CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

SOUTH CENTRE AND CIEL IP QUARTERLY UPDATE: THIRD 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 the options, flexibilities, and unresolved issues present at the multilateral level, it is crucial to develop a global view of international intellectual property standard-setting and to take the larger context into consideration during any negotiation or discussion.

2. The South Centre and CIEL IP Quarterly Update is intended to facilitate a broader perspective of international intellectual property negotiations by providing a summary of relevant developments in multilateral, plurilateral, and bilateral fora. Moreover, each IP Quarterly Update focuses on a significant topic in the intellectual property and development discussions to demonstrate the importance of following developments in different fora and the risks of lack of coordination between the various negotiations. In the present Update we discuss, in Section II, the Multilateral System of Access and Benefit-Sharing under the Food and Agriculture Organization's (FAO) International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and highlight the issues relevant to the intellectual property and development debate. Then, Section III will provide a brief factual update of intellectual property-related developments in a number of different fora in the third quarter of 2004.

II. ACCESS AND BENEFIT SHARING UNDER THE FAO ITPGRFA - INTELLECTUAL PROPERTY CONSIDERATIONS

A. Introduction

3. The ITPGRFA, adopted on 3 November 2001, entered into force on 29 June 2004. The treaty, negotiated under the auspices of the FAO, responds to concerns over the increasing privatization and monopolization of plant genetic resources for food and agriculture (PGRFA) and the potentially negative impacts this trend may have on agricultural biodiversity.[1] Agricultural biodiversity is a result of over 10,000 years of access to and exchange of PGRFA between farmers across the world.[2] Maintaining such access is thus crucial for the ITPGRFA's objective of achieving "the conservation and sustainable use of PGRFA and the fair and equitable sharing of benefits derived from

[1] Robert J L Lettington, "Agrobiodiversity and Intellectual Property Rights: Selected Issues under the FAO International Treaty on Plant Genetic Resources for Food and Agriculture" presented at the ICTSD/ UNCTAD/TIPS Regional Dialogue, *Intellectual Property Rights (IPRs), Innovation and Sustainable Development in Eastern and Southern Africa*, 29 June – 1 July 2004, Cape Town, South Africa, at 2 (available at http://www.iprsonline.org/unctadictsd/dialogue/2004-06-29/2004-06-29_lettington.pdf).

[2] See Clive Stannard, 'Developments in the Food and Agricultural Organization of the United Nations' presented at *WIPO Information Meeting on Intellectual Property and Genetic Resources*, 15 September 2004, Geneva (available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_gr_im_ge_04/ipgr_fao.pdf).

their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security."[3] As a result, one of the fundamental elements of the ITPGRFA is the establishment of a multilateral system for facilitated access and benefit sharing for selected PGRFA.[4]

4. The multilateral system of access and benefit sharing of the ITPGRFA is also one of the most innovative aspects of the treaty and many of the mechanisms required for its implementation remain to be elaborated. As with the access and benefit-sharing regime under the Convention on Biological Diversity (CBD), some of the most important of these issues are directly related to intellectual property. Their adequate consideration and resolution is thus not only critical to ensure effective access and benefit sharing in the context of PGRFA, but also increasingly relevant to the intellectual property and development agenda pursued by developing countries and NGOs in diverse international fora. Since the ITPGRFA came into force, the Commission on Genetic Resources for Food and Agriculture (CGRFA),[5] acting as the Interim Committee for the ITPGRFA, met in October 2004 and will meet again from 15 to 19 November 2004 to address some of these issues, with the first meeting of the Governing Body[6] tentatively scheduled for mid to late 2005.

5. The purpose of this note is to highlight and briefly analyze the main intellectual property related issues that arise in the elaboration of the multilateral system for facilitated access and benefit sharing in the ITPGRFA. Section B describes the proposed multilateral regime for PGRFA and its main implementing mechanism, the standard material transfer agreement (MTA). It also outlines the process that is currently taking place with regard to the development of the MTA as Contracting Parties move towards implementation of the ITPGRFA. Section C then analyzes in more detail certain intellectual property-related issues currently being discussed in the context of the standard MTA. Their resolution will not only profoundly affect the scope and functioning of the multilateral system, but they are also closely linked to topics being discussed in the World Trade Organization (WTO), World Intellectual Property Organization (WIPO) and the CBD. Finally, Section D presents some concluding thoughts.

