



CENTER FOR INTERNATIONAL
ENVIRONMENTAL LAW

**SOUTH CENTRE AND CIEL IP QUARTERLY UPDATE:
FOURTH QUARTER 2004**

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

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I. ABOUT THE IP QUARTERLY UPDATE

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 existing options and flexibilities, as well as issues still unresolved, 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. The present Update discusses, in Section II, ongoing discussions at the Council for Trade-Related Aspects of Intellectual Property Rights (Council for TRIPS) and their significance for the intellectual property and development agenda. Then, Section III provides a brief factual update of intellectual property-related developments in a number of different fora in the fourth quarter of 2004.

II. THE TRIPS AGREEMENT AT A CROSSROADS: INTELLECTUAL PROPERTY AND DEVELOPMENT CONCERNS IN THE LEAD UP TO THE HONG KONG MINISTERIAL

A. Introduction

3. Despite the relevance of issues in its agenda for developing countries, discussions in the Council for TRIPS have been increasingly limited and subdued. In 2004, the run-up to the adoption of the General Council Decision on the Doha Work Program on 1 August 2004 (July Framework) rightly occupied the attention of World Trade Organization (WTO) Members, but even in its wake discussions in the Council for TRIPS were only slightly more pronounced.¹ Another factor in the diminishing profile of discussion regarding the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement) is of course the increasing political relevance of negotiations at the World Intellectual Property Organization (WIPO) and at the bilateral level.² The focus of developing countries and civil society on these latter negotiations is logical as they are mostly designed by developed countries to increase levels of intellectual property protection and circumvent the options, flexibilities, and unresolved issues present in the WTO system. Nevertheless, as the intellectual property and development

¹ The negotiations during this period mainly focused on agriculture, non-agricultural market access (NAMA), Singapore Issues and to some extent services.

² Previous South Centre and CIEL IP Quarterly Updates, for instance, have highlighted this trend.

debate broadens and the challenge of coordinating strategies and positions increases, the original piece of the puzzle – the TRIPS Agreement – is often critically overlooked.

4. The TRIPS Agreement remains the most comprehensive multilateral agreement on intellectual property. It still provides the basis for most other ongoing international intellectual property negotiations. In addition, it continues to have serious gaps and failures, as well as opportunities to address some of these problems. Several questions thus need to be considered as the Hong Kong Ministerial draws near: Are the items on the agenda of the Council for TRIPS still considered crucial for development? What are the potential and desired outcomes? What work can and should be done on these issues? How can developing countries improve their coordination and effectiveness in these discussions? How can civil society best support their efforts? Furthermore, questions arise as to the long-term perspective for the TRIPS Agreement: Given the growing web of intellectual property-related negotiations, what is now the role of the Council for TRIPS? What are the prospects for the TRIPS Agreement?

5. The present note, while not intending to answer all of these questions, does aim to present some strategic considerations for negotiations and discussions at the Council for TRIPS in the run-up to the Ministerial Conference in Hong Kong in December 2005, as well as in the longer term. After this introduction, Section B of the note provides a brief overview of the work conducted in the Council for TRIPS in 2004. Section C then considers possible strategies for the intellectual property and development agenda in the WTO in 2005 and beyond. Finally, Section D offers some concluding thoughts.

B. Council for TRIPS: Developments in 2004

6. Negotiations at the Council for TRIPS focused on two main substantive issues in 2004: the relationship between the TRIPS Agreement and the CBD, where six new submissions were received from both developing and developed countries,³ and the implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health.⁴ There were also limited discussions on non-violation and situation complaints, geographical indications, and special and differential treatment. There was no discussion at all on the review of the TRIPS Agreement under Article 71 of the Agreement.

B.1. Relationship between the TRIPS Agreement and the CBD

7. Discussions under the review of Article 27.3 (b) include not only the patenting on life forms and the protection of plant variety through *sui generis* systems, but have also

³ See WTO documents IP/C/W/420 and Add.1, IP/C/W/423, IP/C/W/429/Rev.1 and Add. 1 and 2, IP/C/W/433, IP/C/W/434 and IP/C/W/438.

⁴ Apart from the proposal by the African Group on amending Article 31 of the TRIPS Agreement (IP/C/W/437) there were a number of informal discussions held throughout the year regarding the amendment in addition to presentations by a number of developed countries on their implementation of the 30 August 2003 Decision. The annual review of the Decision in accordance with its paragraph 8 and Article IX of the WTO Agreement was also undertaken in the December meeting. For further information see the 2004 Annual Report of the Council for TRIPS, IP/C/32.

addressed other related topics such as the relationship between the TRIPS Agreement and the CBD and the protection of traditional knowledge and folklore.⁵ All of these issues had been repeatedly raised by developing countries as fundamental to the development dimension of the TRIPS Agreement. The amount of issues on the table and even the large amount of communications and papers within each of these issues, however, presented the challenge of converging discussions towards concrete results. In that context, Bolivia, Brazil, Cuba, Ecuador, India, Peru, Thailand, and Venezuela presented, in the first meeting of the Council for TRIPS in 2004, a Checklist of Issues to facilitate a more focused and result-oriented discussion by concentrating on the need for coherence between the TRIPS Agreement and the CBD.⁶

9. As the proposal explains, one of the major concerns of developing countries in regards to the TRIPS Agreement is that it allows the granting of patents for inventions that use genetic material and associated knowledge without requiring compliance with the provisions of the CBD. The implementation of the objectives of the CBD relies on the protection and use of knowledge and is thus affected, directly or indirectly, by intellectual property.⁷ The CBD thus requires parties to cooperate to ensure that patents and other intellectual property rights “are supportive of and do not run counter to” its objectives.⁸ On the other hand, the WTO has also recognized that, in the development of a mutually supportive relationship between WTO Agreements and multilateral environmental agreements (MEAs), due respect must be afforded to both.⁹ Moreover, it is critical for the Council for TRIPS to address this issue as the failure of patent rules and examination procedures to expressly deal with genetic resources and traditional knowledge affects the efficacy of the intellectual property system, which, in its current form, has permitted the issuance of patents with respect to genetic resources and products or processes known and used in developing countries for years or obtained in an illegal or illegitimate manner.¹⁰

10. The proposal of developing countries aims to move forward the discussion by putting forth a checklist of elements that need to be addressed to prevent such misappropriation, developed on the basis of points made by delegations in previous discussions. These elements relate to disclosure of source and country of origin of biological resources and traditional knowledge and of evidence of prior informed consent and benefit sharing under relevant national regimes. This checklist received wide and cross-regional support, with Zimbabwe, China, South Africa and Kenya expressing their

⁵ Paragraph 19 of the Doha Ministerial Declaration indicated that, in undertaking all this work, the TRIPS Council should be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and take fully into account the development dimension.

⁶ See WTO document IP/C/W/420 and Add. 1.

⁷ Howard Mann and Stephen Porter, “The State of Trade and Environment Law 2003: Implications for Doha and Beyond,” 37.

⁸ See the Convention on Biological Diversity, at article 16.5.

⁹ Report of the WTO Committee on Trade and Environment to the Singapore Ministerial Conference, 12 November 1996, WTO document WT/CTE/1.

¹⁰ See examples in, e.g., Graham Dutfield, “Intellectual Property Rights, Trade and Biodiversity: Seeds and Plant Varieties,” Earthscan, 2000, as well as in developing countries’ submissions and statements to the Council for TRIPS.

wish for the issue of disclosure to be discussed in the Council for TRIPS.¹¹ Even the European Union (EU), which had previously advocated prioritizing work conducted at the Intergovernmental Committee in WIPO, has articulated its willing to move forward and have a more structured discussion on issues likely to attract consensus, “such as disclosure of source.”¹² Indeed, the checklist has become the *de facto* basis for discussions and has resulted in significant progress in the discussions on the relationship between the TRIPS Agreement and the CBD in 2004.

