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

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CONTENTS

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, the increasing levels of protection of copyright and related rights established by bilateral trade agreements 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 first quarter of 2005.

II. LIMITING ACCESS TO KNOWLEDGE: COPYRIGHT PROVISIONS IN BILATERAL TRADE AGREEMENTS

II.1. Introduction

3. Copyright, as other intellectual property rights, was designed to promote intellectual creativity by balancing private rights and the public interest. Limited private rights over intellectual creations were thus established to ultimately enrich and disseminate cultural heritage.[1] The proper role of copyright, however, stands challenged by increasingly unbalanced rules at the international and national levels.[2] International copyright norms, for example, impose longer terms of protection, an expanded subject matter, and new measures to support technological protection. Expanding rights are also being granted to activities "related" to copyright – such as those of producers and broadcasting organizations – that can never merit the same or even greater protection from intellectual property rules: neighboring rights do not reward creation, but rather seek to protect investments.[3] As a

[1] WIPO Intellectual Property Handbook, at paragraph 2.165.

[2] Cornish and Llewelyn identify "the unremitting lobbying of the copyright industries" as responsible for the push to broaden and intensify the grasp of copyright, thus jeopardizing the role of copyright in underpinning free and open debate. See Cornish & Llewelyn, INTELLECTUAL PROPERTY, 364 (2003).

[3] The WIPO Intellectual Property Handbook explains the protection of these activities through "neighboring" or "related" rights because they "assist intellectual creators to communicate their message and to disseminate their works to the public at large, is attempted by means of related rights." However, it has been noted that the proposed broadcasting treaty in WIPO would indeed undermine the right of authors in favor of investors.

result, current international copyright norms pose serious challenges for access and dissemination of knowledge in both developing and developed countries.[4]

4. Particular concerns, however, arise with regards to developing countries. Increased levels of copyright protection indeed seem to be enhancing the knowledge gap between developed and developing countries. Current rules on copyright may be reinforcing "a system of knowledge inequality" and working against those who have least to spend on knowledge products.[5] The Commission on Intellectual Property Rights (IPR Commission), for instance, noted the mounting relevance of copyright for developing countries as they seek to participate in a knowledge-based global economy, and emphasized that "getting the right balance between protecting copyright and ensuring adequate access to knowledge and knowledge-based products" is critical.[6]

5. More and more, the increasing levels of protection of copyright and the resulting difficulties for adequate access to knowledge come from bilateral trade agreements. Bilateral trade agreements, particularly those involving the United States, generally contain a number of provisions that raise levels of copyright beyond those required by multilateral copyright rules, including provisions linked to ratification and accession to copyright-related treaties, database protection, and regulation of the software used by the Parties' governments.

6. The present note will describe a small number of these copyright provisions in bilateral trade agreements and highlight their potential impact on access to knowledge. After the introduction, Section B will describe the multilateral legal framework for copyright. Then, Section C will address two provisions usually included in U.S. bilateral trade agreements: the extension of the term of copyright protection and the regulation of technological protection measures (TPMs). Finally, Section D will provide some concluding thoughts.

II.2. Copyright Provisions and Negotiations at the Multilateral Level

7. The multilateral framework of copyright and related rights includes the Berne Convention, the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement), and the so-called World Intellectual Property Organization (WIPO) "Internet Treaties" – the WIPO Copyright Treaty (WCT) and the WIPO Performers and Phonograms Treaty (WPPT). In addition, the possibility of a treaty expanding the protection of broadcasting organizations is currently being discussed in the WIPO Standing Committee on Copyright and Related Rights (SCCR). While existing treaties establish

[4] The concerns regarding the U.S. Digital Millennium Copyright Act (DMCA) will be briefly analyzed below. The protection of databases, pioneered by the EU, is also questioned for its impact on scientific research. In addition, there is a growing global movement to require governments to consider and promote free/libre/open source software in their procurement.

[5] Philip Altbach, "Book Publishing," in UNESCO WORLD INFORMATION REPORT 1997-1998, available at http://www.unesco.org/webworld/com_inf_reports/index.shtml.

[6] Commission on Intellectual Property Rights, Integrating Intellectual Property Rights and Development Policy, Chapter 5, available at http://www.iprcommission.org/papers/text/final_report/chapter5htmfinal htm.

minimum standards of protection for copyright for contracting States, they also provide certain flexibility that is critical for countries to ensure that their copyright rules effectively protect both private and public interests.

8. The Berne Convention of 1886 was the first multilateral copyright treaty. Its objective is to safeguard the rights of authors in their literary and artistic works, by establishing minimum standards of protection.[7] It does, however, permit countries to establish a number of limitations and specific and general exceptions, aimed at allowing particular kinds of use of protected works for an overriding public interest. Moreover, as developing countries joined the Berne Convention, it was forced to address the issue of adequate access to copyrighted works in a direct manner. In 1971, after several unsuccessful attempts at revisions, an Appendix was added to the Convention, which establishes a system of compulsory licenses. In this regard, the Berne Appendix is the only express "access mechanism" for developing countries in international copyright rules.[8] Unfortunately, it has not proved practicable or effective.[9]

9. The Berne Convention was the basis for the copyright provisions of the TRIPS Agreement, which incorporates a number of its rights and obligations. The TRIPS Agreement establishes minimum standards for the protection of authors, broadcasting organizations, performers and phonogram producers.[10] In regards to exceptions, the TRIPS Agreement uses more restrictive terms than the Berne Convention, subjecting all exceptions to the controversial "three-step" test.[11] Nevertheless, it maintains the length of protection for copyright established in the Berne Convention – as will be analyzed below, incorporates the Berne Appendix, and grants developing and least-developed countries transitional periods to implement their obligations.

