission of a draft technical study to the Secretariat of the Convention on Biological Diversity (CBD).² The General Assembly also makes crucial decisions as a result of its responsibility of adopting the biennial budgets. The Program and Budget for the 1998-99 biennium, for instance, included a proposal for the establishment of four standing committees, including the SCP, which is now discussing the SPLT.³ Nevertheless, the General Assembly did not determine the issues to be considered by the Standing Committees, which were established by each particular committee in its first session.⁴

6. Determining to what extent certain decisions should be made at the General Assembly is crucial in light of the differences in the representation of countries and NGOs in the General Assembly and other bodies. In the framework of the General Assembly, the issues are discussed in a much broader context and by high-level officials that often have not been involved in previous discussions and negotiations. Moreover, only NGOs with permanent observership status to WIPO are allowed to participate in the General Assembly, excluding all those NGOs that actively contribute in the discussions of the different WIPO bodies as ad hoc observers. Nevertheless, when the issues raised refer to matters that cut across the different negotiating bodies, the General Assembly ensures an appropriately integral consideration.

7. The issues to be discussed by the General Assembly – the agenda – is prepared by the Director General, though any State member may request the inclusion of supplementary items on the draft agenda up to one month before the date fixed for the opening of the session, and even the General Assembly itself may amend or delete items from the agenda, as well as add new ones if they are of urgent character.⁵ Such procedures can be a challenge for developing countries since, even if a body did not decide to take an issue to the General Assembly, that issue may nevertheless come up for consideration. The present note focuses on three issues that may be raised at the next Session of the General Assembly: the CBD's request for WIPO to undertake work on the issue of disclosure, the possibility of a diplomatic conference on the protection of broadcasting organizations and the future work plan regarding the SPLT. These issues have been chosen as they have been the focus of the work of the South Centre and CIEL Joint Project on Intellectual Property in the last year, though important issues may also arise in other contexts.⁶

¹ The functions of the General Assembly are listed in Article 6 of the Convention establishing the World Intellectual Property Organization (WIPO Convention), available at www.wipo.int/clea/docs/en/wo/wo029en.htm

² See the Report of the Thirtieth Session of the General Assembly, document WO/GA/30/8, paras. 93-95, 97, available at www.wipo.int/documents/en/document/govbody/wo_gb_ga/doc/wo_ga_30_8.doc.

³ The General Assembly at its March, 1998, approved the Program and Budget for the 1998-99 biennium (document A/32/2-WO/BC/18/2; approval reported in document A/32/7, paragraph 93), in which a proposal for the establishment of "Standing Committees" was included.

⁴ See, e.g., the revised draft report adopted by the first session of the SCP, document SCP/1/7 Prov. 2, available at www.wipo.int/documents/en/document/scp_ce/doc/scp1_7p2.doc.

⁵ Rule 5 of the WIPO General Rules of Procedure (document 399(FE) Rev. 3) establishes the procedural norms relating to the agenda.

⁶ The protection of audiovisual performances and the enforcement of intellectual property, for instance, are also on the agenda of the General Assembly.

8. Regardless of the particular issues discussed in the General Assembly, however, the main challenge remains ensuring discussions reflect the needs and concerns developing countries and NGOs have expressed during previous negotiations and discussions, as well as the notion that intellectual property should constitute a tool of development policy rather than an end in itself. In that regard, it is crucial to analyze each issue in the context of the discussions leading up to the General Assembly, as well as in the framework of the broader policy needs and interests of developing countries.⁷

C. Selected Issues to Consider in the Next Session of the General Assembly

C.1 Matters concerning the IGC: CBD, WIPO, and Disclosure Requirements

9. In February, 2004, the Seventh Conference of the Parties of the CBD (COP-7) reaffirmed that the fair and equitable sharing of the benefits arising out of the utilization of genetic resources is one of the principal objectives of the Convention and mandated the relevant working groups to elaborate and negotiate an international regime on access to genetic resources and benefit-sharing. Despite considerable debate regarding the role of trade and other related concerns in the context of the CBD, as well as on the wisdom of having the CBD resort to other organizations for clarification of issues essential to its implementation, COP-7 invited the collaboration of a number of organizations, including WIPO. Specifically, COP-7 asked WIPO to examine, and where appropriate address, in a manner supportive to the objectives of the CBD, issues regarding the interrelation of access to genetic resources and disclosure requirements in intellectual property rights applications.⁸ Such an invitation raised concerns not only in relation to the fact that the CBD should rely on other sources of information and technical analysis apart from WIPO on these issues, but also as to the effect of the request on developing country and NGO efforts to move forward the discussion on the protection of genetic resources and traditional knowledge in a simultaneous and coherent manner in all the relevant fora.