11. The group of developing countries, for instance, built on the checklist through two further proposals. Joined by Colombia and Pakistan, they presented a communication to the Council for TRIPS in its September meeting, exploring in greater detail disclosure requirements relating to the origin of genetic resources and any traditional knowledge used in an invention.¹³ The proposal discusses the rationale for such a requirement and provides suggestions for the form it could take, as well as the potential consequences of non-compliance. Again, the proposal was endorsed by a number of developing countries and received the general support of the EU, while the United States and Japan maintained their opposition. The second proposal was put forth in December and expounded on the second element of the checklist of issues – the disclosure of evidence of prior informed consent. Among other issues, the proposal addressed how furnishing evidence of prior informed consent would ensure a harmonious relationship between the CBD and the TRIPS Agreement, how such evidence would be provided, and the potential consequences of non-compliance.¹⁴

12. In addition, countries that had not been previously engaged in the discussion of disclosure requirements at the Council for TRIPS presented communications. Switzerland, for instance, informed the Council for TRIPS in two documents of its proposal to WIPO for the reform of PCT Regulations, which would explicitly enable Parties to require patent applicants to declare the source of genetic resources and/or traditional knowledge, and its additional comments relating to issues such as use of terms, scope of the obligation, and potential sanctions for failure to disclose or wrongful disclosure.¹⁵ The United States presented a proposal arguing for tailored, national solutions as the most effective means of ensuring authorized access to genetic resources and equitable benefit-sharing, as well as of preventing erroneously issued patents.¹⁶

B.2 Implementation of paragraph 11 of the 30 August Decision

13. A temporary solution to the difficulties faced by countries with insufficient manufacturing capacity in the pharmaceutical sector in the effective use of compulsory licensing under the TRIPS Agreement – was agreed to in the General Council Decision of

¹¹ See minutes of the September 2004 meeting of the Council for TRIPS, WTO document IP/C/M/45.

¹² *Id.*

¹³ The second proposal of developing countries in 2004 was circulated as WTO document IP/C/W/429.

¹⁴ The third proposal was circulated as WTO document IP/C/W/438.

¹⁵ The Swiss proposals are available as WIPO documents PCT/R/WG/4/13 and PCT/R/WG/6/11.

¹⁶ See Communication from the United States, Article 27.3(b), relationship between the TRIPS Agreement and the CBD, and the protection of traditional knowledge and folklore, 26 November 2004 (WTO document IP/C/W/434).

30 August 2003 (30 August Decision).¹⁷ This decision established waivers from the obligations set out in paragraphs (f) and (h) of Article 31 of the TRIPS Agreement, albeit subjecting them to a number of formalities.¹⁸ The solution is provisional because the waivers will be replaced with an amendment to the TRIPS Agreement, for which the original deadline was June 2004. Wide divergences arose, however, as to the content, legal form, and timing of such an amendment. As a result, despite intensive informal consultations and an extension of the deadline – to March 2005 – no formal discussions on the amendment took place for most of 2004.

14. In the December meeting of the Council for TRIPS, however, the African Group presented the first formal proposal for the amendment of Article 31 of the TRIPS Agreement.¹⁹ The proposed amendment follows the structure of the waivers with certain modifications. Recalling that WTO Members agreed that the amendment would be based, “where appropriate”, on the 30 August Decision, the African Group only incorporated elements of that Decision where it considered them necessary to ensure the amendment is legally predictable, secure, and economically and socially sustainable. The African Group thus proposes to amend Article 31 of the TRIPS Agreement by adding a second paragraph to the Article that eliminates a number of provisions in the 30 August Decision “as they would be redundant in the context of an amendment or where their purpose would otherwise be served by other provisions of the TRIPS Agreement.”²⁰ In particular, the proposed amendment does not include the preamble and annex of the 30 August Decision, or the Chairman’s Statement that accompanied it.

15. As the proposal was presented only shortly before the December meeting, there was only limited discussion. Nevertheless, the proposal received a cautious reception from other developing countries, except the Philippines, which supported it, and a fairly hostile response from developed countries. The EU, for instance, considers that the amendment should be a purely technical exercise, with no re-opening of substantive discussions, and with the link between the Decision and the Chairman’s Statement preserved.²¹ The United States also deems essential that the amendment preserve the entire 30 August Decision through an express reference to both the Decision and the Chairman’s Statement.²² The Council for TRIPS agreed that the Chair would hold intensive consultations with a view to meeting the March 2005 deadline.

B.3 Non-violation and Situation Complaints

16. Despite most WTO Members having fundamental concerns as to the necessity or desirability of applying non-violation and situation complaints to the TRIPS Agreement, the issue remains unresolved. The concerns raised by these complaints –which would

¹⁷ The 30 August Decision can be found as WTO document IP/C/W/405 or WT/L/540.

¹⁸ The 30 August Decision was accompanied by a statement read out by the Chairman, which can be found in WTO document JOB(03)/177 and was also reproduced in the minutes contained in WT/GC/M/82.

¹⁹ See Communication from Nigeria on behalf of the African Group, “Implementation of Paragraph 11 of the 30 August 2003 Decision,” 10 December 2004 (WTO document IP/C/W/437).

²⁰ *Id.*

²¹ See *supra* note 11.

²² *Id.*

allow challenging actions that, though consistent with the text of the TRIPS Agreement, otherwise nullify or impair a benefit arising from it or other WTO agreements – have been particularly highlighted by developing countries. They have described, for instance, how the application of non-violation and situation complaints is unnecessary because the TRIPS Agreement is not designed to protect market access or the balance of tariff concessions and because any balance of rights and obligations is reflected in its principal obligations and flexibilities.²³ Also, as most other countries, they consider that non-violation and situation complaints would introduce incoherence among WTO Agreements and would limit the use of essential flexibilities in the TRIPS Agreement.²⁴ Nevertheless, there were no recommendations to the Fifth Ministerial Conference on whether these complaints should apply in the context of intellectual property.²⁵ The Derbez text, however, sought to maintain the moratorium on the use of such complaints in the TRIPS Agreement. In the same way, Paragraph 1(h) of the July Framework simply extended the moratorium to the Sixth Ministerial Conference in December 2005.

17. In order to move forth its discussions on the issue, the Council for TRIPS, in its September meeting, requested the WTO Secretariat to update a note summarizing points raised by Members.²⁶ The updated summary note retained the previous structure and relatively few additions and modifications have been made. It addresses the exceptional character and purpose of the non-violation remedy, as well as issues raised by the nature of the benefits accruing under the TRIPS Agreement and of the measures that could be at issue. It then analyzes issues related to causality, burden of proof, and remedy, and finalizes with a summary of the proposals for action. Notably, most of the additions that have been made reflect concerns regarding the applicability of non-violation complaints to the TRIPS Agreement, including those raised by the legal uncertainty inherent in the concept of non-violation and its application through the TRIPS Agreement to any domestic measures.²⁷ Indeed, in discussions at the December meeting of the Council for TRIPS, it was evident once again that the majority of WTO Members do not support the use of non-violation complaints in the TRIPS Agreement, with only the United States strongly advocating for the end of the moratorium.

B.4 Geographical Indications

18. Negotiations concerning the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits were foreseen by the TRIPS Agreement itself in order to facilitate protection of those geographical indications

²³ Communication from Argentina, Bolivia, Brazil, Colombia, Cuba, Ecuador, Egypt, India, Kenya, Malaysia, Pakistan, Peru, Sri Lanka and Venezuela, “Non-violation and Situation Nullification or Impairment under the TRIPS Agreement,” 30 October 2002 (WTO document IP/C/W/385).

²⁴ *Id.*

²⁵ In Doha, the Decision on Implementation-related Issues directed the Council for TRIPS to continue its examination of the applicability of non-violation and situation complaints and present recommendations to the Fifth Ministerial Conference. It also established that, until the issue was resolved, WTO Members could not initiate such complaints under the TRIPS Agreement.

²⁶ The updated note was circulated as document IP/C/W/349/Rev.1.