10. After the adoption of the TRIPS Agreement, work intensified in WIPO to address issues copyright holders felt had not been adequately resolved in the WTO context. In particular, the concern was responding to the effect of new technologies on copyright regulation.[12] As a result, it is not surprising that the most important provisions of the two resulting treaties - the WCT and the WPPT, adopted in 1996 – are those related to "the

[7] Cornish and Llewelyn explain the focus on harmonization of levels of protection and the principle of national treatment by the atmosphere of "mutual suspicion" on copyright issues at the time. However, Okediji notes that it was easier to coordinate levels of protection, where countries had similar provisions, than limitations and exceptions, where there countries differed substantially.

[8] Ruth Okediji, "Fostering Access to Education, Research, and Dissemination of Knowledge through Copyright," Paper presented to the UNCTAD-ICTSD Dialogue on Moving the pro-development IP agenda forward: Preserving Public Goods in health, education and learning, 2004, available at www.iprsonline.org.

[9] In addition, it is also threatened by trade agreements. The North American Free Trade Agreement (NAFTA), for instance, places limitations on its use.

[10] Part II, Section 1 of the TRIPS Agreement deals with copyright and related rights.

[11] Article 13 of the TRIPS Agreement states that "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."

[12] A more thorough description of the background of the WIPO "Digital Agenda" can be found in Sisule F. Musungu and Graham Dutfield, "Multilateral Agreements and a TRIPS-Plus World: The World Intellectual Property Organization (WIPO)" (QUNO and QIAP, 2003).

digital agenda."[13] These provisions cover issues such as rights applicable to the storage and transmission of works in digital systems, the limitations and exceptions to rights in a digital environment, and TPMs. Of the two treaties, the WCT is considered by some to be the most controversial, as it goes well beyond the standards of protection required by the Berne Convention and the TRIPS Agreement and provides particularly strong rights for copyright owners in the digital environment.[14] The scope of these treaties is, nevertheless, still limited: the WCT has 51 Contracting Parties, while the WPPT has 49.[15]

11. Work on copyright and related rights in WIPO is now primarily focused towards on increasing the protection of broadcasting organizations. The 2004 WIPO General Assembly indicated the SCCR should accelerate its work with a view to a diplomatic conference, where the new treaty would be adopted.[16] Some issues, however, including TPMs and webcasting, remain highly contested. Moreover, many developing countries continue 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.[17] On other hand, Chile has suggested that the SCCR, in considering new technologies, should prioritize promoting the opportunities to facilitate access to education, culture and knowledge. In particular, Chile proposed the regulation and harmonization at the international level of limitations and exceptions to copyright, such as those for public libraries, handicapped people and distance education.[18]

II.3. Copyright and Bilateral Trade Agreements

12. The discussion of copyright-related issues at the multilateral level, however, is increasingly being undermined by the introduction of provisions in bilateral trade agreements that raise the levels of protection beyond TRIPS requirements and introduce measures still highly controversial in multilateral negotiations.[19] Examples include

[13] WIPO Intellectual Property Handbook, at paragraph 5.217. The digital agenda, however, launched in September 1999 by the Director General of WIPO, is said broader, aimed at, among other things, broadening the participation of developing countries in accessing intellectual property information and participating in global policy formulation, and to promote the adjustment of the international intellectual property regulatory framework to facilitate e-commerce.

[14] See *supra* note 12, at page 15.

[15] It is noteworthy that the vast majority of Contracting Parties are developing countries.

[16] 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.

[17] See, e.g., the interventions of the African Group, Brazil, India, Iran, and China at the 12th Session of the Standing Committee on Copyright and Related Rights (SCCR). The draft report is available at http://www.wipo.int/edocs/mdocs/sccr/en/sccr_12/sccr_12_4_prov.doc. Discussions were also reflected in numerous articles and notes by observers (see, for instance, "WIPO Broadcasting Treaty Discussions end in Controversy, Confusion," available at www.ip-watch.org).

[18] The Chilean proposal, presented at the 12th Session of the SCCR, is available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_12/sccr_12_3.doc.

[19] For discussion of how other intellectual property-related multilateral discussions are also being precluded by bilateral trade agreements, see, e.g., "Non-violation complaints in regional and bilateral trade agreements: Precluding discussions at the multilateral level" in South Centre and CIEL IP Quarterly Update: First Quarter 2004, available at www.southcentre.org and www.ciel.org.

provisions extending the term of protection of copyright and provisions introducing legal protection for TPMs limiting access and use of works. Both these types of provisions, which will be analyzed below, will further imbalance international copyright law and impede adequate access to information and knowledge.

A. Term of Protection

13. The term of protection of copyright is the period during which the owner has the right to exclude others from using the protected work without his or her authorization.[20] Article 9 of the TRIPS Agreement incorporated the minimum term of protection established by the Berne Convention: the life of the author plus 50 years. In addition, the TRIPS Agreement established a minimum term of protection of 50 years from the end of the year of authorized publication or creation for those works in which the author is not a natural person.[21] Intellectual property provisions in bilateral trade agreements, however, extend the minimum protection period, both after the life of the author and from the date of publication or creation, to 70 years.

14. Terms of protection are crucial to establishing an adequate balance between private and public interests in intellectual property. It is only when copyright expires that the work enters the public domain, thus ensuring that intellectual property achieves its ultimate objective of promoting access to information and knowledge: "copyright should last only for a limited period, since so far as possible the borrowing and exchange of ideas is itself crucial to a free society."[22] The longer the copyright term, the slower the growth of the public domain with respect to these works.