10. Because ensuring mutual supportiveness between international patent rules and the CBD requires cross-cutting solutions, the issue has been raised by developing countries in a number of WIPO bodies as well as in the context of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement). However, discussions in these different fora have not always advanced and much less been mutually supportive, but rather have been played against each other by several developed countries, causing a general lack of progress. The IGC process is particularly used to detract from other important initiatives. For example, discussions in the TRIPS Council on the relationship between the TRIPS Agreement and the CBD continue to be opposed by countries such as the United States and Japan because of ongoing discussions in the IGC.⁹ In addition, a number of developed countries have rejected proposals tabled by Latin American countries in the SPLT negotiations claiming that matters relating to the disclosure and protection of genetic resources and traditional knowledge belong in the IGC, with the United

⁷ For a comprehensive discussion on WIPO and developing countries, see Sisulu F. Musungu and Graham Dutfield, "Multilateral agreements and a TRIPS-plus world: The World Intellectual Property Organization (WIPO)," TRIPS Issues Papers 3 (QUNO and QIAP, 2003).

⁸ See COP decision VII/19 on Access and Benefit-sharing as related to Genetic Resources (Article 15), sub E (8), available at www.biodiv.org/decisions/default.aspx?m=COP-07&id=7756&lg=0.

⁹ See, e.g., the report of the last TRIPS Council meeting in BRIDGES Weekly Trade News Digest - Vol. 8, Number 22, 23 June, 2004, which can be accessed at www.ictsd.org/weekly/archive.htm

States flatly refusing to discuss the issues in the context of the SCP.¹⁰ Finally, while the Swiss proposal regarding the declaration of the source of genetic resources and traditional knowledge in patent applications in the Working Group for the Reform of the Patent Cooperation Treaty (PCT) was generally perceived as a step in the right direction, including by the European Union, several countries insisted the adequate forum for discussion of such issues was the IGC.¹¹

11. It is not surprising, therefore, that in the last session of the IGC (Sixth Session – March 2004) a substantial debate on which was the appropriate forum for the discussion of disclosure followed the presentation of the CBD's invitation to WIPO. Developing countries saw the attempt to deal with the invitation exclusively in the IGC context when it had been directed at the organization as whole, as yet another way of circumventing the consideration of these issues in other equally important bodies. After all, the significance of the IGC to developing countries was always as a forum to clarify issues so that they could effectively be included and dealt with in other WIPO bodies.¹² Finally, attempts by developed countries for the disclosure work to remain in the IGC could not overcome the fact that submitting the invitation to the General Assembly was only the appropriate manner for WIPO Member States to respond to such a request.¹³ Thus, the consideration of the CBD invitation by the General Assembly becomes a fundamental opportunity to formally extend the consideration of the issues of genetic resources and traditional knowledge, thus ensuring an adequate discussion of these issues.

C.2 The possibility of a diplomatic conference on the protection of broadcasting treaty

12. Another critical assignment for the General Assembly at its September 2004 meeting will be establishing the timeframe for a diplomatic conference on the protection of broadcasting organizations. Though many WIPO Members, as well as NGOs, opposed proceeding towards the final step in the WIPO treaty-making process while a number of essential issues remain unresolved, the last session of the SCCR (Tenth Session – June 2004) agreed to recommend that the General Assembly consider the possibility, at an appropriate time, of a diplomatic conference. As the General Assembly discusses potential dates for a diplomatic conference, therefore, it is crucial that it consider such divergences and provide enough time for the SCCR to fully settle them. As several countries stated in the SCCR discussions, only through a comprehensive discussion can countries ensure that the negotiation process will result in an international instrument that responds to the needs of developing countries, copyright holders, consumers and the public in general.

13. While a number of treaties, including the Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, the TRIPS Agreement and the recent WIPO treaties on Copyright (WCT) and on Performance and Phonograms (WPPT), already require countries to provide protection for the broadcasting of a work, its transmission and public communication, the proposed treaty would grant broadcasting

¹⁰ The final report of the last session of the SCP, which both South Centre and CIEL representatives attended as observers, is not yet available, though the chair summary, document SCP/10/10 is available at www.wipo.int/scp/en/documents/session_10/doc/scp_10_10.doc.

¹¹ The summary of the last session of the Working Group for the Reform of the PCT, document PCT/R/WG/6/12, is available at www.wipo.int/pct/en/meetings/reform_wg/doc/pct_r_wg_6_12.doc. For more information on developments in these fora, please see Section III of the Update.

¹² The background of the IGC's creation has repeatedly been noted by developing countries in the context of discussions in that forum. See, e.g., statements by the delegation of Ecuador in the Report of the Sixth Session of the IGC, paragraph 173 (WIPO/GRTKF/IC/6/14).