B. The Multilateral System and the Standard MTA

6. The concept of a multilateral system for access and benefit sharing is based on the premise, also recognized in the CBD,[7] that States have sovereign rights over their PGRFA. Nevertheless, the ITPGRFA acknowledges that the case-by-case and nation-by-nation approach to access and benefit sharing provided for in the CBD would not be appropriate in the context of agricultural biodiversity. Agricultural crops have been

[3] See ITPGRFA Article 1. Article 2 of the ITPGRFA defines PGRFA as "any genetic material of plant origin of actual or potential value for food and agriculture" and genetic material as "any material of plant origin, including reproductive and vegetative propagating material, containing functional units of heredity."
[4] ITPGRFA Part IV, Articles 10 – 13.
[5] 164 countries and the European Community are currently members of the CGRFA. Membership is open to all FAO Members and Associate Members; see http://www.fao.org/ag/cgrfa/Default.htm.
[6] The Governing Body is composed of all Contracting Parties to the ITPGRFA and has as its function to promote the full implementation of the Treaty; see ITPGRFA Article 19.
[7] In particular, CBD Article 15.

spread around the world and modified far from their origins for thousands of years. Modern collecting efforts have further distributed the genetic resources of major crops. Countries of origin are therefore difficult to identify and benefit sharing on the basis of current location likely to be inequitable. In addition, agriculture in virtually all countries is heavily dependent on a supply of PGRFA from other parts of the world. In the context of such strong interdependency, a multilateral system that makes available the total range of agricultural biodiversity is preferable to an access system requiring numerous bilateral agreements with the holders of particular PGRFA.

7. The multilateral system of facilitated access and benefit sharing, established in Part IV of the ITPGRFA, thus serves a dual purpose. First, it aims to facilitate access to PGRFA, and through such facilitated access to ensure the maintenance and continued development of agricultural biodiversity. Second, it is intended to enable the fair and equitable sharing of the benefits arising from the use of PGRFA and thus to contribute to sustainable development (for an explanation of the scope of the multilateral system see Box 1).

Box 1 – Scope of the ITPGRFA Multilateral System

The multilateral system covers crops and forages listed in Annex A to the ITPGRFA, when they are under the management and control of Member States and in the public domain, held in *ex situ* collections by the International Agricultural Research Centres (IARCs) of the Consultative Group on International Agricultural Research (CGIAR) or other collaborating international institutions, or under private control – where the owner of such PGRFA agrees (ITPGR Article 11). The multilateral system does not extend, however, to all exchanges of covered PGRFA. It will only apply in circumstances where covered PGRFA are accessed for "the purpose of utilization and conservation in research, breeding and training for food and agriculture, provided that such purposes do not include chemical, pharmaceutical and/or other non-food/feed industrial uses" (ITPGR Article 12.3(a)). The focus is thus on access to covered PGRFA for further research and breeding and the system does not apply to situations where covered PGRFA is accessed for personal or commercial production. Nevertheless, this limitation in scope does raise some difficulties in determining whether accessions by small-scale farmers should fall under the multilateral system. Such farmers, while not engaged in formal research and breeding, constantly adapt their crops to changing environmental conditions and hence contribute to agricultural biodiversity, even when their primary purpose is food production.

8. Facilitated access is viewed as an important benefit in and of itself. The ITPGRFA also provides, however, that benefits arising from the use of PGRFA under the multilateral system should be shared fairly and equitably through information exchange, access to and transfer of technology, capacity building and the sharing of monetary benefits derived from the commercialization of PGRFA.[8] Facilitated access under the

[8] ITPGRFA Article 13.The monetary benefits collected are to be added to a trust account set up under the ITPGRFA (Article 19.3(f)). The account, which will also include donations from Contracting Parties and other legal or natural persons, will be spent in accordance with a funding strategy to be determined by the Governing Body at its first meeting and then periodically reviewed (Article 19.3(c)). Article 18.5 requires

multilateral system is to be provided, free of charge or at cost,[9] to legal and natural persons under the jurisdiction of any Member State, on the condition that the material accessed continue to be made available to the multilateral system.[10]

9. The mechanism for the provision of facilitated access and benefit sharing is a standard MTA.[11] The standard MTA constitutes the "mutually agreed terms" and "prior informed consent" for access to all covered PGRFA and obviates the need for and expense of individual negotiations each time access to a covered PGRFA is sought. The ITPGRFA provides some guidance on the content of the MTA, including requiring a number of mandatory provisions, but leaves much open for negotiation.[12]

10. The content of the standard MTA is, therefore, one of the principal issues currently under consideration. Indeed, the interim arrangements for the ITPGRFA included the establishment of an Expert Group to develop and propose recommendations on the terms of an MTA.[13] The terms of reference for the Expert Group, developed by the Interim Committee, called for the consideration of issues such as what constitutes commercialization and what the level, form and manner of payments under the multilateral system should be.[14] The Expert Group met in October 2004 to discuss these issues and the Interim Committee will review their report, which provides a number of different options, at its November meeting. The Expert Group is expected to meet once or twice more prior to the first meeting of the Governing Body, who will be responsible for finalizing the MTA.[15]

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that this funding be used in priority for the benefit of farmers in developing countries who conserve and sustainably utilize PGRFA.

[9] ITPGRFA Article 12.3(b).