15. As a result, the extension of copyright terms – such as the one introduced by bilateral trade agreements – has proved controversial, even in developed countries. In the United States, for instance, the constitutionality of a law extending the duration of copyright by 20 years was challenged before the Supreme Court.[23] Though the Supreme Court found the law did not violate the U.S. Constitution, several Justices expressed their concern with the expanding temporal protection of copyright. Justice Stevens, for example, affirmed that giving the public access to a creation as early as possible was the justification of copyright and the best way for it to reach its goal of promoting the progress of science and useful arts. Justice Breyer asserted that the extension of copyright would indeed inhibit this goal. He pointed out that the costs of an extension – in terms of higher royalties to use the work and costs of obtaining permission to use the work – would restrict the dissemination of a work. Moreover, he questioned whether longer periods of protection would even serve the rationale of promoting creation, since "no potential author can reasonably believe that he has more than a tiny chance of writing a classic that will survive commercially long enough for the copyright extension to matter."

16. Developing a strong public domain and thus fostering access to information is even

[20] WIPO Intellectual Property Handbook, at paragraph 2.179.
[21] Article 12. Either because they were created by a group of people or by a corporation.
[22] See *supra* note 2, at 366.
[23] Eldred v. Ashcroft, 537 U.S. 186.

more important for developing countries, given their need to overcome the knowledge gap. In this regard, UNESCO has reaffirmed the need to define the strategies and policies which may make it possible to narrow the gap between those who have access to information and those who are deprived of it. In particular, UNESCO notes the need for an energetic policy of promotion of access to information in the public domain, which constitutes an "inestimable… wealth of knowledge and works belonging to all the cultures of the world."[24] Maintaining a truly limited period of protection for copyrights should thus be an important consideration when negotiating intellectual property provisions both at the multilateral and bilateral levels.

B. Technological Protection Measures and Access to Digital Information

17. Limitations to the protection of copyright also apply during the term of protection. The need for exceptions that protect the public interest is indisputable: "in return for the valuable support which the State offers by conferring the rights, right-owners can be expected to contribute in limited ways to social policies on maintaining the stock of knowledge, fostering the processes of research and education, allowing the transmission of news and the expression of criticism and review."[25] In this regard, both the Berne Convention and the TRIPS Agreement recognize specific and general exceptions, **though there is still discussion as to whether these exceptions have sufficient scope or practicability to achieve their objectives.**

18. The biggest obstacle for exceptions to copyright to be effectively implemented and used, however, comes from the difficulties of translating them into digital environment. Indeed, given the growing amount of information in digital format, the limitations and exceptions provided for in international and national intellectual property rules may be meaningless unless they also ensure access to such information. As a result, the IPR Commission recommended that users of internet information in developing countries should be entitled to exceptions such as making and distributing printed copies from electronic sources in reasonable numbers for educational and research purposes, and using reasonable excerpts in commentary and criticism.

19. The development of TPMs, however, is undermining the possibilities for rapid and inexpensive dissemination of digital information. TPMs were developed as method to control access to digital works or various uses of such works, thus partly assisting in the enforcement of copyright.[26] The problem is that TPMs can create "virtual fences" around digitized content whether or not it enjoys copyright protection. As a result, they allow much greater control than traditional copyright law and have potentially serious implications for public access to information.[27] As a study prepared on the issue for the Canadian government states: "It's well and good for law to spell out public rights – exceptions and

[24] General Conference of UNESCO 1998-1999 Program and Budget, available at http://unesdoc.unesco.org/images/0011/001103/110397e.pdf.
[25] See *supra* note 2, 366.
[26] Common TPMs include, for example, the use of passwords and encryption.
[27] Ian Kerr, Alana Maurushat, and Christian S. Tacit, "Technical Protection Measures," Study prepared for the Heritage department of the Canadian government (2002), available at http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/protection/index_e.cfm.

limitations - that are reserved from copyright, but if a rights-holder can lock up its works with measures that prevent the public from exercising those public rights, what does it matter?"[28]

20. Many TPMs are vulnerable to circumvention, however. This has generated a push for their legal protection that raises additional concerns for the public interest exceptions of copyright law. Adding an additional layer of legal protection may, rather than address some of the problems they cause for access to knowledge, further undermine the balance that copyright endeavors to achieve. The problem is augmented by the lack of empirical data as to what an appropriate legal response should be.[29]

21. The TRIPS Agreement does not address the issue of TPMs. While, in light of the preceding comments, such omission may be seen as positive, it was seen as a serious oversight by content holders and software organizations, which pushed for the legal protection of TPMs in the WIPO "Internet Treaties." Article 11 of the WCT and Article 18 of the WPPT thus require Contracting Parties to provide "adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights… that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."

22. Consequently, the IPR Commission called on countries to make the decision of joining these treaties with the utmost caution.[30] Authors also warn that membership in the WCT and WPPT in absence of technological infrastructure to ensure access and use would simply transform developing countries into subsidizers of the global copyright system.[31] Bilateral trade agreements, however, particularly those involving the United States, require Parties to ratify or accede to these treaties. Article 29 a) of the U.S.-Jordan agreement, Article 16.1 of the U.S.-Singapore agreement, and Article 15.1 2) of CAFTA are all cases on point.

23. Because the WCT and WPPT merely requires Contracting Parties to prevent circumvention through "adequate legal protection," there could still be certain flexibility as to the form such legal protection could take. For example, countries could place a limited prohibition against the circumvention of an access control TMP, creating a regime as coherent as possible with copyright policy and including a range of exceptions aimed at maintaining an adequate balance between public and private interests. Provisions on TPMs in several free trade agreements, however, such as those with Chile, Morocco, and Bahrain establish a maximalist regime based on the U.S. Digital Millennium Copyright Act

[28] Id.
[29] Id.
[30] See *supra* note 5. Musungu and Dutfield, however, argue that the issue may be moot due to the number of developing countries that are already Parties to the WCT and WPPT.
[31] Ruth Okediji, "Development in the Information Age: Issues in the Regulation of Intellectual Property Rights, Computer Software, and Electronic Commerce," UNCTAD-ICTSD Project on IPRs and Sustainable Development (2004), available at www.iprsonline.org.