¹³ See the Report of the last session of the IGC, document WIPO/GRTKF/IC/6/14, para.183, available at www.wipo.int/documents/en/meetings/2004/igc/doc/grtkf_ic_6_14.doc.

organizations significant new rights. For example, under the consolidated text of proposals and discussions prepared by the Secretariat, the current basis for discussions, broadcasting organizations have the exclusive right to authorize the fixation and communication to the public of their broadcasts. Such rights would not only grant them equal protection as is recognized to the creators of the material, but it would even enable them to gain control over works that cannot be copyrighted or are otherwise in the public domain.¹⁴ In this regard, developing countries in past SCCR sessions have repeatedly questioned going beyond the classic protection of broadcasting to create rights aimed at protecting the investments of broadcasting organizations, as worthy as they may be, rather than any innovative activities or a role as an informational and educational tool.¹⁵

14. In addition, the proposed treaty contains alternatives that would create a similar system of ownership for wired communications over cable networks and for material transmitted over Internet computer networks, with no assessment of the effects of such a framework in new, evolving technologies, as well as no consideration of the challenges of a coexisting number of different proprietary rights. The broadcasting treaty would thus, unlike the WCT and WPPT, which made only “cautious changes” to the legal regulation of copyright on the internet in light of the constantly expanding possibilities of such novel technologies, radically modify its legal framework.¹⁶ Nevertheless, the Group of Latin American and Caribbean Countries, Kazakhstan, China, India, and Australia, were among the many in the last session of the SCCR to affirm it would be imprudent at the present stage to regulate such new technologies.¹⁷ In the same way, a number of countries have objected to increasing the minimum term of protection, including Singapore in its proposed treaty text, which in the consolidated text escalates to fifty years over the minimum twenty years established by the TRIPS Agreement.¹⁸

15. Despite the divergences as to the nature, scope, and term of protection, among other issues, however, the SCCR decided in its last Session to recommend that the General Assembly consider the possibility, at an appropriate time, of a diplomatic conference. The SCCR Chair, Mr. Jukka Liedes from Finland, insisted that having the General Assembly make the decision at its next meeting would allow the SCCR, as soon as it was ready, to proceed directly with a diplomatic conference. Moreover, he observed that diverging proposals were to be expected until the negotiating stage, where delegations would reveal the issues that they considered most significant and those in which they were willing to show some flexibility. Nevertheless, several

¹⁴ During the last session of the SCCR, several countries raised the need to distinguish between the protection of the signals used to carry the broadcast program and the content of the program. There are increasing calls for any new instrument relating to broadcasting should protect the signals only and that signal protection language, not copyright or neighbouring rights, would be the most appropriate to protect those signals. For a full treaty-language implementation of these fundamental concepts, please see the document presented by CPTech (Consumer Project on Technology), EDRI (European Digital Rights), FIPR (Foundation for Information Policy Research), IMMF (International Music Managers Forum), and PK (Public Knowledge) at the last session of the SCCR , entitled “A Treaty on the Protection of Broadcasts and Broadcasting Organizations,” available at www.cptech.org/ip/wipo/ngo-broadcast-proposal-v2.3.pdf.

¹⁵ See, e.g., the interventions of India and Brazil at the Tenth Session of the SCCR. The report is document SCCR/10/5 and is available at www.wipo.int/documents/en/meetings/2003/scer/doc/scer_10_5.doc.

¹⁶ See Cornish & Llewelyn, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS, 368 (London, Sweet & Maxwell, 2003) for an analysis of the WCT and WPPT.

¹⁷ The report for the last session of the SCCR was still not available as this Update was being finalized. Thus, references to the Eleventh Session of the SCCR are based on notes taken at the meeting. South Centre representatives attended the meeting as observers.

¹⁸ The Singapore proposal is document SCCR/11/2 and is available at www.wipo.int/documents/en/meetings/2004/scer/doc/scer_11_2.doc.

developing countries remained unconvinced as to the ripeness of the issues for discussion at the diplomatic conference level. As stated by Nigeria, the convening of such a conference must not be at the expense of further consultation and deliberation, and most important of all, it must not sacrifice developing an agreement that addresses the needs of all stakeholders. Thus, it is crucial for the General Assembly at its September meeting to grant the SCCR enough time to comprehensively discuss and resolve these issues in advance of a diplomatic conference to finalize the treaty.

C.3 The SPLT, the SCP, and the General Assembly

16. The SCP, unlike the IGC and the SCCR, did not reach an agreement as to whether to delegate certain decisions to the General Assembly. On the contrary, when dealing with the future of the SPLT, the main issue under discussion at the last session of the SCP (Tenth Session – May 2004), developing countries argued strongly in favour of leaving the determination of the future of the SPLT to the SCP. Nevertheless, given the strong political forces behind the SPLT, namely the so-called user groups (associations of corporations and patent lawyers), the major patent offices, and the International Bureau itself, there is still risk that the issue will find itself in the agenda of the General Assembly. As mentioned in paragraph five, the procedures for setting the agenda of the General Assembly allow any Member, and even the Director General, to incorporate an item in the agenda, though limitations regards as far as timing and process.¹⁹ If the issue is raised in the General Assembly, the challenge for developing countries and NGOs becomes to ensure that their contributions to the debate adequately reflect the needs and concerns raised their interventions at the SCP.