²⁷ This point had been raised in IP/C/W/385, para. 46 and IP/C/M/37/Add.1, para. 270.

relating to wines.²⁸ With a view to completing these negotiations, the Doha Ministerial Declaration established the Fifth Ministerial Conference as a deadline.²⁹ In addition, in Doha WTO Members agreed to begin discussions towards extending the protection of geographical indications to products other than wines and spirits, as one of the pending implementation issues.³⁰ Differences between WTO Members remain strong on both issues, however, with the July Framework merely leaving the Special Session to make progress with respect to the issue of a register for wines and spirits and the Council for TRIPS to deal with the issue of extension of coverage.³¹ Nevertheless, the General Council did request the Director General, within the consultative process on outstanding implementation issues, to hold consultations on the extension of protection to products other than wines and spirits.

19. Discussions in first session of these consultations, held in mid-December, showed WTO Members to be still deeply divided on the issue of extension of coverage. Moreover, countries also do not agree as to whether the consultations should focus only on extension of the protection for geographical indication or they should also cover other related issues. Negotiations on the multilateral register of geographical indications have also not moved forward significantly since July. Some WTO Members, including the United States, Canada, Chile, and Argentina, consider that the system of notification and registration should not be binding or oblige countries that do not register any terms.³² Other WTO Members, such as countries from the European Union, argue that countries should be required to protect registered terms, even if they don't participate in the system.³³

B.5 Special & Differential Treatment

20. In May 2003, the Chair of the General Council referred to the Council for TRIPS two proposals on special and differential treatment related to the TRIPS Agreement that had been made in the context of the negotiations in the Special Session of the Committee on Trade and Development. The first one is a proposal by the Least Developed Countries (LDCs) concerning their transition period under Article 66.1 of the TRIPS Agreement.³⁴ This proposal states that, if at the end of the transition period of Article 66.1 an LDC has not established a viable technological base, a further extension of transition period should be automatically granted by the Council for TRIPS, upon request of the WTO Member in question. The second one is a proposal by the African Group. It concerns the extension of transition periods under Article 65.4, which the African Group proposes should be possible for developing country WTO Members for additional 5-year periods. In addition, the African Group proposal also addresses exclusive marketing rights under

²⁸ Article 23.4 of the TRIPS Agreement.

²⁹ See the Doha Ministerial Declaration, 20 November 2001, at paragraph 18 (WTO document WT/MIN(01)/DEC/1).

³⁰ Id. at paragraphs 12 and 18. Also see the Decision on Implementation-related Issues.

³¹ See Decision Adopted by the General Council on 1 August 2004, paragraph 1 (f) (WTO document WT/L/579).

³² See, e.g., the minutes of the 2004 meetings of the Special Session, WTO documents TN/IP/M/8-10.

³³ Id.

³⁴ See WTO document TN/CTD/W/4/Add.1.

Article 70.9 of the TRIPS Agreement.³⁵ According to the July Framework, all WTO bodies to which these type of proposals (so-called Category II proposals) have been referred to, should expeditiously complete their consideration and send clear recommendations for a decision to the General Council no later than July 2005.³⁶

21. In order to move discussions forward, the WTO Secretariat circulated an informal document at the December 2004 Council for TRIPS meeting, summarizing the work done on these proposals.³⁷ On the LDC proposal, the note states that the LDC coordinator in 2003 expressed the possibility that no further work would be required on the proposal, given work under way on a general provision on LDCs' transition periods.³⁸ Since then, no delegation has taken up the proposal, although Maldives submitted a formal request to the Council under Article 66.1 for a five-year extension of its transition period.³⁹ On the African Group proposal, the note highlights that work has only taken place in the Council for TRIPS on the issue of exclusive marketing rights.

C. Intellectual Property and Development in the WTO in 2005 and Beyond

22. Although the July Framework reaffirmed the commitment of WTO Members to all areas of intellectual property negotiations established by the Doha Ministerial Declaration, the status of these different negotiations in the Council for TRIPS varies. As a result, a variety of approaches will be required to move forward issues on the intellectual property and development agenda in the lead to the Hong Kong Ministerial Conference in December 2005. The following paragraphs offer some of the substantive and political considerations that may define these approaches. In addition, they consider long-term objectives in international intellectual property negotiations that may also be critical to establishing an effective path forward.

C.1 Introducing Disclosure of Origin Requirements in the TRIPS Agreement

23. Through intensive discussions on the relationship between the TRIPS Agreement and the CBD, significant progress was achieved in building the technical basis for the proposal to include a disclosure of origin requirement in the TRIPS Agreement. In addition, having established the checklist of issues as the basis for discussions in the Council for TRIPS will provide an important opportunity to ensure the case for a disclosure of origin requirement continues to be made in the lead up to the Hong Kong

³⁵ See WTO document TN/CTD/W/3/Rev.2. The African Group conveyed to the Chair on 19 August 2003 a text that modified its original proposal in the light of discussions it had held with some other delegations. The Chair forwarded this text to all WTO Members and to the Chair of the General Council (the letter to the latter was circulated as an annex to document JOB(03)/171, dated 21 August 2003).

³⁶ See supra note 31, at paragraph 1 (d).

³⁷ The document was circulated as JOB(04)/164.

³⁸ See supra note 37.

³⁹ See Communication from Maldives, "Request from Maldives for an extension of the transition period under article 66.1 of the TRIPS agreement," 16 August 2004 (WTO document IP/C/W/425). According to the 2004 Annual Report of the Council for TRIPS, consultations will be held on the request, with the Chair of the Council for TRIPS and the Chair of the Committee on Trade and Development coordinating arrangements.

Ministerial Conference.⁴⁰ In this regard, future communications and interventions may address several issues. For example, it may be important to highlight the shortcomings of Switzerland's proposals for international rules that allow but do not require disclosure, which have been extensively raised by developing countries in the Working Group for the Reform of the PCT.⁴¹ In the same way, it may be useful for developing countries to inform the Council for TRIPS of the work being conducted on these issues in the context of the CBD, which is addressing questions such as the nature, scope and elements of an international regime on access and benefit-sharing; the use of terms and definitions; the potential use of an international certificate of origin/source/legal provenance; and the practicality and costs of measures to support compliance with prior informed consent.⁴² Discussions towards an international regime in the CBD context demonstrate that national laws and action alone are not sufficient to ensure adequate access and benefit-sharing, as well as the feasibility of dealing with these issues at the international level. Moreover, these discussions, rather than duplicating any work currently being undertaken at the Council for TRIPS, are closely following that work, with many countries having repeatedly called for the inclusion of requirements of disclosure of country of origin and evidence of prior informed consent and benefit-sharing in the TRIPS Agreement.⁴³

24. It may also be necessary to address some of the issues raised by the United States in their communication, as they remain the primary opponents of the proposal for disclosure requirements, though many of these issues seem to arise primarily out of a limited understanding of the proposal. For example, the US communication expresses concern that the disclosure requirements would not be sufficient to achieve the shared objectives of ensuring authorized access to genetic resources and equitable sharing of the benefits and preventing the issuance of erroneously issued patents.⁴⁴ It affirms that a

⁴⁰ The presentation of substantive proposals has been welcome by a number of developed countries. Indeed, the proposals have been essential in overcoming some of the concerns raised by developed countries. For example, in view of the concern as to the nature and consequences of the disclosure requirement, the proposals elaborated arguments as to the manner in which the proposed obligation to disclose would be introduced in the TRIPS Agreement and the legal effect of wrongful disclosure or non-disclosure. Moreover, proponents also addressed the characteristics of a requirement to disclose evidence of prior informed consent, considered fundamental as establishing an equitable and balanced system of intellectual property, one that is inclusive of the interests of all sections of the society, is required by the objectives enshrined in Article 7 of the TRIPS Agreement.

⁴¹ See, e.g., comments made during the May 2004 session of the Working Group in WIPO document PCT/R/WG/6/12.