(DMCA).[32]

24. The DMCA provides protection for TPMs by prohibiting the circumvention of measures preventing unauthorized access to a copyright work. A distinction between access and use was employed because copying of a work may be an exception allowed by copyright law. Nevertheless, making or selling devices or services that can be utilized to circumvent measures to prevent unauthorized access *or* use is also prohibited.[33] These prohibitions apply even if the intended use of the protected work would not infringe copyright.[34] Moreover, though the DMCA contains several exceptions for certain socially beneficial activities, these exceptions are, in practice, inadequate to ensure access for these and other legitimate activities.[35]

25. Since the protection of TPMs required by bilateral trade agreements is not the same in all case, however, there may be room to protect and promote adequate exceptions in the implementation of these provisions. In this regard, the Electronic Frontier Foundation (EFF), an NGO active in this area, has developed several recommendations.[36] These include:

- Providing a general exception to both the act of circumvention and the prohibition on devices when the purposes are non-infringing or legitimate. To protect exceptions provided by copyright law but not expressly recited as an exception to the circumvention ban, the anti-circumvention provisions should provide an exception for circumvention for legitimate and non-infringing uses of protected digital works. Unfortunately, none of the bilateral FTAs provides for such an exception;[37]
- Requiring actual (subjective) knowledge of circumvention. Article 16.4 (7) of the U.S. – Singapore agreement prohibits the circumvention of a TPM with knowledge or with *reasonable grounds to know* of the act of circumvention. More recent FTAs have gone even further and removed the knowledge requirement altogether. On the other hand, Article 17.7(5) of the U.S.-Chile FTA incorporates an *actual* knowledge standard. Thus, a person can only be held liable for *intentionally* circumventing a TPM; and
- No criminal or civil liability for non-profit libraries, archives and educational institutions. Article 17.7(5) of the U.S.-Chile FTA permits such an exemption from criminal liability. It also permits exemption from civil liability, where the

[32] See, e.g., the U.S. agreements with Jordan (article 4.13), Singapore (16.4-7), CAFTA (15.5-7), Australia, Morocco, and Bahrain.

[33] Rather than prohibiting the act of circumvention, these measures proscribe the manufacturing, distribution, or sale of devices that are used to circumvent TPMs. The premise is that sanctioning acts of circumvention on a case-by-case basis is costly and ineffective.

[34] An example given by the Electronic Frontier Foundation (EFF) is that, under U.S. law, there is a copyright exception allowing not-for-profit organizations to translate books into Braille for blind people, which they would be not able to exercise in connection with e-books that are protected by TPMs.

[35] See, e.g., EFF, "Unintended Consequences: Five Years under the DMCA," available at http://www.eff.org/IP/DMCA/?f=unintended_consequences.html.

[36] These can be found in EFF, "Seven Lessons from a Comparison of the Technological Protection Measure Provisions of the FTAA, the DMCA, and recent bilateral Free Trade Agreements," available at http://www.eff.org/IP/FTAA/?f=tpm_implementation html.

[37] The U.S. Congress, on the other hand, is considering DMCA reform legislation that would provide for such an exception.

circumvention is carried out by those entities in good faith and without knowledge that the conduct is prohibited. By comparison, Article 16.4(7) of the U.S.-Singapore FTA and Article 15.5.7(a) of the CAFTA provide a carve-out only for criminal liability, but not for civil penalties.

II.4. Conclusion

26. Access to information is an essential element in fostering innovation and creativity. As a result, developing countries calling for a development dimension to intellectual property have particularly focused on the need for intellectual property to bridge the "knowledge gap" and adequately balance the needs of the producers and users of information.[38] The appropriate design and equilibrium of international copyright rules is thus an increasingly important element of ensuring intellectual property is an effective tool of public policy. In particular, norm setting at both the multilateral and bilateral levels should ensure that the public domain is preserved and promoted, and that access and dissemination of knowledge, as key pillars in copyright law, are fully considered and supported.

III. AN OVERVIEW OF RELEVANT IP DEVELOPMENTS IN VARIOUS FOR A

27. 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 first quarter of 2005.[39]

III.1 World Trade Organization (WTO)

A. Council for TRIPS

28. The formal and informal meetings of the Council for TRIPS in March 2005 focused on the impending deadline to achieve a permanent solution to implement Paragraph 11 of the General Council Decision of 30 August 2003 (30 August Decision). No progress, however, was achieved on that issue. On the topic of the relationship between the TRIPS

[38] See the Proposal for a Development Agenda for WIPO presented at the 2004 WIPO General Assembly. The proposal 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, for the establishment of a development agenda for WIPO. It is WIPO document WO/GA/31/11 and can be found on www.wipo.int.

[39] For developments during 2004, please see earlier South Centre and CIEL IP Quarterlies, available at www.southcentre.org and www.ciel.org.