17. Though negotiations on a draft SPLT have been taking place at the SCP since May 2001, it is only recently that developing countries have increased their involvement in these negotiations. Whereas the SPLT, as one of the pillars of the WIPO Patent Agenda, was launched with no assessment of the effects on development, several studies have since described the potentially negative consequences for developing countries.²⁰ For example, SPLT harmonized standards would leave little room for developing countries to adapt their patent laws to local conditions and needs, a crucial condition for patents to act as tool of development. Although the earlier sessions of the SCP were characterized by an asymmetrical participation of developing countries in relation to developed countries, therefore, starting with the Ninth Session (May 2003), a number of developing countries actively participated in the SCP negotiations and made various proposals.²¹

18. In this new scenario, the proponents of the SPLT began to question the existing approach to achieving substantive patent standards. Before the last session of the SCP, the IB stated that the original objective of the SPLT of broad and deep harmonization of patent laws might be too

¹⁹ According to document A/40/INF/1, a memorandum by the Secretariat with general information for the coming Assemblies of the Member States of WIPO, “the rules governing the procedure of the Assemblies and other bodies of the Member States of WIPO and the Unions administered by WIPO consist of provisions in the treaties establishing WIPO and the Unions, the ‘WIPO General Rules of Procedure’ (publication 399 Rev.3) and, for most of the bodies, a distinct set of rules, called ‘Special Rules of Procedure’ (document AB/XXIV/INF/2). The said treaties, publication and document are available upon request.”

²⁰ See, e.g., the report by the Commission on Intellectual Property Rights, “Integrating Intellectual Property Rights and Development Policy,” (Commission on Intellectual Property Rights, 2002).

²¹ See the Draft Report of the 9th Session of the SCP, SCP/9/8 Prov. 2, 24 October 2004 for details on developing countries proposals and interventions at that session.

ambitious in light of the on-going debate about the benefits of harmonization, the balance between right-holders and the public interests and the relationship between the patent system and other policy and regulatory issues such as public health.²² The United States, Japan and the European Patent Office responded by presenting a proposal aimed at moving the process forward and overcoming “problems” such as the existence of complex and controversial issues.²³ The proposal put forth a new framework for patent law harmonization comprised of an initial package of priority issues (prior art related issues, grace periods, novelty and non-obviousness/inventive step) followed by negotiations on other issues at a later stage.²⁴

19. Cutting down the number of provisions to be adopted in the treaty, however, does not eliminate the concerns raised by harmonization. By introducing new standards in areas that are not addressed by the TRIPS Agreement or by other WIPO treaties, the SPLT will inevitably result in loss of sovereign flexibility on the covered issues.²⁵ Moreover, the proposal by the United States, Japan and the European Patent Office avoids even discussing articles that could offer an opportunity for balancing the rights of right-holders and the public interest or preserving policy flexibilities by dismissing them as “controversial”.²⁶ Developing countries repeatedly questioned the issues included in the limited package proposed at the last session of the SCP, particularly as they had been selected in light of the concerns of rights-owners, whereas it is society as a whole that utilizes and is affected by the patent system.²⁷ In that regard, developing countries emphasized the need to consider the development dimension of patents and to recognize intellectual property is a policy instrument for technical and industrial development.

20. In the end, it was clear that there was simply no agreement in the SCP as to a future work plan on the SPLT, as the Chair also concluded, noting that the report would simply reproduce all the interventions that were made on this issue. Developing countries opposed delegating the matter to the General Assembly on the basis that, since the SCP was not created to discuss the SPLT, but rather it was the SCP on its own motion that took on such a negotiation, any decisions on how to proceed or even on whether to abandon the SPLT were up to the SCP itself. Even if there was no further discussion of the SPLT, there would be in fact a number of other pending issues of patent law for the SCP to focus on.

²² See the Memorandum of the International Bureau titled “Information on Certain Recent Developments in Relation to the Draft Substantive Patent Law Treaty (SPLT)”, WIPO Document SCP/10/1, 17 March 2004, para. 2.

²³ See the “Proposal from the United States of America, Japan and the European Patent Office Regarding the Substantive Patent Law Treaty”, WIPO Document SCP/10/9 (April 22, 2004).

²⁴ The initial idea of a two stage approach to the SPLT was first floated at the International Association for the Protection of Intellectual Property (AIPPI) Executive Committee meeting in Lucerne in October 2003. This suggestion was endorsed by a large number of user groups in London and at a Trilateral Cooperation meeting (USPTO, EPO and JPO) held in Tokyo in November 2003 as well as at the AIPPI Geneva seminar in January 2004 and at the International Federation of Intellectual Property Attorneys (FICPI) Executive Committee meeting in Singapore in February 2004. The International Bureau of WIPO then reproduced the conclusions at these various user group and patent office meetings in document SCP/10/8. The United States, Japan and the EPO’s proposal is ostensibly a response to the International Bureau’s memorandum.