⁴² See, e.g., the provisional agenda for the third meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing, to take place in Bangkok in February 2005 (UNEP/CBD/WG-ABS/3/1).

⁴³ Many of the countries in the Group of Like Minded Mega diverse Countries (LMMC), which are home to approximately 70% of the world's biodiversity and played an important role in the start negotiations on an international regime on access and benefit-sharing, also form part of the group of countries that propose the modification of the TRIPS Agreement to incorporate disclosure requirements. Indeed, the New Delhi Ministerial Declaration of the LMMC, developed at a meeting in January 2005, stated that the proposed international regime in the CBD should include "mandatory disclosure of the country of origin of biological material and associated traditional knowledge in the intellectual property right application, along with an undertaking that the prevalent laws and practices of the country of origin have been respected and mandatory specific consequences in the event of failure to disclose the country of origin." The 17 members of the LMMC are Bolivia, Brazil, China, Colombia, Costa Rica, Democratic Republic of Congo, Ecuador, India, Indonesia, Kenya, Madagascar, Malaysia, Mexico, Peru, Philippines, South Africa, and Venezuela.

⁴⁴ See supra note 16.

separate prior informed consent regime is needed, as well as a mechanism to transfer benefits. Indeed, such regimes are crucial both at the national and international level, where they are currently being developed.⁴⁵ The proposal of developing countries, far from trying to replace these regimes, attempts to ensure they are not undermined by the patent system. The disclosure of origin requirement would not, in this regard, determine that commercialization occurring outside of the patent system is not addressed, as work in the CBD context is analyzing different ways of implementing an international access and benefit-sharing regime (for instance, border controls are another of the possibilities being discussed). The patent system will not likely play the role of sole monitoring system, but it must be supportive of these objectives in order for the CBD to be effectively implemented.

25. In addition to building a strong substantive base, any strategy towards a resolution of the issue by December 2005 or the end of the Doha Round should consider the shifting political context of negotiations of the relationship between the TRIPS Agreement and the CBD. While the United States, for instance, is unlikely to modify its position even if presented with further explanations and clarifications, developed countries, including the EU and Switzerland, are increasingly engaging in discussions. Even countries such as Australia and Canada seem now open to discussing disclosure requirements in the TRIPS Agreement. As the time for a concrete solution approaches, however, it is unclear whether these countries will increase and clarify their support for a modification of the TRIPS Agreement. For instance, the EU continues to be unable to reach internal agreement on the issue of disclosure, with strong opposition to any mandatory requirements on the part of Germany and other of its members. Switzerland also appears to remain committed to dealing with these issues in the WIPO context, despite discussing disclosure in the Council for TRIPS. Moreover, the EU and Switzerland may link their position on the relationship between the TRIPS Agreement and the CBD to progress on other issues, possibly geographical indications. The prospects for an increasing isolation of the United States and Japan thus remain unclear.

26. Another political consideration as proponents push the issue towards a decision in Hong Kong or in the context of the Doha Work Program is the support of other developing countries. The diminishing number of sponsors of the checklist and subsequent communications, along with general decrease in developing country coordination in TRIPS Agreement issues in 2004, has raised the concern of a dwindling coalition that would not be able to effectively take the issue to a resolution. Nevertheless, it must be noted that support from the floor for the disclosure requirement has been unwavering. Still, to achieve its goals the coalition of developing countries will have to expand and reinforce itself. It is essential for other developing countries more actively support the checklist process during 2005. In addition, it is also important for civil society organizations, which have previously followed these discussions closely, to re-focus on the issue of the relationship of the TRIPS Agreement and the CBD and ensure it receives adequate attention and consideration.

⁴⁵ Beyond the discussions taking place at the international level, for instance in the CBD context, countries like Costa Rica, Brazil, India, as well as regional groups such as the Andean Community have also developed national or regional regimes.

C.2 Resolving the Implementation of Paragraph 11 of the 30 August Decision

27. The implementation of paragraph 11 of the 30 August Decision was another issue on which intensive discussions took place in 2004. Nevertheless, most of these discussions took place through informal consultations, with no formal proposals being presented in the Council for TRIPS until December. As mentioned, there were significant differences between WTO Members as to the content, legal form, and timing of a permanent amendment to the TRIPS Agreement. On the other hand, the approaching deadline mounted pressure on the African Group to lead the way in finding a conclusion to this fundamental and high-profile issue, which explains their proposal. In addition, a number of African countries issued compulsory licenses for pharmaceuticals in 2004, which may have also compelled the African Group to endeavor to find an enduring solution to the issue.⁴⁶ Finally, the possibility of the Hong Kong Ministerial Conference leading to a last minute agreement, as happened in Cancun, may have also suggested the benefit of having a proposal on the table.

28. Beyond any political considerations, the African Group proposal is significant as it maintains the focus of the amendment discussions on the reasons behind the need to implement paragraph 6, rather than allowing these reasons to be obscured by legalistic and procedural arguments. Nevertheless, it will be primarily political considerations that will determine the future of the proposal. Most developing countries have so far only provided lukewarm support. Similarly, civil society organizations have not yet weighed in on the proposal. Given the clear opposition of many developed countries, who favor an amendment reproducing the 30 August Decision and the Chairman's Statement, the challenge therefore is to develop a strategy that ensures reasonable results without requiring a great amount of political capital to be spent. For developing countries, for instance, the issue is now to find ways to support the African Group proposal on the table. In the same way, civil society organizations need to work closely with developing countries to ensure the "access to medicines" coalition follows through on the ongoing discussions. However, the question of political cost should still be considered by the African Group and developing countries: if the United States and other developed countries insist on their positions, is it worth insisting on an amendment at this time?

C.3 Declaring the Inapplicability of Non-violation and Situation Complaints to the TRIPS Agreement

29. The note presented by the WTO Secretariat to the Council for TRIPS summarizing Members' positions, as well as the ensuing discussions at the December meeting of the Council, demonstrated the strong case developing countries have put forth on the inapplicability of non-violation and situation complaints to the TRIPS Agreement. The note and discussions also reveal the overwhelming majority of WTO Members share

⁴⁶ On April 5, 2004, Mozambique's Deputy Minister of Industry and Commerce issued a compulsory license for patent rights to lamivudine, stavudine and nevirapine. On May 27, 2004, Zimbabwe's Minister of Justice, Legal and Parliamentary Affairs declared a Period of Emergency in order to override antiretroviral drug patents. On September 21, 2004, the Zambian Minister of Domestic Trade and Consumer Affairs also issued a compulsory license for lamivudine, stavudine and nevirapine.

the concerns regarding the impact these complaints would have on the dynamic and balance of the TRIPS Agreement. Nevertheless, the United States remains staunch in its call for the immediate application of non-violation and situation complaints in the intellectual property context, seemingly unconcerned with respect to its isolation. Given the deadlock in these discussions, the natural inclination may be to settle for a further extension of the moratorium at the Hong Kong Ministerial Conference.

30. As described in a previous South Centre and CIEL IP Quarterly Update, the risk of such an approach is that discussions at the WTO are increasingly losing their relevance as bilateral and regional trade agreements incorporate intellectual property into the areas covered by non-violation complaints and even further complicate the situation by equalizing the process for these complaints with that of violation complaints.⁴⁷ Moreover, as more developing countries become bound by these bilateral and regional trade agreements, they may be less disposed to support the inapplicability of non-violation and situation complaints to the TRIPS Agreement. Indeed, if there is an attempt to resolve the issue at the Hong Kong Ministerial Conference, it is unclear how positions will evolve. For instance, many developed countries have supported maintaining the moratorium, but they may not be as definite in regards to a permanent solution. Finally, the longer this issue remains unresolved, the more likely it is that it will become a bargaining chip at the end of the Doha Round. In that context, it is possible that developing countries will lose or at least have to pay a price for the United States to accept a further moratorium or a declaration that these complaints are inapplicable to the TRIPS Agreement.