[10] ITPGRFA Articles 12.2 and 12.3(g). Note, however, that under Article 11.4, the Governing Body is required, within 2 years after the entry into force of the Treaty, to assess the progress of including PGRFA held by private parties into the multilateral system. If that progress is unsatisfactory, the Governing Body may reconsider whether private owners of PRGRFA should continue to receive facilitated access to PGRFA under the multilateral system.

[11] ITPGRFA Article 12.4

[12] See ITPGRFA Articles 12.3 and 12.4.

[13] CGRFA Acting as Interim Committee for the ITPGRFA, *Report of the CGRFA Acting as the Interim Committee for the International Treaty on Plant Genetic Resources for Food and Agriculture*, First Meeting, Rome, 9-11 October 2002 (CGRFA/MIC-1/02/REP) at 15. The Expert Group is composed of four members each from Europe, Africa, Asia, Latin America and Caribbean, and the Near East, and two members each from North America and South West Pacific. Each region was further entitled to appoint an equivalent number of advisors to the members of the Expert Group drawn from governments, industry, academia and civil society. The Expert Group also included one representative each from the CGIAR, WIPO and UPOV to provide technical advice. Documents from the first meeting of the Interim Committee for the ITPGRFA are available at http://www.fao.org/ag/cgrfa/docsic1.htm.

[14] CGRFA Acting as the Interim Committee for the ITPGRFA, *Terms of Reference for the Expert Group on the Terms of the Standard Material Transfer Agreement* (CGRFA/IC/MTA-1/04/3).

[15] In this regard, it should be noted that the speed at which the process of shaping the MTA, as well as other implementation issues within the ITPGR, will advance is dependant on additional funding being made available by the Contracting Parties. At this stage there are no financial resources available for any activities after the Second Session of the Interim Committee. See CGRFA Acting as Interim Committee for the ITPGRFA, *Second Meeting of the CGRFA Acting as the Interim Committee for the Treaty on Plant Genetic Resources for Food and Agriculture,* "Report on Progress and Activities since the First Meeting of the Interim Committee, including Cooperation with Relevant International Bodies" (CGRFA/MIC-2/04/Inf.2) at para 14.

11. The numerous issues that need to be addressed to finalise the MTA raise many interesting policy issues.[16] Part C of this note will focus on two of the provisions under the multilateral system of the ITPGRFA that most directly interact with intellectual property protection – Articles 12.3(d) and 13.2(d)(ii) – and on the related issue of how MTAs will be enforced and the role that intellectual property regimes may play in this respect. Box 2 below briefly discusses the recognition of Farmers' Rights in the ITPGRFA. Although these fall outside the scope of the multilateral system, their realization also requires consideration of intellectual property rights related issues.

C. Selected Issues to Consider in the Formulation of the MTA

C.1 Article 12.3(d) – Recipients shall not claim any intellectual property rights or other rights that limit the facilitated access to the plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the Multilateral System.

12. The obvious aim of Article 12.3 (d), one of the most controversial points in the ITPGRFA negotiations, is to prevent the facilitated access provided by the multilateral system from being defeated by the creation of other restrictions on access to covered PGRFA. However, the differing views of developed and developing countries as to the extent to which it should do so resulted in a clause with several ambiguities. In fact, Article 12.3 (d) has been described as "an agreement to disagree."[17]

13. The first ambiguity relates to the exact scope of the phrase "in the form received." It seems obvious that the PGRFA material accessed, as such, could not be patented or protected by plant breeders' rights – it would not satisfy the basic criteria of novelty required for both these forms of protection. For the provision to have any meaning, therefore, the term "in the form received" would have to extend beyond the accessed material as such.[18] How much improvement or modification, however, would be required before a PGRFA is no longer "in the form received"?

14. The answer to this question is not clear in the "compromise" of Article 12.3(d). The reference to the phrase "in the form received" was insisted upon by a core group of developed countries, in light of their position that the article should not prevent PGRFA, or their genetic parts or components, from being the subject of intellectual property

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[16] See CGRFA Acting as the Interim Committee for the ITPGRFA, *Terms of Reference for the Expert Group on the Terms of the Standard Material Transfer Agreement* (CGRFA/IC/MTA-1/04/3); "Draft Report of the First Meeting of the Expert Group on the Terms of the Standard Material Transfer Agreement of the Commission on Genetic Resources for Food and Agriculture, acting as Interim Committee for the International Treaty on Plant Genetic Resources". Note that this report is still in draft form and may be subject to modifications.

[17] Robert J L Lettington, *supra* note 1, at 3.

[18] See Bernhard Herold, "Fair and Equitable Benefit-sharing within the International Treaty on Plant Genetic Resources: The View of the Berne Declaration" presented at *Symposium on Food Security and Biodiversity: Sharing the Benefit of Plant Genetic Resources*, Basel 16 October 2003, available at http://www.benefitsharing.org/pdf/Contribution_Bernhard_Herold.pdf.

rights, provided that the criteria relating to such rights are met.[19] On the other hand, a large group of developing countries successfully insisted on the inclusion of the qualification "or their genetic parts and components," which was seen as supporting a prohibition on patents on life forms and was aimed, in particular, at preventing the patenting of isolated or purified DNA sequences or genes, without other structural modification, currently allowed in some jurisdictions.[20] The view taken was that such isolated or purified DNA or genes were still "in the form received" although they had been removed from their surrounding material.