²⁵ In addition, new standards are generally based on the standards of major patent offices and developed countries.

²⁶ See the United States, Japan, and European Patent Office proposal, *supra* note 23.

²⁷ The report for the last session of the SCP was still not available as this Update was being finalized. Thus, references to the Tenth Session of the SCP are based on notes taken at the meeting. South Centre and CIEL representatives attended the meeting as observers.

21. Nevertheless, perhaps the most important reason to keep the discussion in the SCP is the significance of the concerns raised by developing countries and the need to ensure that they are properly considered. In that regard, the General Assembly does not provide an appropriate forum. With the arduous task of dealing with a number of varied and complicated issues, it is unfeasible for the General Assembly to reach a solution more adequate than would be achieved with more time and focus in the SCP. Therefore, if anyone does raise the issue in the context of the General Assembly, it becomes even more crucial for developing countries and NGOs to maintain coordinated and coherent positions and to reject harmonization efforts that ignore development concerns.

D. Conclusion

22. The September 2004 meeting of the General Assembly constitutes a crucial challenge for developing countries and NGOs as they increase their participation and influence in WIPO. Over the last two years, their interventions have emphasized the role of intellectual property as a means of achieving public policy objectives and described in detail how on-going discussions should reflect the interests and needs of developing countries, local communities, consumers, and society as a whole. Effectively participating at the General Assembly level, however, requires an even greater understanding of the relevant issues and their role in the broader context.

23. In this regard, three issues merit particular consideration in the coming meeting of the General Assembly. The first issue, the presentation of the invitation of the CBD for WIPO to undertake work on issues related to interrelation of access to genetic resources and disclosure requirements, presents an opportunity to reinforce the inclusion of the discussion of genetic resources and traditional knowledge in the agenda of different WIPO bodies. The remaining two issues, on the other hand, must be equally contemplated as they may imperil the previous work of developing countries and NGOs. A diplomatic conference on the protection of broadcasting organizations, for instance, must grant the SCCR enough time to comprehensively discuss and resolve issues related to the nature and scope of such protection. In addition, the possibility of the topic of the future of the SPLT being raised at the General Assembly must be kept in mind to ensure interventions coherent with those made at the SCP in their rejection of harmonization efforts that ignore development concerns.

III. AN OVERVIEW OF RELEVANT IP DEVELOPMENTS IN VARIOUS FORA

24. Intellectual property has become an issue for discussion and a focal point of work in a growing number of fora and processes at both the multilateral, regional, and bilateral levels. A broad perspective of international intellectual property processes thus becomes essential to identify trends, coordinate positions, and ensure that the outcomes of discussions and negotiations in all fora support the interests of developing countries. The following is an overview of the developments in the various fora dealing with intellectual property issues in the second quarter of 2004.²⁸

²⁸ Areas where no developments have taken place in the last three months, such as the CBD, are not included in the present update. Please see the previous South Centre and CIEL IP Quarterly, available at www.southcentre.org and www.ciel.org, for more information.

III.1 WORLD TRADE ORGANIZATION (WTO)

A. Council for Trade-Related Intellectual Property Rights (TRIPS Council)

25. The last meeting of the TRIPS Council, which was scheduled for June 15 to17, finished after a single day of discussions. Such low level of activity can partly be attributed to the dedication of most of the energy in the WTO to the main planks of work in the Doha Work Programme, namely, agriculture, non-agricultural market access (NAMA) and Singapore issues, particularly in advance of the deadline for developing frameworks for negotiations – the end of July. Nevertheless, the lack of movement in the TRIPS Council also reflects continuing divergences in topics such as the proposed amendment to the TRIPS Agreement to implement paragraph 6 of the Doha Declaration on TRIPS and Public Health and the relationship between the TRIPS Agreement and the CBD. **The next TRIPS Council is scheduled for September 21-23, with the following issues pending:**

- a. TRIPS and Health: Differences in positions as to the appropriate content, legal form, and timing of an amendment have not been overcome through the informal consultations. Thus, as expected, no consensus was reached before the June deadline. The deadline has now been moved to March, 2005.
- b. Patentable Subject Matter and Exceptions to Patentability: The proposal by Brazil, Bolivia, Cuba, Ecuador, India, Pakistan, Peru, Thailand and Venezuela putting forth a checklist of elements that need to be addressed to prevent misappropriation has continued to be opposed by several developed countries. Despite the cross-regional support for the initiative demonstrated at the previous TRIPS Council, the Chairman suggested the possibility of shifting discussions to focus on relevant national legislation on the issues, requirements of disclosure in patent filing procedures and existing databases, an approach that was rejected by developing countries.
- c. Transfer of Technology to Least Developed Countries (LDCs): As the LDCs have not completed the assessment of the compliance of reports provided by developed countries with the criteria established by the Decision of 19 February 2003 on the implementation of article 66.2 of the TRIPS Agreement, they requested that the discussion on the issue to be postponed until the next session.