31. Although the manner in which to advance the resolution of the issue – given the deadlock of discussions – is not evident, several strategies may be useful in 2005. First, a potential contribution may be a comprehensive analysis of the legal situation posed by Article 64 (2) and (3) of the TRIPS Agreement. The United States suggests non-violation and situation complaints *are* applicable to the TRIPS Agreement as soon as the moratorium expires. The text of those provisions could be interpreted, however, to require a positive declaration on the part of WTO Members for these complaints to become applicable in the context of the TRIPS Agreement. Second, it will be essential for the broad coalition of developing and developed countries that questions the applicability of these complaints to intellectual property to work closely in the course of negotiations, in order to analyze possible strategies and courses of action. Finally, whereas non-violation complaints may seem like a matter of academic interest, it is unquestionable that their application to the TRIPS Agreement would fundamentally impact the balance of public and private interests. As a result, this too should be an issue that civil society keeps close watch over, which may also be effective for ensuring its advance in the lead to the Hong Kong Ministerial Conference.

⁴⁷ See South Centre and CIEL IP Quarterly Update: First Quarter 2004, available at www.southcentre.org and www.ciel.org.

C.4 Preserving the Link between Geographical Indications and Implementation Issues

32. Of the issues currently on the agenda of the Council for TRIPS, the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits and the extension of the protection of geographical indications to products other than wines and spirits are the two that cannot be qualified as developing country demands. The EU, for example, is the primary demandeur for a binding registration system. The extension of coverage of geographical indications has also been spearheaded by the EU, though the “Friends of GIs” on this issue also includes a number of developing countries. On the other hand, several developing countries have expressed their opposition to the extension of coverage. Both issues, however, are likely to be resolved in the context of the Doha Round and will certainly impact developing countries, particularly as they are closely related to agricultural products. As the negotiations progress, therefore, it becomes more and more important for developing countries to comprehensively analyze potential costs and benefits of the multilateral register and the extension of coverage of geographical indications to other products.

33. In addition, it is important to highlight that the extension of coverage is an implementation issue. Again, the only implementation issue being actively advanced by developed countries. As the Hong Kong Ministerial Conference approaches and the EU and other countries actively seek to resolve this issue, it is thus important to preserve its link with other implementation issues, both related to the TRIPS Agreement and not, in order to ensure their progress. Although the July Framework attempted to provide stimulus to the negotiations by instructing the Trade Negotiations Committee (TNC) and other relevant WTO bodies to “redouble their efforts” to find appropriate solutions, discussions on these issues have generally not been advancing. Moreover, it should be noted that the relationship between the TRIPS Agreement and the CBD is one of the pending implementation issues in the intellectual property context.

C.5 Upholding other Intellectual Property and Development Issues and Concerns

34. A number of issues that were subject to no or limited discussion in the Council for TRIPS remain nevertheless fundamental to ensuring that intellectual property rules in the WTO adequately respond to the needs and concerns of developing countries. One of them, the Special and differential treatment proposals referred to the Council for TRIPS, has a specific deadline in 2005. Notwithstanding a more general discussion on special and differential treatment as one of the pillars of the Doha Work Program, it thus remains important to determine the possibilities of moving them forward in the context of Council for TRIPS, as well as the best strategies to achieve such progress. On the extension of the Article 66.1 transition period, for instance, considerations may include the interest of LDCs in prioritizing the issue and the option of continuing pushing for a general extension *vis a vis* moving forward through individual requests, such as the one presented by the Maldives.

35. Yet it is perhaps the issues that lack a deadline that are most at risk of being overlooked in discussions at the Council for TRIPS. For example, there was no significant movement or substantive submission presented on the review of Article 27.3 (b) or Article 71.1 in 2004. Informal consultations are planned for Article 27.3 (b) for 2005, however, so developing countries should consider whether there is a realistic chance of achieving an amendment of that provision or whether they should plan to address it in the longer-term. In either case, it will be critical for the issue to be kept alive. Similarly, it is unclear whether the Article 71.1 review, which was once seen as an important opportunity for developing countries to address the imbalances in the TRIPS Agreement, remains relevant for the short-term. Regardless, the Article 71.1 review may be strategically and politically important in the longer-term. It is also essential, therefore to preserve the opportunity and begin considering what issues may be raised in this context at a more opportune time.

D. Conclusion

36. As the Doha Work Program approaches its conclusion, the TRIPS Agreement stands at a crossroads. While discussions at the Council for TRIPS have diminished due to the internal dynamics of the WTO and to the increasing profile of intellectual property negotiations at WIPO and at the bilateral level, many of the issues on the agenda remain crucial for developing countries. In the lead up to the Hong Kong Ministerial Conference, therefore, it is fundamental to review the state of play in issues such as the relationship between the TRIPS Agreement and the CBD, the implementation of paragraph 11 of the 30 August Decision, and non-violation and situation complaints, among others. Of the numerous issues on the table, it becomes necessary to determine whether they are all ripe for resolution or whether prioritizing certain negotiations is indispensable, both from a substantive and political perspective. Moreover, having reviewed ongoing discussions and priorities, it is critical to determine the adequate strategies to move forward the intellectual property and development debate and its different sub-issues. The present note offered a brief overview of discussions at the Council for TRIPS, as well as some substantive and strategic considerations both developing countries and civil society may take into account looking forward. In this regard, though the state of discussions on the various issues differs, as do the political and technical issues they raise, one constant does arise from the analysis: A strong coalition among developing countries and with civil society is fundamental for any of the intellectual property and development issues to be resolved in the context of the WTO. The primary challenge for 2005 is thus ensuring that coalition develops and strengthens.

III. AN OVERVIEW OF RELEVANT IP DEVELOPMENTS IN VARIOUS FORA

37. 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 goals of development. The following

is an overview of the developments in the various fora dealing with intellectual property issues in the fourth quarter of 2004.⁴⁸

III.1 World Trade Organization (WTO)

A. Council for TRIPS

38. For a description of the main developments in the Council for TRIPS during the fourth quarter of 2004, please see Section II. **The next meeting of the Council for TRIPS is scheduled for 8-10 March 2005.**

III.2 World Intellectual Property Organization (WIPO)

39. After the significant discussions and decisions of the 40th Series of Meetings of the Assemblies of the Member States of WIPO (the Assemblies) in early October, the Fourth Quarter of 2004 was relatively quiet at WIPO, with no meetings of the Working Group for the Reform of the Patent Cooperation Treaty (PCT) or the Standing Committee on the Law of Patents (SCP) and subdued interactions at the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC). Nevertheless, discussions of a potential treaty for the protection of broadcasting organizations at the Standing Committee on Copyright and Related Rights (SCCR) were once more quite spirited, with a strong participation of civil society organizations.

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

40. The Seventh Session of the IGC took place from 1-5 November, 2004, with little progress towards establishing a clear direction and framework for the effective international protection of genetic resources, traditional knowledge, and folklore. Although many developing countries considered the documents prepared by the Secretariat as a useful basis for future work, they also noted it would be necessary to build upon them in order to conclude appropriate international instruments for the protection of genetic resources, traditional knowledge, and folklore.⁴⁹ The documents dealing with traditional knowledge and folklore, for instance, though incorporating some elements of the African Group proposal to the Sixth Session of the IGC, were far from constituting the “objectives, principles, and elements of an international instrument” that the African Group had requested.⁵⁰ In this regard, developing countries expressed

⁴⁸ For developments during previous quarters of 2004, please see earlier South Centre and CIEL IP Quarterlies, available at www.southcentre.org and www.ciel.org.

⁴⁹ See, e.g., opening statement by Ecuador as described in the Draft Report of the Seventh Session of the IGC, document WIPO/GRTKF/IC/7/15/PROV, at paragraph 19.