Agreement and the Convention on Biological Diversity (CBD), on the other hand, developing countries, both as a group and individually, continued expounding on the need for the introduction of disclosure requirements. Discussions on both these topics will be summarized below. Other pending issues, such as the necessity or desirability of applying non-violation and situation complaints to the TRIPS Agreement and the consideration of proposals on special and differential treatment, were only briefly addressed.[40] Moreover, the European Union requested that enforcement issues be added to the agenda of the Council for TRIPS, which was strongly opposed by developing countries on the basis that these issues would fall outside its competence. **Meetings of the Council for TRIPS are scheduled for June 14-15 and October 25-26, 2005.**

- *Implementing Paragraph 11 of the 30 August Decision*: Wide divergences continued as to the amendment to the TRIPS Agreement that will establish a permanent solution to the difficulties faced by countries with insufficient manufacturing capacity in the pharmaceutical sector in the effective use of compulsory licensing. Two communications were presented and discussed at the March meeting of the Council for TRIPS. First, the African Group elaborated on the legal arguments supporting its proposal for the amendment of Article 31 of the TRIPS Agreement, presented at the December 2004 meeting of the Council for TRIPS.[41] In particular, the African Group addressed the following issues: 1) the legal form of the amendment, arguing a direct amendment was less complex and more certain than any other approach – such as the use of a footnote proposed, for instance, by the United States; 2) the appropriateness of eliminating certain elements of the 30 August Decision insofar they would be obsolete or redundant; and 3) the situation of the Chairman's Statement, arguing it should not be part of the amendment as it was not part of the 30 August Decision. Second, an advance copy of United States communication reaffirmed their position that any amendment must reflect the 30 August Decision in its entirety, including an express reference to the Chairman's Statement.[42] Discussions also centered on these issues, with differences remaining sharp.

  The United States, Switzerland, Japan, Canada and the European Union all insisted on references to the Chairman's Statement. Several developing countries, on the other hand, including Argentina, Brazil, Hong Kong-China, India, Jamaica, Malaysia, and the Philippines supported the African Group's proposal. They also emphasized that the main purpose of the 30 August Decision had been to provide an

[40] According to the July Framework, all WTO bodies to which these types of special and differential treatment 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. The deadline in regards to non-violation complaints, also established by the July Framework, is the Sixth Ministerial Conference.

[41] See Communication from Rwanda on behalf of the African Group, "Legal Arguments to Support the African Group Proposal on the Implementation of Paragraph 11 of the 30 August 2003 Decision," 1 March 2005 (WTO document IP/C/W/440). The December Communication from Nigeria on behalf of the African Group was titled "Implementation of Paragraph 11 of the 30 August 2003 Decision," 10 December 2004 (WTO document IP/C/W/437).

[42] See Communication from the United States, "Comments on Implementation of the 30 August 2003 Agreement (Solution) on the TRIPS Agreement and Public Health," 18 March 2005 (WTO document IP/C/W/444).

answer to a humanitarian problem, and that its implementation should thus be carried out in that spirit. Given the lack of agreement on this issue, the meeting of the Council for TRIPS was suspended to allow for further consultation.

In the next formal meeting held on March 31 – the very day of the deadline, however, the situation did not significantly change and no agreement was reached. In a statement on behalf of the African Group, Rwanda called on Members to show more dedication and determination to achieving an effective solution.[43] Moreover, it recalled the African Group only agreed to the 30 August Decision on the understanding that it was an interim solution and that more consideration and discussion would go towards developing a permanent solution. As a result, the African Group stated it cannot and will not accept an interpretation that the Decision in its entirety and the Chairman's Statement must be part of the amendment.

Indeed, the African Group recalled the footnote referring to the Chairman's statement was added to the 30 August Decision without the express consent of the Members. Zambia, on behalf of the Least Developed Countries, Benin, on behalf of the Asian, Caribbean, and Pacific countries, Argentina, Brazil, India, Philippines, Sri Lanka, and Peru, all supported the African Group's position. On the other hand, the United States, the European Union, and Switzerland continued arguing the Decision struck a balance between a range of concerns and that the Chairman's Statement was a part of the consensus. **The new Chairman of the Council for TRIPS, H.E. Ambassador Choi Hyuck of Korea, will now undertake consultations with a view to adopting a Decision at the May 26-27 meeting of the General Council.**

- *Relationship between the TRIPS Agreement and the CBD:* In the March meeting of the Council for TRIPS, some developing countries, both collectively and individually, continued expounding on the need for the introduction of disclosure requirements. Bolivia, Brazil, Colombia, Cuba, Dominican Republic, Ecuador, India, Peru, and Thailand presented a third submission elaborating on the checklist of issues, focusing on the elements of the obligation to disclose evidence of benefit-sharing.[44] In particular, the paper explained how benefit-sharing might be determined, when the patent applicant might be obliged to provide it, what would happen in the case of lack of a national regime on benefit-sharing, and what might be the effects of non-compliance.
  Brazil and India also submitted some technical observations on the issues raised by the December US submission.[45] While welcoming the US submission and the

[43] The statement was later distributed as a communication. See Communication of Rwanda on behalf of the African Group, "The TRIPS Agreement and Public Health," 6 April 2005 (WTO document IP/C/W/445).
[44] See Submission from Bolivia, Brazil, Colombia, Cuba, Dominican Republic, Ecuador, India, Peru and Thailand, "The Relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD) and the Protection of Traditional Knowledge – Elements of the Obligation to Disclose Evidence of Benefit-sharing under the Relevant National Regime," 18 March 2005 (WTO document IP/C/W/442).
[45] See Submission from Brazil and India, "The Relationship between the TRIPS Agreement and the

expressed desire to resolve differences on these issues, Brazil and India argued that the U.S submission had not made a case against the proposed disclosure requirements. In particular, Brazil and India explained that, contrary to the US concerns regarding the impact of disclosure requirements on the patent system, they would in fact introduce much needed clear and internationally agreed rules on the issue of genetic resources and traditional knowledge.[46] Finally, Peru presented the concrete measures it is taking at a national level to reduce cases of bad patents and prevent bio-piracy, including the establishment of a National Commission for the Protection of Access to Peruvian Biological Diversity and to the Collective Knowledge of the Indigenous Peoples.[47]

A number of developing countries, including China, supported these submissions. The United States, Canada, Japan and the European Union, however, remained opposed to introducing disclosure requirements in the TRIPS Agreement, raising, for instance, the issue of costs. Several developing countries then highlighted the enormous costs involved in examining patent applications in third countries to determine cases of misappropriation, as well as the general costs incurred by developing countries as a consequence of the adoption of the TRIPS Agreement. Lastly, several developing countries stressed that the time had come to take concrete measures to resolve these issues. In this regard, **the Chairman of the Council for TRIPS is conducting informal consultations.**