15. In this regard, Article 12.3(d) is a direct reflection of continuing disagreement about patentability criteria that has stalled progress in the review of Article 27.3(b) of the TRIPS Agreement, in particular, regarding the appropriateness of patenting life forms. It also reflects the controversial invention versus discovery debate, which is taking place, *inter alia*, in WIPO's Standing Committee on Patents in the context of negotiations for a Substantive Patent Law Treaty (SPLT) (see Part III.2 below for more details). Until these outstanding issues are resolved, it will be difficult to determine the full import of Article 12.3(d) and whether the words "in the form received" limit the claiming of intellectual property rights within the ITPGRFA's multilateral system beyond the minimum requirements for intellectual property protection.[21] In the meantime, discussions on an interpretation of the phrase "in the form received" are likely to become another front for these debates.

16. A second ambiguity in Article 12.3(d) relates to determining which intellectual property rights "limit facilitated access." While intellectual property rights clearly limit access, not all intellectual property rights limit access for research and breeding purposes, which is, as previously mentioned, the purpose of facilitated access under the ITPGRFA. Plant breeders' rights under the International Convention for the Protection of New Varieties of Plants (UPOV Convention), for example, include an exception for experimentation and the breeding of new varieties.[22] Similarly, patent law in some jurisdictions includes a research or experimentation exception, although existing international patent standards do not foresee such an exception.[23] It is not clear, however, that these exceptions are sufficient to prevent these intellectual property rights from being

[19] See the declarations made by the EC and its Member States upon ratification of the Treaty. Available at http://www.fao.org/Legal/TREATIES/033s-e.htm.

[20] Robert J L Lettington, *supra* note 1, at 2-3.

[21] In this context, it should be noted that the tenth paragraph of the preamble to the IPGRFA states that "nothing in this Treaty shall be interpreted as implying in any way a change in the rights and obligations of the Contracting Parties under other international agreements". This obviously includes intellectual property related agreements such as TRIPS, the UPOV Convention and relevant WIPO treaties. ITPGRFA Article 12.3(f) is also worth noting. It provides that access under the multilateral system to PGRFA protected by intellectual and other property rights shall be consistent with relevant international agreements, and with relevant national laws. This provision appears primarily to be aimed at protecting the existing rights of private natural or legal persons who decide to include PGRFA under their control in the multilateral system.

[22] 1991 International Convention for the Protection of New Varieties of Plants Article 15(1).

[23] See comments of WIPO representative at the first meeting of the Expert Group on the Terms of the Standard Material Transfer Agreement: "Draft Report of the First Meeting of the Expert Group on the Terms of the Standard Material Transfer Agreement of the Commission on Genetic Resources for Food and Agriculture, acting as Interim Committee for the International Treaty on Plant Genetic Resources" at 5.

classified as "rights that limit the facilitated access" to PGRFA. Under the UPOV Convention, for example, the breeder's exception is significantly limited by the notion of essentially derived varieties.[24] The scope of any research or experimentation exception in patent law would also need to be carefully considered. Often such exceptions, while allowing research and experimentation, do not allow commercialization of the fruits of that research during the patent term.

17. The incorporation of Article 12.3(d) into the MTA has still not been considered in detail.[25] Simply including the language of Article 12.3(d) verbatim in the MTA would allow countries considerable flexibility in the domestic interpretation and enforcement of the MTA. Developing countries may then find, however, that the expected benefits of the provision are seriously curtailed when access is provided to ITPGRFA member countries with a more intellectual property rights friendly interpretation of Article 12.3(d).[26] On the other hand, resolving the ambiguity could prove to be as difficult a process as similar discussions in the TRIPS Council and WIPO.

C.2 Article 13.2(d)(ii) – The Contracting Parties agree that the standard Material Transfer Agreement referred to in Article 12.4 shall include a requirement that a recipient who commercializes a product that is a plant genetic resources for food and agriculture and that incorporates material accessed from the Multilateral System, shall pay to the mechanism referred to in Article 19.3(f), an equitable share of the benefits arising from the commercialization of that product, except whenever such a product is available without restriction to others for further research and breeding, in which case the recipient who commercializes shall be encouraged to make such payment.