⁵⁰ See WIPO documents WIPO/GRTKF/IC/7/5, 7/6, 7/3, and 7/4, which provided an overview of the policy objectives and core principles of protection, as well as the range of national and regional legal mechanisms through which those core principles could be implemented. The recognition of traditional knowledge in the patent system was also discussed and a draft set of recommendations for patent authorities on this issue will

disappointment that, notwithstanding an overwhelming demand for the development of a legally binding international instrument, the policy objectives and core principles drawn up in the document were merely an international layer of national systems.⁵¹ There was also concern regarding principles that would seem to subjugate the protection of traditional knowledge to existing intellectual property system, when the work of the IGC was based on the understanding that it is the intellectual property system that needs to be supportive of the protection of traditional knowledge.⁵² **Further comments on these documents – which will serve again as the basis for discussion at the Eighth Session – may be submitted to WIPO until 25 February 2005.**

41. The approach of the document on genetic resources, on the other hand, was not at all considered appropriate by developing countries. The African Group, for example, indicated that many countries find the contractual approach proposed by the Secretariat of limited usefulness, urging work to focus instead on more pressing issues.⁵³ Some developed countries supported the continuation on such work, however, noting the need for assistance in this area, regardless of whether or not a contractual approach is believed to be the most appropriate.⁵⁴ No consensus was reached and no decision was taken on the issue, which will be discussed again at the Eighth Session. **The Eighth Session of the IGC – the last under the renewed mandate – is scheduled for 6 -10 June 2005.**

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

42. The Twelfth Session of the SCCR took place in Geneva from 17 to 19 November 2004. Despite a heated debate, the 2004 Assemblies had called for the SCCR to “accelerate its work on the protection of broadcasting organizations with a view to approving the convening of a diplomatic conference at the next session of the WIPO General Assembly in 2005.”⁵⁵ In the SCCR, many developing countries continued to emphasize the importance of not undercutting the discussion process, fundamental to ensuring that any international instrument considers their particular needs, as well as the needs of copyright holders, consumers, and the public in general.⁵⁶ As a result, though there was some movement and progress in discussions, some issues, such as technological protection measures and webcasting, remained highly contested. Moreover, the meeting ended in confusion when, in light of opposition to the conclusions of the Chairman, Mr. Jukka Liedes of Finland, there was a vote-like exercise to attempt their adoption. In their press release, WIPO, though making reference to these

be developed by the Secretariat for the Eighth Session of the IGC. The submission by the African Group is available as document WIPO/GRTKF/IC/6/12.

⁵¹ See, e.g., statement by India in Draft Report of the Seventh Session of the IGC, document WIPO/GRTKF/IC/7/15/PROV, at paragraph 106.

⁵² See, e.g., comments by India, Peru, Philippines, and Brazil in supra note 5.

⁵³ See supra note 5, at paragraph 186.

⁵⁴ See comments by New Zealand in supra note 5, at paragraph 185.

⁵⁵ See WIPO General Assembly – Thirty-First (15th Extraordinary) Session, September 27 to October 5, 2004 – Draft Report (WO/GA/31/15 Prov.) at paras. 38 – 52.

⁵⁶ Although the report of the meeting has not been posted on the WIPO website, both the South Centre and CIEL attended the meeting as observers. Moreover, discussions were reflected in numerous articles and notes by other observers (see, for instance, “WIPO Broadcasting Treaty Discussions end in Controversy, Confusion,” available at www.ip-watch.org).

conclusions, does refer to them as those of the Chairman, not the Committee.⁵⁷ Conclusions not adopted do not bind the Committee and are not actionable. It is unclear what will happen at the next session of the committee. Another important development at the Twelfth Session was that the delegation of Chile presented a proposal on minimum exceptions and limitations to copyright and related rights for the purposes of education, libraries and disabled persons.⁵⁸ It was agreed, after discussions, that the issue would be placed on the agenda of the next session for further discussion. **The date for the next meeting of the SCCR has not been officially announced, but it is expected to take place in June or July 2005.**

C. Other Developments and Upcoming Meetings

43. The **Intergovernmental Meeting on the Development Agenda**, the first of the inter-sessional intergovernmental meetings mandated by the Assemblies to further examine the proposal presented by a number of developing countries in the 2004 Assemblies, as well as any additional proposals of Member States, has been scheduled for **11 to 13 of April 2005**.⁵⁹ The meeting will be open to WIPO-accredited intergovernmental and non-governmental organizations observers. The **international seminar on intellectual property and development**, also foreseen by the decision of the Assemblies and to be co-organized by other relevant international organizations, will take place on **2 and 3 May 2005**.⁶⁰

44. The process developed by the Assemblies to respond to the invitation of the Convention on Biological Diversity (CBD) to WIPO on Genetic Resources and Disclosure Requirements in Intellectual Property Applications is also ongoing.⁶¹ Members' comments, as well as a first draft of the examination prepared by the International Bureau, are available and open for comment by Member States and accredited observers until **the end of March 2005**.⁶²

⁵⁷ See WIPO Press Release, "SCCR Accelerates Work on the Protection of Broadcasting Organizations," (WIPO/PR/2004/400) 22 November 2004.

⁵⁸ See Proposal by Chile on the Subject "Exceptions and Limitations to Copyright and Related Rights," document SCCR/12/3.

⁵⁹ The proposal for a development agenda was put forth by Argentina and Brazil, and co-sponsored by Bolivia, Cuba, the Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania and Venezuela. See document WO/GA/31/11. The proposal crystallized many of the development concerns raised in different WIPO bodies by developing countries and NGOs, with the clear aim of ensuring a broad and horizontal development agenda, across all WIPO bodies and activities. It contained a number of concrete ideas for further discussion including the adoption of a high level declaration on intellectual property and development, amendments to the WIPO convention to expressly include the development dimension, the investigation of the potential of open collaborative models of knowledge generation, the expansion of the consideration of enforcement issues to include the enforcement of right holders' obligations, and enhanced NGO participation.

⁶⁰ See WIPO General Assembly – Thirty-First (15th Extraordinary) Session, September 27 to October 5, 2004 – Draft Report (WO/GA/31/15 Prov.) at paras. 144 – 214.

⁶¹ See WIPO General Assembly – Thirty-First (15th Extraordinary) Session, September 27 to October 5, 2004 – Draft Report (WO/GA/31/15 Prov.) at paras. 96 – 115.

⁶² These documents are available at <http://www.wipo.int/tk/en/genetic/proposals/index.html>.

III.3 Other Multilateral Fora⁶³

A. World Health Organization (WHO)

45. In cooperation with the Government of Mexico, the WHO convened a **Ministerial Summit on Health and Research** in Mexico City, Mexico, from 16 - 20 November 2004. One of the summit's aims was to promote the generation, dissemination and use of knowledge for the attainment of the health-related United Nations Millennium Development Goals, to strengthen the performance of health systems, and to participate in the socio-economic development of less developed countries. One of the major achievements of the Summit was the "Mexico Statement on Health Research," which emphasizes the importance of research as a global endeavor, based on the sharing of the knowledge and information.⁶⁴ Recommendations from the meeting will be forwarded to the 58th World Health Assembly.

46. The Commission on Intellectual Property Rights, Innovation and Public Health (CIPIH) held its second meeting on 4-6 October in Washington DC, USA. In addition to meeting with various U.S. government bodies, industries, and non-governmental organizations, the CIPIH reviewed the progress of its work to date, decided on the timetable for future meetings and for the preparation of its report, and agreed on a first draft of an outline of this report. The CIPIH also hosted a session entitled "CIPIH: What should be its priorities?" during the Mexico Ministerial Summit. **The third meeting of the CIPIH will be held in Brazil on 31 January - 4 February 2005.**

B. United Nations Educational, Scientific and Cultural Organization (UNESCO)

47. The drafting committee for the Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions held its first formal meeting in Paris from 14 to 17 December 2004.⁶⁵ The preliminary draft convention aims to protect and promote the diversity of cultural expressions and contains a number of references to intellectual property, described in previous South Centre and CIEL IP Quarterly Updates.⁶⁶ Due to time constraints and lack of directives, the Drafting Committee stated that it was not able to integrate all comments received, particularly those from certain intergovernmental organizations, notably the United Nations Conference on Trade and Development (UNCTAD), WIPO and those from non-governmental organizations. Comments from non-governmental organizations included, for instance, calls for the instrument to not be made subordinate to existing or future trade

⁶³ Please note that not all fora dealing with intellectual property related issues are covered in each South Centre and CIEL IP Quarterly Update, which only focuses on developments in the covered timeframe.