B. Special Session of the Council for TRIPS

29. The meeting of the Special Session of the Council for TRIPS took place on March 11, 2005. The stalemate in the negotiations on the multilateral register of geographical indications, which have not moved significantly since July, continued. The group of WTO Members that support a non-binding system of notification and registration presented a draft decision on the issue, but it was rejected by the European Union and Switzerland, which support a draft prepared by the Chairman in 2003 as a basis for negotiations.[48] **The next meetings of the Special Session are scheduled for June 16-17, September 16, and October 27-28.**

30. On the issue of extension of coverage of geographical indications, the second round informal consultations mandated by the General Council took place on March 10, 2005, led

Convention on Biological Diversity (CBD) and the Protection of Traditional Knowledge: Technical Observations on Issues raised in a Communication by the United States," 18 March 2005 (WTO document IP/C/W/443).

[46] Brazil and India also replied to US concerns regarding the effectiveness and costs of disclosure requirements, as well as analyzing potential shortcomings of the US proposals on the issue.

[47] See Communication from Peru, "Article 27.3(B), Relationship between the TRIPS agreement and the CBD and Protection of Traditional Knowledge, and Folklore," 8 March 2005 (WTO document IP/C/W/441).

[48] See Submission by Argentina, Australia, Canada, Chile, Dominican Republic, Ecuador, El Salvador, Honduras, Mexico, New Zealand, Chinese Taipei and the United States, "Proposed Draft TRIPS Council Decision on the Establishment of a Multilateral System of Notification and Registration of Geographical Indications for Wines and Spirits," 1 April 2005 (WTO document TN/IP/W/10).

by WTO Deputy Director-General Francisco Thompson-Flores. Discussions were equally difficult and unsuccessful. **The informal consultations will likely continue in April.**

III.2 World Intellectual Property Organization (WIPO)

A. Standing Committee on the Law of Patents (SCP)

31. The future work program of the Standing Committee on the Law of Patents (SCP), which proved extremely controversial in the last session of the SCP and in the 2004 WIPO Assemblies, became even more so after a informal meeting organized by the WIPO Director General in Casablanca in February 2005.[49] Given the lack of consensus over a proposal by the United States and Japan to continue work on a limited set of provisions of the draft Substantive Patent Law Treaty (SPLT), the 2004 WIPO Assemblies directed that "the dates of the next … SCP should be determined by the Director General following informal consultations that he may undertake."[50] The meetings of the SCP scheduled for the remainder of the year 2004 were thus cancelled.[51] The consultation held in Casablanca, however, which was solely by-invitation, not only addressed the date of the next SCP meeting, but also proposed a work plan for the SCP and the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC).[52] As a result, the representative of Brazil did not associate himself with the statement.

32. Moreover, the Group of Friends of Development, consisting of Argentina, Brazil, Bolivia, Cuba, Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania and Venezuela, issued a counter-statement.[53] The statement by the Group of Friends of Development recalled that inclusiveness and transparency were core elements for making WIPO and intellectual property more responsive to development needs and interests, and affirmed that informal consultations cannot modify or affect decisions adopted by the WIPO Assemblies. In particular, the statement reaffirmed that any SCP meeting would have to consider the draft SPLT as a whole, including proposed provisions on the transfer of technology, on anticompetitive practices, on the safeguarding of public interest flexibilities, and that Member States have the prerogative to decide on the

[49] For an analysis of the debate regarding the future work program of the SCP, see South Centre and CIEL IP Quarterly Update: Third Quarter 2004, available at www.southcentre.org and www.ciel.org.

[50] See WIPO General Assembly – Thirty-First (15th Extraordinary) Session, September 27 to October 5, 2004 – Draft Report (WO/GA/31/15 Prov.) at paras. 116 – 143.

[51] On 18 October 2004, the head of WIPO's Patent Law Section notified subscribers to the SCP Forum that no session of the SCP would be convened in the second half of 2004.

[52] The Casablanca statement is available as a document for the SCP meeting scheduled for June, as WIPO document SCP/11/3. The consultations were attended by nationals from Brazil, Chile, China, France, Germany, India, Italy, Japan, Malaysia, Mexico, Morocco, Russian Federation, Switzerland, United Kingdom, United States of America, African Regional Intellectual Property Organization (ARIPO), Eurasian Patent Office (EAPO), European Patent Office (EPO), African Intellectual Property Organization (OAPI) and the European Union, but it is unclear how many of them were representing their countries.

[53] The statement by the Group of Friends of Development was submitted to WIPO with a request that it be distributed to all Member States. The statement is available as WIPO document SCP/11/4 at http://www.wipo.int/meetings/en/details.jsp?meeting_id=7128.

convenience and opportunity of transmitting to the General Assembly any proposals presented to the SCP. On 5 April, India also announced its opposition to the Casablanca Statement, associating itself with the statement by the Group of Friends of Development. In addition, India reaffirmed its position regarding the need for a holistic approach in SPLT discussions. Finally, India made it clear that Dr. R.A. Mashelkar, who chaired the Casablanca meeting, had participated in his individual capacity and not as a delegate of India.