18. Although there is at least some expectation that the MTA will promote all of the types of benefit sharing established by the ITPGRFA,[27] Article 13.2(d)(ii) is the only benefit sharing provision that must necessarily be included in the standard MTA. This provision requires a recipient who receives material from the multilateral system, uses the material to produce a product that is a PGRFA,[28] and then commercializes that product in a manner that restricts its access back into the multilateral system, to pay an equitable share of the benefits arising from the commercialization to the ITPGRFA system. In

[24] 1991 International Convention for the Protection of New Varieties of Plants Article 14(5).
[25] See "Draft Report of the First Meeting of the Expert Group on the Terms of the Standard Material Transfer Agreement of the Commission on Genetic Resources for Food and Agriculture, acting as Interim Committee for the International Treaty on Plant Genetic Resources".
[26] Robert J L Lettington, *supra* note 1, at 3, 10.
[27] See "Draft Report of the First Meeting of the Expert Group on the Terms of the Standard Material Transfer Agreement of the Commission on Genetic Resources for Food and Agriculture, acting as Interim Committee for the International Treaty on Plant Genetic Resources" at 16.
[28] This provision only applies to a product that is itself a PGRFA, such as a new plant variety. It does not apply to products containing PGRFA, such as for example breakfast cereals. The closing line of the chapeau to Article 2 of the ITPGRFA (Use of Terms) makes this clear when it states that the "definitions are not intended to cover trade in commodities".

cases where access to the product through the multilateral system is not restricted, benefit sharing is voluntary rather than mandatory.[29]

19. The trigger for benefit sharing is not the acquisition of intellectual property rights but rather commercialization. Indeed, using genetic use restriction technologies or maintaining parent lines of a hybrid variety as a trade secret are other possible ways to restrict access to PGRFA. Nevertheless, intellectual property rights remain the main means of restricting access and, as a result, the article implicitly recognizes the right of recipients to take out intellectual property rights over derivatives of material accessed from the multilateral system, however these may be defined (see discussion in Section C.1 above). The ITPGRFA can thus been criticized, as can the CBD, for accepting the appropriateness of intellectual property protection over genetic resources and then needing to resort to other mechanisms to allow for a more equitable sharing of the resulting benefits.[30]

20. The discussion of when a product is considered to be available without restriction to others for further research and breeding has also arisen in respect of Article 13.2(d)(ii) .The Expert Group on the Terms of the Standard Material Transfer Agreement set forth a range of possible interpretations for this phrase, including in the context of intellectual property.[31] On one extreme, it suggested that for a product to be available without restriction under Article 13.2(d)(ii) both the product itself, and its genetic parts and components, would need to be completely free of intellectual property protection. On the other extreme, it suggested it might suffice for a recipient to patent a product, or a genetic part or component of that product but then undertake to make the product, or its part or component, available for research and breeding through a royalty-free license. The range of suggestions in the middle included discussions on the breeder's exception under the UPOV Convention and the experimentation exceptions in patent law, along similar lines as discussed in Section C.1 above. As in that context, the concern is that separating access for further research and breeding from the freedom to commercialize the results of that research or breeding could act a serious disincentive for such research and defeat to some extent the goals of the multilateral system.

C.3 Enforcement of the MTA and intellectual property regimes

21. Once the standard MTA is developed, its enforceability will become essential for the effectiveness of the multilateral system – both in terms of maintaining the availability

[29] Note, however, that Article 13.2(b)(ii) gives the Governing Body the option to consider, within a period of five years from the entry into force of the ITPGRFA, whether the mandatory benefit sharing requirement should be extended to apply to all circumstances where a PGRFA produce incorporating PGRFA accessed from the multilateral system is commercialized, whether or not the product is available without restriction.

[30] It could be argued that a more equitable situation would be achieved by prohibiting intellectual property protection over genetic resources altogether. Although such an approach would not generate an alternative stream of benefits, it would most likely reduce the cost of new products, thus making them more accessible.

[31] See "Draft Report of the First Meeting of the Expert Group on the Terms of the Standard Material Transfer Agreement of the Commission on Genetic Resources for Food and Agriculture, acting as Interim Committee for the International Treaty on Plant Genetic Resources" at 5-6. The Expert Group also considered other issues pertaining to Article 13.2(d)(ii) including the meaning of "commercialization" and "incorporation" and what level, form and manner mandatory payments should take.

of covered PGRFA and of ensuring benefit sharing under Article 13.2(d)(ii). Article 12.5 of the ITPGR provides that "Contracting Parties shall ensure that an opportunity to seek recourse is available, consistent with applicable jurisdictional requirements, under their legal systems, in case of contractual disputes arising under such MTAs, recognizing the obligations arising such MTAs rest exclusively with the parties to such MTAs." As a result of this provision, a number of countries consider that the enforcement of MTAs should be solely a matter of private law. Several other countries, however, believe the Governing Body should have a primary role in monitoring compliance with MTAs given their central role in the ITPGRFA.[32] The issue is fundamental since, if the enforcement process is not relatively simple and inexpensive, its burden could defeat the purpose of the ITPGRFA.