⁶⁴ The statement is available at http://www.who.int/rpc/summit/agenda/en/mexico_statement_on%20health_research2.pdf.

⁶⁵ Coincidentally, the Chairperson of the drafting committee was Mr. Jukka Liedes of Finland (see description of developments at the Standing Committee on Copyright and Related Rights at WIPO).

⁶⁶ Preliminary Draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions, UNESCO CLT/CPD/2004/CONF-201/2 (July 2004), at Article 1 (a). See South Centre and CIEL IP Quarterly Update: Third Quarter 2004.

agreements, but to be designed to protect the cultural diversity and the communication rights of all peoples, and to balance any references to the protection of intellectual property rights with reference to protection of the cultural commons.⁶⁷ The Drafting Committee proposed, for articles 1 to 11 of the preliminary draft text, a new document, which presents for each article its original version and a series of optional formulations drafted on the basis of the amendments and comments of the Member States, specifying each time, in a box, the main lines of emphasis of the Committee's discussions thereon. **The second session of the intergovernmental meeting of experts on the Draft Convention will take place on 31 January – 12 February 2005.**

C. The United Nations Human Rights Bodies and Committees

48. At its 33rd session, which took place on November 8 - 26 2004, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) again addressed the impact of intellectual property rules on human rights. In its consideration of the reports of State Parties under Article 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, for instance, it encouraged Chile, one of the countries under examination, to provide greater access to generic medicine making use of the flexibility clauses permitted in the TRIPS Agreement.⁶⁸ The CESCR also began its consideration of the Draft General Comment on article 15 (1)(c) of the Covenant (the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author). The draft had been criticized by a number of individuals and organizations working on intellectual property and development. For instance, concern had been expressed with regards to addressing sub-paragraph (1)(c) of Article independently of sub-paragraphs (1)(a) and (b), which contain the balancing rights, including the right take part in cultural life and the right to enjoy the benefits of scientific progress and its applications.⁶⁹ Similar concerns were raised by a number of developing countries, which questioned the lack of a clear distinction between intellectual property rules and human rights and worried such language would allow the comment to be misused to promote higher levels of intellectual property protection. Given these concerns, discussions were postponed until the **next session of the CESCR, which will take place from 25 April to 13 May 2005.**

D. Food and Agriculture Organization (FAO)

49. The second session of the Commission on Genetic Resources for Food and Agriculture (CGRFA) acting as Interim Committee for the International Treaty on Plant

⁶⁷ See, e.g., *Campaign for Communication Rights in the Information Society (CRIS)*, "Comments on the Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions" 10 November, 2004, available at <http://www.mediatrademonitor.org/cris-suggestions.php>.

⁶⁸ See the concluding considerations of the Committee on Economic, Social, and Cultural Rights (CESCR) in the consideration of the reports submitted by Chile under Articles 16 and 17 of the Covenant, Thirty-third session of the CESCR, 8-26 November 2004, document E/C.12/1/Add.105.

⁶⁹ For a more detailed analysis, see Sisule F Musungu "The Right of Everyone to Benefit from the Protection of the Moral and Material Interests from any Scientific, Literary or Artistic Production of which He is the Author – Preliminary Comments on Draft General Comment No. 18" (September 2004).

Genetic Resources for Food and Agriculture (ITPGRFA) met in Rome from 15-19 November 2004.⁷⁰ The Interim Committee established an inter-sessional contact group to develop a draft standard Material Transfer Agreement (MTA) for consideration by the Governing Body.⁷¹ The Interim Committee also established the terms of reference for the contact group, which require the contact group to be regionally balanced and invite the Consultative Group on International Agricultural Research (CGIAR), the CBD, WIPO and the Union for the Protection of New Varieties of Plants (UPOV) to send representatives. The Secretariat will prepare the first draft of the MTA and the first meeting of the contact group will take place in the first half of 2005, subject to availability of extra-budgetary resources.⁷²

50. It is also worth noting that the Interim Committee is currently collaborating with these international organizations. For example, during the second session of the CGRFA acting as the Interim Committee, WIPO introduced the information document “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 on Plant Genetic for Food and Agriculture,” a study undertaken at the request of the Ninth Session of the FAO Commission. The Interim Committee welcomed this preliminary report and indicated that it looked forward to receiving the next stage of this work, in line with the follow-up activities identified in the preliminary report.

III.4 Regional and Bilateral Trade Agreements with Intellectual Property Provisions

51. International intellectual property related negotiations are increasingly taking place at the regional and bilateral level. By linking intellectual property with the increased market access or investment agreements, some developed countries, the United States in particular, and to a lesser extent the European Union, are working to design agreements that specifically respond to the perceived “shortcomings” of the TRIPS Agreement. As a consequence, “TRIPS-plus” standards are becoming the norm in bilateral and regional agreements. The following section highlights the latest developments in these “TRIPS-plus” bilateral and regional negotiations.

A. Free Trade Agreements involving the United States

52. The United States has repeatedly affirmed its commitment to promoting increased intellectual property protection through a variety of mechanisms, including the negotiation of free trade agreements (FTAs).⁷³ U.S. FTAs include a chapter on intellectual property protection, as well as references to intellectual property in the investment and dispute settlement chapters.⁷⁴ The intellectual property chapter contains

⁷⁰ For a description of the ITPGRFA and its links to the intellectual property and development discussion, please see South Centre and CIEL IP Quarterly Update: Third Quarter 2004.

⁷¹ The first meeting of the governing Body will be held in 2005 or 2006 in Spain.

⁷² See the report of the meeting (CGRFA/MIC-2/04/REP-PART II). The Interim Committee welcomed the offer by the US to provide support for the meeting of the contact group in 2005.

general provisions, which among other obligations include the requirement to ratify or accede to a number of intellectual property protection treaties, and provisions on patents, copyright and related rights, trademarks, geographical indications, domain names, protection of encrypted program carrying satellite signals, measures related to regulated products, and enforcement.⁷⁵

Free Trade Area of the Americas (FTAA)

53. The negotiations for creating a Free Trade Area for the Americas have been delayed since last April. Due to disagreements over various major issues, including intellectual property, the 2003 Miami Ministerial Declaration 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. **Co-Chairs United States and Brazil, however, will meet at the World Economic Forum in late January to discuss re-launching the stalled negotiations in preparation for to the Summit of the Americas in Mar de Plata in Argentina in November 2005.**⁷⁶ Parallel with the FTAA talks, the United States and Brazil are also engaged in bilateral talks on intellectual property.

Other US Free Trade Agreements (FTAs)

54. The US currently has FTAs in force with Australia, Canada and Mexico (NAFTA), Chile, Israel, Jordan, and Singapore. The FTA with the Dominican Republic and other Central American countries has to date only been ratified by El Salvador.⁷⁷

55. Ongoing negotiations and FTAs not yet ratified include:

- **US-Bahrain Free Trade Agreement:** Negotiations concluded on May 27 and the Agreement was signed on 14 September 2004.
- **US-Southern African Customs Union (SACU):** The United States and the five member countries of the SACU – Botswana, Lesotho, Namibia, South African and Swaziland – launched negotiations toward an FTA on 2 June 2003. Talks became deadlocked, however, after SACU offered to continue talks on market access but requested the issues of investment, intellectual property, and labor and

⁷³ See, e.g., the statement of USTR Robert Zoellick upon the release of the 2003 “Special 301” Report, available at http://www.ustr.gov/Document_Library/Press_Releases/2004/May/Special_301_Report_Finds_Continued_Progress_But_Significant_Improvements_Needed.html.