B. Working Group on Transfer of Technology

26. The May 3rd meeting of the Working Group focused on establishing a work plan. In that regard, previous submissions by the European Communities (EC) and a group of developing countries including Cuba, India, Kenya, and Pakistan, were identified as potential starting points for discussions. The EC submission had suggested focusing on developing a common understanding of the definition of technology transfer and of the conditions under which the various channels for transfer of technology are most effective, while the submission by developing countries had proposed examining different provisions relating to technology transfer in WTO Agreements to make them operational and meaningful, as well as provisions that may have the effect of hindering transfer of technology to developing countries to recommend ways to mitigate the negative effects of these provisions. **The next meeting of the Working Group is scheduled for July 20th.**

III.2 WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

A. Negotiations on a Substantive Patent Law Treaty (SPLT)

27. Negotiations on the draft treaty continue at the Standing Committee on the Law of Patents (SCP) simultaneously with negotiations on the draft regulations and the draft practice guidelines. After the Ninth Session featured increased participation by developing countries and an enhanced debate on the draft provisions of the SPLT, the United States, Japan and the European Patent Office proposed a new approach to discussions during the SCP's Tenth Session. The submission suggested focusing on a limited set of SPLT provisions, namely prior art, grace period, novelty, and inventive step/non-obviousness, as a more productive model of negotiations. Nevertheless, as such an approach would exclude provisions considered essential by the developing countries, such as those dealing with exceptions to patentability and disclosure requirements, the proposal was rejected by a number of countries, including Brazil, India, Egypt, and Argentina. In particular, developing countries emphasized the close inter-linkages between the different provisions, as well as the need for any discussion to be comprehensive enough to achieve a balance between the interests of applicants and those of society as a whole (for more information on these discussions, please see Section II). **The 11th session of the Standing Committee on the Law of Patents is tentatively scheduled for November 2004.**

B. The Patent Cooperation Treaty (PCT) Reform

28. The process for reforming the PCT started in 2000 to simplify and streamline procedures while aligning it to the new Patent Law Treaty standards. A second stage sought by the United States and other developed countries would involve a more fundamental overhaul of the PCT system to facilitate global patenting. The last meeting of the Working Group for the Reform of the PCT was held in May, with discussions focusing on a proposal by the European Patent Office aimed at further accelerating the PCT reform by greater use of the electronic forum and on the additional comments submitted by Switzerland in relation to its earlier proposal for an amendment to enable countries to require disclosure requirements. While the European proposal did not find much support among the delegations, the Swiss submission continued to be praised by a number of countries, including developing countries, as a step in the right direction. **The next meeting of the Working Group for the Reform of the PCT is scheduled to begin on November 22, 2004.**

C. Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)

29. The sixth session of the IGC took place from March 15 to 19, 2004. Despite a new mandate which substantively broadened the scope of work of the Committee, instructing it “accelerate its work,” “focus on the international dimension” and “exclude no outcome, including the possible development of an international instrument or instruments in this field,” the session was characterized by a division between countries stating that the IGC is a place to share national experiences and discuss the issues in a general manner and others affirming that the Committee should move to concrete actions at the international level. These divergences were reflected in the different positions on how to deal with the international dimension, whether as an integral part of the issues covered by the IGC or as a separate issue. Nevertheless, a proposal by the African Group putting forth objectives, principles, and elements of a possible international instrument was accepted by many delegations as a basis for future discussion. Another controversial issue was

the appropriate way to respond to the invitation presented to WIPO by the Seventh Conference of the Parties (COP-7) of the CBD (see Section II for more details). **The seventh session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is scheduled to take place November 1 to 5, 2004.**

D. Standing Committee on Copyright and Related Rights (SCCR)

30. In June 2004, the Eleventh Session of the SCCR continued discussing elements of the WIPO “Digital Agenda,” including the protection of non-original databases and the possibility of a new treaty to deal with the rights of broadcasting organizations. The proposed treaty, which would create a system of ownership for material transmitted over wireless means such as television, radio and satellite, as well as wired communications over cable networks, and also over Internet computer networks, has been increasingly controversial. Thus, the draft document issued by Secretariat in the last SCCR, which suggested that the General Assembly convene, at its 2004 session, a diplomatic conference on the protection of broadcasting organizations was highly debated (see Section II). **The next meeting of the Committee will take place from November 17 to 19, 2004.**

III.3 OTHER MULTILATERAL FORA

A. Food and Agriculture Organization (FAO)

31. **The International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) entered into force on June 29, 2004.** The Treaty sets a framework for the conservation and sustainable use of plant genetic resources for food and agriculture, in harmony with the CBD, and establishes institutional machinery to oversee the implementation of its provisions. In particular, the Treaty provides for a multilateral system of facilitated access and benefit sharing for selected resources. Another significant provision is the explicit recognition of Farmers’ Rights.