22. The question of enforcement was discussed by the first meeting of the Expert Group on the Terms of the Standard Material Transfer Agreement.[33] The Expert Group recognized that, in a system where benefits are diffuse, the provider of PGRFA would not always have an incentive to bring a, perhaps costly, enforcement action, noting that the MTA should allow any interested natural or legal person to bring a complaint. It further considered the possibility of establishing an authority to manage and monitor MTAs, although it is not clear whether this would be at the domestic or international level. Finally, it suggested that a dispute resolution/arbitration mechanism should be included within the MTA and discussed the possibility of an international arbitration mechanism.

23. Although, as previously discussed, mandatory benefit sharing under Article 13.2(d)(ii) will not necessarily be triggered by intellectual property rights, one method of facilitating the enforcement of MTAs may be found in the defensive protection measures – such as disclosure of origin requirements in patent applications - currently being proposed to support the enforcement of CBD access and benefit sharing regimes. For example, requiring the disclosure of the incorporation of PGRFA from the multilateral system into a patented product would allow patent offices to assist any MTA monitoring body in ensuring compliance with MTAs. If no MTA monitoring body were established, having this information available in the patent application would still facilitate the task of interested persons to check compliance with MTAs and enforce benefit sharing where necessary. These links between enforcement of the ITPGRFA and the CBD should be kept in mind in the discussion of disclosure of origin requirements in the TRIPS Council and WIPO.

[32] See Robert J L Lettington; *supra* note 1, at 10.

[33] "Draft Report of the First Meeting of the Expert Group on the Terms of the Standard Material Transfer Agreement of the Commission on Genetic Resources for Food and Agriculture, acting as Interim Committee for the International Treaty on Plant Genetic Resources" at 18-25.

Box 2 – Farmers' Rights under the ITPGRFA

Part III, or Article 9, of the ITPGRFA, for the first time in an international treaty, explicitly recognized Farmers' Rights, another significant aspect of the Treaty linked to intellectual property issues. Under Article 9.2, Farmers' Rights include the protection of traditional knowledge, the right to an equitable share of the benefits arising from the use of PGRFA and the right to participate in national decision-making related to PGRFA. Further Article 9.3 states "nothing in this Article shall be interpreted to limit any right that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate". Articles 5 and 6 provide further guidance on the nature of Farmers' Rights. Article 5 requires the promotion of on-farm conservation of PGRFA and the *in-situ* conservation of wild PGRFA by supporting the efforts of local and indigenous peoples.[a] Article 6 requires the promotion of diverse farming systems and the promotion of plant breeding efforts which strengthen the capacity of farmers, particularly in developing countries, to develop varieties particularly adapted to local social, economic and ecological conditions.[b]

Because the responsibility for the implementation of Farmers' Rights is left to national governments, they are unlikely to become a substantive issue for discussion at either the Interim Committee or the first meeting of the Governing Body. For ITPGRFA Members, however, implementing this provision requires the consideration of how Farmers' Rights may be limited or supported by international intellectual property standards developed in the WTO, WIPO and UPOV, and by other international regimes such as the CBD. What aspects of Farmers' Rights, for example, can be protected under existing intellectual property regimes such as patents and plant breeder's rights? Is this type of protection effective in the context of small scale farmers? If a Member of the ITPGR decides to provide for plant variety protection under Article 27(3)(b) of TRIPS through a *sui generis* system, what types of provisions will be necessary to ensure the protection of Farmers' Rights? Can the protection of traditional knowledge and benefit sharing relating to PGRFA be implemented using the same or a similar legislative framework as that developed to implement CBD requirements for the protection of traditional knowledge and benefit sharing?[c]

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a. ITPGRFA Articles 5.1(c) and (d).

b. ITPGRFA Articles 6.2(a) and (c).

c. For further discussion of the nature of Farmers' Rights under the ITPGR see Robert J L Lettington, 'Agrobiodiversity and Intellectual Property Rights: Selected Issues under the FAO International Treaty on Plant Genetic Resources for Food and Agriculture' presented at the ICTSD/ UNCTAD/TRIPS Regional Dialogue, *Intellectual Property Rights (IPRs), Innovation and Sustainable Development in Eastern and Southern Africa*, 29 June – 1 July 2004; Cape Town, South Africa (available at http://www.iprsonline.org/unctadictsd/dialogue/2004-06-29/2004-06-29_lettington.pdf). For a discussion of Farmers' Rights more generally see C M Correa, 'Options for the Implementation of Farmers' Rights at the National Level' *TRADE Working Paper No. 8*, South Centre, December 2000 (available at http://www.southcentre.org/publications/farmersrights/toc.htm).

D. Conclusion

24. The multilateral system for facilitated access and benefit sharing created by the ITPGRFA is an innovative and novel approach to deal with a distinctive class of genetic resources. While the ITPGRFA sets up the framework of this mechanism, it is the details

that remain to be developed that will determine whether or not the treaty can truly achieve its objective of conservation and sustainable use of PGRFA and the fair and equitable sharing of its benefits for sustainable agriculture and food security. In particular, issues related to intellectual property are crucial for ensuring facilitated access and the consequent sharing of benefits.