33. For unexplained reasons, another informal consultation meeting on the future sessions of the SCP, scheduled for April 21-22 in Geneva, was cancelled. **However, the WIPO Secretariat has prepared a document on the "Future Work Program" for the SCP for its June 1-2 meeting, which invites the SCP to consider and adopt the recommendations, the objectives, and the work program for the SCP in the Casablanca statement, and to transmit them to the 2005 WIPO Assemblies.**

B. Upcoming WIPO Meetings

34. The first **Inter-sessional Intergovernmental Meeting (IIM) on a WIPO Development Agenda** took place on April 11-13, 2005.[54] The next IIM will take place on June 20-22, with a third meeting scheduled for July. Other upcoming meetings include:

- The **Seminar on Intellectual property and Development**, co-organized by WIPO, the World Health Organization, the United Nations Conference on Trade and Development, the WTO and UNIDO, which will take place on May 2-3;
- The **Ad-hoc Intergovernmental Meeting to discuss the WIPO response to the CBD** request for work on disclosure requirements, scheduled for May but with no concrete dates announced yet;
- The **Eighth Session of the IGC**, which will take place on June 6-10;
- The **Seventh Session of the Working group on the Reform of the Patent Cooperation Treaty**, scheduled for June 25- 31; and
- Though not officially announced, the next meeting of the **Standing Committee on Copyright and Related Rights** is expected to take place in June or July 2005.

III.3 Other Multilateral For a

A. Convention on Biological Diversity (CBD)

35. The third meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing was held in Bangkok from 14 to 18 February 2005. The relationship between access and benefit-sharing and intellectual property once again figured prominently. One of the most heated debates was generated by the opening statement read by a representative of the United Nations Environment Programme (UNEP) on the

[54] The proposals and discussions of the first Inter-sessional Intergovernmental Meeting (IIM) will be analyzed in detail in the next South Centre and CIEL IP Quarterly Update.

relationship between the TRIPS Agreement and the CBD.[55] The statement affirmed "there are real contradictions in essential points between the TRIPS Agreement and the CBD, which must be resolved."[56] The statement also stated that provisions of the TRIPS Agreement run counter to the objectives of the CBD, impeding their full and practical realization: "Private monopoly can only begin where national or community sovereignty has been effectively suspended. Therefore, under the TRIPS Agreement, the very genetic resources which nations and communities are supposed to control access to will be under the control of intellectual property rights holders." During the discussion regarding the adoption of the report, the European Union, Australia, Japan, the United States, and other developed countries questioned the statement and affirmed they saw no contradiction between the TRIPS Agreement and the CBD. On the other hand, Brazil, Ethiopia, and a number of non-governmental organizations (NGOs) supported the statement by the UNEP representative.

36. References to intellectual property can also be found in the recommendations of the Working Group. The disclosure of origin/source/legal provenance of genetic resources and associated traditional knowledge in applications for intellectual property rights, for instance, is mentioned as a potential element of an international regime on access and benefit-sharing. Other potential elements include any relevant provisions of the TRIPS Agreement, WIPO Treaties, and the International Convention for the Protection of New Varieties of Plants (UPOV Convention), as well as "measures to ensure that intellectual property rights do not undermine the international regime."[57] The issue of intellectual property also came up in the negotiation of the recommendation on measures to support compliance with prior informed consent and mutually agreed terms on which access was granted. Brazil, supported by Egypt, Colombia, Malaysia, and the African Group called for future meetings of the Working Group to consider relevant proposals on these issues in the Council for TRIPS, as a way to increase mutual supportiveness. This was strongly opposed by Switzerland and other developed countries. It was eventually agreed that the Executive Secretary of the CBD would "compile pertinent documentation circulated in other relevant forums, in particular recent proposals submitted by Parties to the CBD in the following international organizations, listed in alphabetical order: the Food and Agriculture Organization (FAO), UNCTAD, UNEP, the UPOV Convention, WIPO, and the WTO Council for TRIPS."[58] **The fourth meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing will take place in Spain in March 2006.**

B. World Health Organization (WHO)

37. The Commission on Intellectual Property Rights, Innovation and Public Health (CIPIH) held its third meeting on January 31 to February 4, 2005, in Brazil. The issues addressed at the meeting included the Brazilian approach to the use of the patent system

[55] Subsequent to this statement, the UNEP Executive Director, in letter to the Chairman of the meeting, stated that the speech did not represent or reflect the position of UNEP.
[56] See Report of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing on the Work of its Third Meeting, 3 March 2005 (UNEP/CBD/WG-ABS/3/7).
[57] Id.
[58] Id.

and the flexibilities in TRIPS Agreement. On March 14-16, the CIPIH held its fourth meeting in Brussels, Belgium. Consistent with other meetings a key purpose of the visit was to establish a dialogue with important stakeholders and to engage them in a discussion of the issues that CIPIH is addressing. CIPIH expressed specific interest, for instance, in the EU trade policy, particularly with regards to access to medicines, as well as the attitudes of European pharmaceutical industry towards patents, R&D for neglected diseases, and various incentives for creating new medicines and vaccines for developing countries. **Upcoming meetings include a May 30-31 CIPIH workshop to promote discussion of the different commissioned studies by diverse stakeholders and the fifth meeting of the Commission, scheduled to take place in Geneva on June 1-2.**

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

38. The second session of the intergovernmental meeting of experts on the Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions took place in Paris from January 31 to February 11, 2005. The draft convention aims to protect and promote the diversity of cultural expressions and contains a number of references to intellectual property.[59] The experts examined the comments from intergovernmental organizations such as UNCTAD, WIPO, and the WTO, as well as non-governmental organizations, and attempted to reduce the number of options in the revised text. At the closing session, the intergovernmental meeting requested the Chairman "to prepare a consolidated text consisting of the draft provisions recommended by the Drafting Committee together with proposals by the Chairman himself." The Member States further asked "that such a consolidated text be circulated to [them] as soon as possible" and have recommended "the convening of a third session."