32. Some of the most important implementation issues in the ITPGRFA relate to intellectual property. Access to crops in the multilateral system, for instance, is subject to certain conditions, including that “recipients shall not claim any intellectual property or other rights that limit the facilitated access to the plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the multilateral system.” Whether the provision means that no intellectual property rights of any sort can be claimed or that intellectual property rights could be obtained *as long as* those rights do not limit the facilitated access is still uncertain. In addition, facilitated access of plant genetic resources are to be provided on the basis of a standard Material Transfer Agreement (MTA). The ITPGRFA does not provide guidance on the exact content of an MTA, but it is expected that some of the key provisions will devote attention to intellectual property rights and benefit sharing. **A meeting of the Conference of the Parties, along with meetings of the interim commission of the ITPGRFA and party-to-party and regional consultations, is scheduled to take place in November.**

B. World Health Organization (WHO)

33. The Commission on Intellectual Property, Innovation and Public Health (CIPIH) established by the World Health Assembly (WHA) held its first meeting in April with a view to present its report in January 2006. Ruth Dreifuss, the Chair of CIPIH, has stated that the Commission would endeavour not only to produce an evidence-based analysis of the links between IPRs, innovation and public health, but also to provide concrete, practical proposals designed to facilitate decision-making and the implementation of appropriate measures.²⁹ Moreover, the establishment of the CIPIH confirms a trend within WHO towards some form of organization-wide approach on intellectual property and public health as opposed to the previous department based and ad hoc approach. For example, at the 57th WHA adopted a resolution on HIV/AIDS that specifically recalled the Doha Declaration on TRIPS and public health and urged Members “to consider, whenever necessary, adapting national legislation in order to use to the full the flexibilities contained in the Agreement on Trade-Related Aspects of Intellectual Property Rights” and “to encourage that bilateral agreements take into account the flexibilities contained in the WTO TRIPS Agreement...³⁰,

34. In addition, the work of the CIPIH will also complement the work of WHO on intellectual property and access to essential medicines in the EDM and the work on gene patents in the Human Genetics Programme. The Human Genetics Programme is conducting important work on the impact of gene patents on access to genetic technologies in developing countries as a follow-up to the Genomic and World Health report which identified intellectual property as a factor affecting the accessibility of the results of genomic research.³¹

C. United Nations Conference on Trade and Development (UNCTAD)

35. UNCTAD XI, the Conference’s highest decision-making body, took place from June 13-18, 2004 in Sao Paulo, Brazil.³² The Sao Paulo Consensus, one of the resulting documents, is a negotiated vision of the role of UNCTAD in the coming years. It particularly notes the importance of a number of intellectual property-related issues, including **ensuring that the framework of intellectual property contributes to technological development, implementing the TRIPS Agreement in a manner supportive of public health, and achieving protection in intellectual property rules of traditional knowledge and folklore.**³³ The Sao Paulo Consensus also remarked the necessity of undertaking analysis, at the regional level, of the development dimension of the TRIPS Agreement, including ways to improve the transfer of technology to developing countries, the development dimensions and implications of the establishment and enforcement of IPRs, as well as protection of TK, genetic resources, and folklore and fair and equitable sharing, without prejudice to the work undertaken in other fora.³⁴

²⁹ See WHO press release, available at www.who.int/intellectualproperty/news/wha_decision/en/.

³⁰ See WHA resolution A57.14, paras. 2 (4) and 2 (6), available at www.who.int/gb/ebwha/pdf_files/WHA57/A57_R14-en.pdf.

³¹ The Advisory Committee on Health Research, WHO, *Genomics and World Health*, WHO, Geneva, 2002.

³² For an exhaustive analysis see “The UNCTAD XI Sao Paulo Consensus: Defining UNCTAD’s Mandate”, South Centre Analytical Note, July 2004, SC/TADP/AN GEG/5.

³³ “Sao Paulo Consensus”, UNCTAD document TD/410 (June 25, 2004), at para 68, available at www.unctad.org/en/docs/td410_en.pdf.

³⁴ Id. at para. 101.

D. The United Nations Human Rights Bodies and Committees

36. Over the last four years, there has been a **clearly discernible trend for the human rights community and various UN bodies to examine and explore the implications of intellectual property for the protection and promotion of human rights.** A particular focus has been the potential consequences of including intellectual property in bilateral free trade agreements. For example, the Special Rapporteur of the United Nations Commission on Human Rights stated that the US-Peru trade agreement must not restrict Peru's abilities to use the public health safeguards enshrined in TRIPS and the Doha Declaration.³⁵ The Committee on Economic, Social and Cultural Rights also recommended that Ecuador conduct an impact assessment of the effect of international trade rules on the right to health.³⁶ The Committee on Rights of the Child, analyzing the negative effects of intellectual property rules on access to health, recommended that El Salvador "systematically consider the best interest of the child when negotiating trade-related intellectual property rights."³⁷