⁷⁴ See, e.g., the discussion on non-violation complaints in South Centre and CIEL IP Quarterly Update: First Quarter 2004.

⁷⁵ See, e.g., the US-Morocco FTA, available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Morocco_FTA/FInal_Text/asset_upload_file797_3849.pdf.

⁷⁶ http://www.bilaterals.org/article.php3?id_article=1140

⁷⁷ El Salvador ratified DR-CAFTA on December 18, 2004.

- government procurement to be left out of the agreement.⁷⁸ United States Trade Representative (USTR) Zoellick visited Lesotho and Namibia on December 10-13 2004 to maintain negotiations on the FTA.⁷⁹ A meeting of deputy ministers is scheduled to take place in the first two months of 2005 to provide political guidance to the negotiations.⁸⁰ Lesotho Minister of Trade and Industry Mpho Malie recently expressed the hope that the U.S. and five members of SACU could complete a free trade agreement before the fall of 2007.
- **US-Thailand:** Negotiations were launched in late June 2004, under the Southeast Asian framework. The need to raise Thailand's intellectual property protection to standards set in other recently negotiated FTAs has been explicitly mentioned as driving these negotiations. The second round of negotiations took place in Hawaii from 11 to 17 October 2004. It seems at the moment that the US – Thailand FTA will be drafted along the lines of the US – Singapore FTA and will require Thailand to accede to the PCT and UPOV 1991.⁸¹
 - **US-Andean countries:** In May 2004, the US began FTA negotiations with three Andean nations: Peru, Ecuador and Colombia. The US is also encouraging Bolivia to join the negotiations, as is the General Secretary of the Andean Community.⁸² A particular tension in these FTA discussions has been caused by the Andean countries reluctance to go beyond their WTO obligations in terms of intellectual property rights and their strongly expressed concerns about biodiversity, traditional knowledge and access to medicines. The US is continuing nonetheless to propose similar intellectual property provisions as those found in other US FTAs, including extensions on patent terms, limitations to compulsory licensing, 3-5 years of date exclusivity and linkage of patent status with marketing approval.⁸³ At the fifth negotiating round, which took place on October 25-29 in Guayaquil, Ecuador, the United States continued to push its original demands on intellectual property, though Andean negotiators expressed the US position on biodiversity was becoming more flexible. **The next round of negotiations is scheduled to take place on 7-11 February 2005 in Colombia**⁸⁴
 - **US-Panama:** The negotiations for this FTA, which began in April 2004, are ongoing.⁸⁵ U.S. and Panamanian negotiators are scheduled to meet in Washington beginning on 31 January 2005 for the eighth round of negotiations.

⁷⁸ See BRIDGES Weekly Trade News Digest Vol. 8, Number 33; see also http://www.bilaterals.org/rubrique.php3?id_rubrique=24

⁷⁹ See <http://www.us-mission.ch/press2004/1206AmbassadorZoellick.htm>

⁸⁰ See Inside U.S. Trade, Dec. 24, p. 10.

⁸¹ See US – Thailand page at Bilaterals.org: http://www.bilaterals.org/rubrique.php3?id_rubrique=19.

⁸² Andean Community Press Release, 18 August 2004, 'The General Secretary of CAN supports the full incorporation of Bolivia in the FTA negotiations between Andean Community Countries and the United States' (available at <http://www.comunidadandina.org/ingles/press/np18-8-04.htm>).

⁸³ See Ricardo Santamaría Daza, 1 September 2004, 'Serias peticiones de Estados Unidos en patentes' *La Republica* (available at http://www.la-republica.com.co/noticia.php?id_notiweb=16964&id_subseccion=88&template=noticia&fecha=2004-09-01_11:59pm).

⁸⁴ See Colombia Trade News: US-Andean FTA at <http://www.coltrade.org/fta/rounds.asp>

⁸⁵ See Office of the United States Trade Representative: US – Panama FTA at http://www.ustr.gov/Trade_Agreements/Bilateral/Panama_FTA/Section_Index.html.

B. Free Trade Agreements Involving the European Union

56. Partnership, association, and trade agreements pursued by the EU also include intellectual property provisions. The EU-Chile agreement, for instance, signed in 2002, contains several references to intellectual property, including an article promoting cooperation in matters relating to the practice, promotion, dissemination, streamlining, management, harmonization, and the protection and effective application of intellectual property rights, and a title requiring Parties to “grant and ensure adequate and effective protection of intellectual property rights in accordance with the highest international standards” and to ratify or accede to over 10 intellectual property treaties.⁸⁶ Moreover, the “Strategy for the Enforcement of Intellectual Property Rights in Third Countries” developed by the European Commission recommends careful monitoring and effective implementation (including through technical assistance) of intellectual property related clauses in FTAs and suggests the EU should strengthen enforcement clauses in bilateral and regional FTAs.⁸⁷

EU – Mercosur

57. Talks resumed on 20 October 2004 in Lisbon, but negotiators recognized the talks would extend beyond the original deadline. In intellectual property, the main priority for the EU remains geographical indications while Mercosur is interested in the relationships between intellectual property and biodiversity, public health, and technology transfer.⁸⁸ A ministerial meeting will likely be held in early 2005.

EU – ACP Economic Partnership Agreements (EPAs)

58. In 2000, the European Union and the African, Caribbean and Pacific Group of States (ACP Group) adopted the Cotonou Agreement, a framework trade, aid and political cooperation treaty. Under that Agreement, the parties agreed to negotiate a separate set of individual bilateral treaties between the EU and participating ACP countries. The first phase of the EPA negotiations ran from September 2002 to September 2003. The second phase started in October 2003, with the deadline set for October 2008. Given the early stage of the negotiations, it is not yet clear whether the EPAs will contain any TRIPS-plus provisions. Article 46 of the Cotonou Agreement, which deals with the protection of intellectual property rights, generally references intellectual property protection standards in the context of TRIPS, although Article 45(4) states: “The Community and its Member States and the ACP States may consider the conclusion of

⁸⁶ Agreement establishing an Association between the European Community and its Member States, on one part, and the Republic of Chile, on the other part, Article 32 and Articles 168-171, available at http://europa.eu.int/comm/trade/issues/bilateral/countries/chile/docs/euchlagr_i.pdf.

⁸⁷ The Strategy was released in by the European Commission on 23 June 2004 and is available at http://europa.eu.int/comm/trade/issues/sectoral/intell_property/pr010704_en.htm.

⁸⁸ See ‘EU-Mercosur Trade Deal On Ropes Over Lack Of Acceptable Offers’ in BRIDGES Weekly Trade News Digest Vol. 8, Number 33. 9; see also EU – Mercosur page at [bilaterals.org](http://www.bilaterals.org/rubrique.php?id_rubrique=24): http://www.bilaterals.org/rubrique.php?id_rubrique=24

agreements aimed at protecting trademarks and geographical indications for products of particular interest of either party.”⁸⁹

Other EU Free Trade Agreements (FTAs)

59. The EU has concluded FTAs with Algeria, Bangladesh, Chile, Egypt, India, Israel, Jordan, Kazakhstan, Korea, Lebanon, Moldova, Morocco, Mexico, the Palestinian Authority, South Africa, Sri Lanka and Tunisia.⁹⁰ FTAs are also under negotiation with Albania, Iran, Syria and with the Gulf Cooperation Council.⁹¹

⁸⁹ The Cotonou Agreement is available at http://europa.eu.int/comm/development/body/cotonou/agreement/agr21_en.htm.

⁹⁰ Note that the EU – Algeria FTA allows for accession to UPOV to be replaced by the implementation of an adequate and effective *sui generis* system of plant variety protection if both parties agree, see Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part, Annex 6.

⁹¹ See http://trade-info.cec.eu.int/doclib/docs/2004/july/tradoc_118238.pdf. Note product specific trade agreements have not been included here.