25. In addition, as Lettington has noted, the intellectual property rights and related issues presented by the implementation of the ITPGRFA – such as the scope of the prohibition on claiming intellectual property rights that restrict facilitated access to PRGFA under the multilateral system and the circumstances in which a PGRFA product is available without restriction – are in large part reflections of controversies in the broader international context.[34] The consideration of the ITPGRFA process in the broader context and the recognition of the need for a synergistic approach to these issues in other fora thus become critical to achieving effective results in intellectual property and development issues in a crosscutting manner.

III. AN OVERVIEW OF RELEVANT IP DEVELOPMENTS IN VARIOUS FORA

26. 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 third quarter of 2004.[35]

III.1 World Trade Organization (WTO)

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

27. Discussions at the last meeting of the TRIPS Council, scheduled for September 21 to 22, finished after a single day with little substantive progress being made. The lack of progress is in part attributable to the absence of a permanent chair to mediate the negotiations. The former chair of the TRIPS Council, Mr Joshua Law, was recalled to Hong Kong after the June TRIPS Council meeting to take up a new appointment. While the Chair of the General Council has been involved in consultations for the appointment of a new TRIPS Council chair, none has yet been appointed. Ambassador Puangrat Asavapisit of Thailand assumed the role of acting chair. Moreover, although this was the first TRIPS Council meeting held since WTO Members agreed to the July Package in an attempt to move the Doha Round forward, the only reference to the TRIPS Agreement in the July Package was a reaffirmation by the Members of their commitment to progress in

[34] Robert J L Lettington, *supra* note 1, at 11.

[35] For developments during the first and second quarters of 2004, please see the previous South Centre and CIEL IP Quarterlies, available at www.southcentre.org and www.ciel.org.

line with the Doha Mandate. The issues pending before the TRIPS Council therefore remained the same as at its last meetings in March and June. **The next TRIPS Council is scheduled for December 1 to 2, with the following issues pending:**

a. TRIPS and Health: A few Members made statements pertaining to the appropriate content and legal form of an amendment to TRIPS Agreement rules to allow the export, under a compulsory license, of pharmaceutical products to countries lacking domestic manufacturing capacities. In addition, the WTO Secretariat had prepared an informal 'non-paper' on the legal consequences of the various proposals put forward for the TRIPS amendment. Nevertheless, the differences in positions that led to the postponement of the deadline for making this amendment remained and no substantial progress was made.

b. The Relationship between TRIPS Agreement and the CBD: Brazil, India, Pakistan, Peru, Thailand and Venezuela, supported by Cuba and Ecuador, presented a new proposal for the consideration of the TRIPS Council (IP/C/W/429). This proposal expands on the broader proposal made by a number of developing countries in March 2004 but opposed by the US and Japan, which suggested a check list of issues to cover in the negotiations on biodiversity including disclosure of origin, evidence of prior informed consent and benefit sharing. The new proposal explores in greater detail disclosure requirements relating to the origin of genetic resources and any traditional knowledge used in an invention. The proposal discusses the rationale for such a requirement and provides suggestions for the form it could take and the consequences of non-compliance. The proposal was endorsed by a number of developing countries and also received the general support of the European Union,[36] while the US and Japan maintained their opposition. Nonetheless, this proposal has more or less become the de facto basis for negotiations.

c. Transfer of Technology to Least Developed Countries (LDCs): Although this item was on the agenda for discussion at this session, LDCs informed the meeting that they had still not completed the assessment of the compliance reports provided by the developed countries with the criteria established by the Decision of 19 February 2003 on the implementation of Article 66.2 of the TRIPS Agreement. LDCs therefore requested discussion on the issue to be postponed to the November session. Updated compliance reports from developed countries for this year are also due to be submitted prior to the November TRIPS Council meeting.

d. Non-Violation and Situation Complaints: Non-violation and situation complaints under TRIPS were included in this TRIPS Council meeting as a specific agenda item, in the context of follow up on the July Package, which extended the moratorium on the application of non-violation and situation complaints to the Sixth Ministerial Conference in December 2005. Though no substantive discussion took place on this issue at this meeting, it was decided that it will

[36] In this context, it is pertinent to note that at the recent 40th WIPO Assemblies, the EU foreshadowed a proposal that it intends to present at the next session of WIPO's IGC for the mandatory disclosure of origin requirement applicable to all national, regional and international patent applications. See WIPO General Assembly – Thirty-First (15th Extraordinary) Session, September 27 to October 5, 2004 – Draft Report (WO/GA/31/15 Prov.) at para. 100.

specifically be placed on the agenda of the upcoming meeting and Members requested the WTO Secretariat to provide an updated note on country positions in relation to this issue.