E. World Summit on Information Society (WSIS)

37. WSIS was conceived as an opportunity to discuss the dynamics of an evolving global information society and its impact on the international community. Held under the patronage of the UN Secretary-General, with the International Telecommunication Union (ITU) taking the lead role, the first phase of WSIS took place in Geneva in December 2003, and addressed a broad range of themes, including the divisive of intellectual property. While developing country efforts to include allusions to the need for flexibility in intellectual property were not successful, the language proposed by the United States on the recognition of the importance of intellectual property and international intellectual property instruments was also removed from final drafts. **The second phase of WSIS, which will focus on development themes, will take place in Tunis from 16 to 18 November 2005.** Meanwhile, several Preparatory Meetings (PrepCom) are also taking place. **The second PrepCom is scheduled for February 17, 2005 in Geneva.**

III.4 REGIONAL AND BILATERAL TRADE AGREEMENTS WITH INTELLECTUAL PROPERTY PROVISIONS

38. In spite of the previous long list of international fora dealing with intellectual property, the most active intellectual property negotiations today are taking place not at the multilateral level, but at the bilateral level. Through linking intellectual property with the possibility of increased market access or investment agreements, some developed countries, the United States in particular, are working to design agreements that specifically respond to the perceived "shortcomings" of the TRIPS Agreement. As a consequence, "TRIPS-plus" standards are

³⁵ UN press release, 5 July 2004, "US-Peru Trade: Special Rapporteur on Right to Health Reminds Parties of Human Rights Obligations," available at www.unog.ch/news2/documents/newsen/hr04064e.htm

³⁶ Committee on Economic, Social, and Cultural Rights, "Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant – Ecuador" document E/C.12/1/Add.100 (14 May 2004).

³⁷ Committee of the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding Observations, El Salvador, document CRC/C/15/Add.232 (June 4, 2004) at para. 48.

becoming the norm in bilateral and regional agreements. The following section highlights the latest developments in these “TRIPS-plus” bilateral and regional negotiations.³⁸

A. Free Trade Area of the Americas (FTAA)

39. Due to disagreements over various major issues, including intellectual property, the Miami Ministerial Declaration, while reaffirming a commitment to a “comprehensive” FTAA by January 2005, opted for an “FTAA Light” in the sense that it would only demand some basic provisions in each negotiating area, with interested parties being able to commit additionally through a plurilateral process. However, the subsequent TNC meetings and informal consultations held since have confirmed the divergence between countries’ positions, with the number of brackets in the negotiating text (drafted by the Co-Chairs United States and Brazil) reportedly increasing. **The United States and Brazil called off a meeting of the co-chairs scheduled for June 3rd and ministers are now likely to attempt to extend the deadline for concluding negotiations at a ministerial in November.**

B. EU – Mercosur

40. Given the stagnation of FTAA negotiations, interest in this regional agreement has reportedly augmented. In intellectual property, the main priority for the EU is geographical indications while Mercosur is interested in the relationships between intellectual property and biodiversity, public health, and technology transfer. The XIV Bi-regional Negotiating Committee (BNC), which took place in Buenos Aires from 9 to 11 June, discussed issues related to market access, intellectual property, services and government procurement. In addition, **the European Union presented a non-paper titled “The Integration of Sustainable Development” which included the statement that EU-Mercosur provisions on intellectual property should “reflect the mutual supportiveness between intellectual property and the Convention on Biological Diversity.” The XV BNC will take place in Brussels at the end of July.**

D. Bilateral Free Trade Agreements (FTAs)

41. Ongoing negotiations include:

- a. **US-Bahrain Free Trade Agreement:** Negotiations concluded on May 27. Bahrain is the third Arab country, following Jordan and Morocco, to negotiate a Free Trade Agreement with the United States. The Agreement will be signed not before the end of September 2004. United States has free trade agreements with Israel and Jordan and has recently signed another agreement with Morocco.
- **US-Southern African Customs Union (SACU):** The negotiations are dealing with several issues, including intellectual property. The negotiation rounds are held every 6 to 10 weeks, with an end-of-2004 deadline for completion. The last round took place in Lesotho in May.
- **US-Thailand:** Negotiations were launched in late June, 2004, under Southeast Asian framework. When the United States Trade Representative (USTR) notified the US Congress of the objectives and goals for the negotiations for a FTA with Thailand, it

³⁸ The previous South Centre and CIEL IP Quarterly Update also briefly explained the particular provisions being discussed.

- highlighted the need to raise Thailand's intellectual property protection to standards set in other recently negotiated FTAs. The agreement is expected to be completed by 2005.
- **US–Andean countries:** Representatives of three Andean nations Peru, Ecuador and Colombia met with US officials for the first round of negotiations in May. The talks are scheduled to conclude in early 2005.
 - **US-Panama:** The second round of negotiations took place on June from 7 to 11 in Los Angeles, California, with the next round of negotiations coming up in July.