39. On the basis of the work of the intergovernmental meeting of experts, the UNESCO Director-General presented a preliminary report, summarizing developments since the launching of the initiative in 2003.[60] The report also contains a "composite" text of the Draft Convention. A second preliminary draft convention, which is a consolidated text by the Chairman of the Plenary, is currently being prepared. **There are several references to intellectual property in the composite text.** For example, proposed sub 3 of Article 7 – Obligation to promote [and protect] the diversity of [cultural expressions and contents], reads: "**[States Parties] shall ensure [intellectual property rights] are [fully respected and enforced] according to existing international instruments to which States are parties, particularly through the development [or strengthening] of measures against piracy**." On the other hand, proposed sub 4 for the same article states: "**[States Parties] undertake to ensure in their territory [protection against unwarranted appropriation]**

[59] 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.

[60] Preliminary Report of the Director General Containing Two Preliminary Drafts of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions, UNESCO document CLT/CPD/2005/CONF.203/6, available at http://portal.unesco.org/culture/en/file_download.php/4d9be3255ffc00dcaa46a8f6369ba030CLT-2005-CONF-203-CLD-4-Eng.pdf.

of traditional and popular [cultural contents and expressions], [with particular regard to preventing the granting of invalid intellectual property rights]."

40. Article 19, in regards to the relationship with other instruments, still contains two options: Option A states that provisions of the convention shall not affect the rights and obligations deriving from other international instruments, except where the exercise of those rights and obligations would cause serious damage or threat to the diversity of cultural expressions. However, **nothing in the convention could be interpreted as affecting rights and obligations deriving from instruments relating to intellectual property rights**. Option B states that nothing in the Convention shall affect rights and obligations under other existing international instruments. Following the debate on this issue, the Chairman suggested that another version should be drafted to avoid establishing a hierarchy among international instruments and, on the contrary, emphasize complementarity. Consultations will continue during the third intergovernmental meeting.

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

41. Intellectual property will remain a crucial element of bilateral trade policies for both the United States and the European Union in 2005. In its 2005 Trade Policy Agenda, the United States highlights the value of multiple free trade initiatives in "breaking new ground" in areas such as intellectual property.[61] EU Commissioner for Trade Peter Mandelson has stated that the traditional tariff agenda is not enough and that bilateral trade policy can also tackle other issues, including promoting intellectual property protection.[62] The following section highlights the latest developments in negotiations linking intellectual property with the increased market access or investment agreements.

A. Free Trade Agreements involving the United States

Free Trade Area of the Americas (FTAA)

42. Despite reported progress in bilateral meetings in February, the United States and Brazil – the co-chairs of the FTAA negotiations – postponed a meeting scheduled for March 29-30 in Washington D.C. Brazil's lead FTAA negotiator Adhemar Bahadian has recognized that US demands on intellectual property in the common set of obligations remained a "stumbling block," particularly provisions on cross-retaliation that are considered to exceed requirements of the TRIPS Agreement.[63] The meeting between the co-chairs is now scheduled to take place in May.

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[61] The 2005 Trade Policy Agenda and 2004 Annual report is available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Trade_Policy_Agenda/asset_upload_file454_7319.pdf.

[62] See speech by Peter Mandelson, European Commissioner for Trade in "Strengthening the Lisbon Strategy: the Contribution of External Trade to Growth and Competitiveness in Europe," High Level Seminar on the Lisbon Agenda, Stockholm, Sweden, 15 February 2005.

[63] See Inside US Trade, U.S., Brazil announce progress in FTAA, hope for wider meeting in April, February 25, 2005.

Bilateral Trade Agreements

43. The United States is currently negotiating a number of free trade agreements that include intellectual property provisions. Negotiations are ongoing with Panama, Thailand, South African Customs Union (SACU), several Andean Countries (Colombia, Peru, and Ecuador), the United Arab Emirates, and Oman. Other potential future trade partners for the United States include Egypt, South Korea, Malaysia, and Indonesia. The latest intellectual property-related developments in these negotiations include:

- *US-Thailand*. On 4-8 April, the third round of negotiations was scheduled to take place in Pattaya. The United States has already submitted partial texts on many intellectual property-related issues including copyright and trademark protection and was now expected to submit demands on patent related issues. The discussion of particularly controversial issues, such as data exclusivity protection, however, may be left until further on in the negotiations.
- *US-Andean Countries.* Following the eighth round of negotiations in March, chief US negotiator Regina Vargo indicated intellectual property, while not one of the most divisive issues, still required much work. Negotiators discussed copyrights, trademarks and geographical indications, but did not address issues such as data exclusivity and biodiversity, which are priorities for the Andean countries. Vargo would not speculate as to whether these issues would be discussed in the next round, scheduled for mid April.

B. Free Trade Agreements involving the European Union

44. As mentioned, promoting intellectual property protection will be a significant element of the bilateral trade strategy for the European Union in 2005. As to the objectives of the trade strategy in 2005, Directorate-General for Trade Policy (DG Trade) has announced they include:

- Ensuring the proper implementation of the trade aspects of the Association Agreements in force in the Mediterranean and the Middle East and concluding a comprehensive free trade agreement with the Gulf Cooperation council (Saudi Arabia, Oman, Qatar, Bahrain, UAE, Kuwait);
- Reaching a comprehensive agreement with MERCOSUR (Argentina, Brazil, Paraguay, and Uruguay), renegotiating existing agreements with Mexico and Chile, and assessing the possibilities of a bi-regional agreement with the Andean Community and Central American countries;
- Developing a high level bilateral Trade Policy dialogue with China, including on intellectual property issues and implementing the 2004 Joint Initiative for the Enforcement of Intellectual Property Rights in Asia (with Japan);
- Continuing negotiations with ACP countries, including a group of 16 countries in Eastern and Southern Africa in February 2004, the Caribbean ACP region in April 2004, a group of 7 countries in Southern Africa in July 2004 (SADC) and finally with the Pacific ACP region in September 2004.