B. Working Group on Trade and Transfer of Technology

28. In the July 19th meeting of the Working Group on Trade and Transfer of Technology, the European Communities submission (WT/WGTT/1 and WT/WGTT/W/5) identified as a potential starting point for discussions, was further analysed. The submission focuses on expertise in particular technology transfer channels including foreign direct investment, licensing and franchising. The submission proposes consideration of both home and host countries' factors, including domestic policies, structural problems and business practices. Members reiterated their interest in continuing this analysis and suggested that further submissions would facilitate an enhanced understanding of the interlinkages between trade and transfer of technology and how one could facilitate the other.

29. The July 19th meeting also considered the first two recommendations of a joint submission made by Cuba, India, Indonesia, Kenya, Nigeria, Pakistan, Tanzania, Venezuela and Zimbabwe (WT/WGTTT/W/6). The first recommendation suggests that provisions contained in various WTO Agreements relating to technology transfer should be examined with a view to make them operational and meaningful. The second proposes an analysis of how to mitigate the negative effects of provisions that may have the effect of hindering transfer of technology to developing countries. In this context, the submission made by a group of developing countries (WT/WGTTT/3) that lists Articles 7, 8, 40 and 66.2 of TRIPS as Articles of particular relevance for this analysis was highlighted. Members also identified Article 31 of TRIPS as a provision of particular interest. **The next meeting of the Working Group is scheduled for 22 October 2004.**

III.2 World Intellectual Property Organization (WIPO)

30. The 40th Series of Meetings of the Assemblies of the Member States of WIPO (the Assemblies) were held from 27 September to 5 October 2004. As highlighted in the South Centre and CIEL IP Quarterly Update: Second Quarter 2004, Member States were asked to provide direction on a number of issues of crucial importance to developing countries and civil society and the substantive and political implications of the resulting discussions and decisions determined these to be "the most significant Assemblies in the recent past."[37] Some of these issues include:

[37] Sisule F Musungu, "The WIPO Assemblies 2004: A Review of the Outcomes", *South Bulletin No. 89* (15 October 2004). The article analyses some of the outcomes of the WIPO Assemblies including the Decision on the development agenda proposal, the decision on the SPLT proposal by Japan and the United States and the decision on the proposal tore-adjust PCT fees.

A. Proposal to Establish a Development Agenda at WIPO

31. The most important issue to be discussed at the Assemblies from the perspective of developing countries was the proposal by Argentina and Brazil, 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 (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. The proposal 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. The proposal received broad based support from developing countries. It also received moderate support from developed countries, which acknowledged that development was a shared concern for the international community, though generally expressing the view that development issues were already being discussed in WIPO's various bodies.[38]

32. The Assemblies decision on the Development Agenda proposal welcomed the proposal, placing it in the context of international instruments such as the United Nations Millennium Declaration, the Programme of Action for the Least Developed Countries for the Decade 2001-2010, the Johannesburg Declaration on Sustainable Development, the Declaration of Principles and the Plan of Action of the first phase of the World Summit on the Information Society and the Sao Paulo Consensus adopted at UNCTAD XI. The decision then provided for inter-sessional intergovernmental meetings to be convened to further examine the proposal, as well as any additional proposals of Member States, and for the **preparation of a report for the consideration of the Assemblies in September 2005**. These meetings will be open to WIPO-accredited IGOs and NGOs. Further, the decision requires the International Bureau to organize, with other relevant international organizations such as UNCTAD, WHO, and WTO, an **international seminar on intellectual property and development**, an important step in increasing the visibility of intellectual property and development issues and increasing inter-organizational coordination.[39]

B. CBD invitation to WIPO on Genetic Resources and Disclosure Requirements in Intellectual Property Applications

33. The Assemblies also debated how to respond to the invitation by the Seventh Conference of the Parties (COP-7) of the CBD to "examine, and where appropriate address, taking into account the need to ensure that this work is supportive of and does not run counter to the objectives of the CBD, issues regarding the interrelation of access

[38] See WIPO Press Release, 4 October 2004, 'Member States Agree to Further Examine Proposal on Development' (available at http://www.wipo.int/edocs/prdocs/en/2004/wipo_pr_2004_396.html).

[39] 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.

to genetic resources and disclosure requirements in intellectual property rights applications". As was discussed in the South Centre and CIEL IP Quarterly Update: Second Quarter 2004, this invitation had previously been the subject of a contentious debate in the IGC, which was replayed to some extent at the Assemblies. The decision reached favoured a horizontal and cross-cutting approach to the CBD invitation through the following modalities:

- WIPO Members are invited to submit **proposals and suggestions on a response by 15 December 2004.**
- A **first draft** of the examination will be prepared and published by the International Bureau **by the end of January 2005**. Member States and accredited observers will then have the opportunity to submit observation and **comments until the end of March 2005.** These observations and comments will be posted on the WIPO website.
- A one-day ad-hoc **intergovernmental meeting will be held in May 2005** to consider and revise the draft. The International Bureau will then prepare a **revised draft to be presented to the WIPO Assemblies in September 2005** for consideration and decision.[40]

C. Proposal on New Work Plan for the Substantive Patent Law Treaty (SPLT)

34. As mentioned in the South Centre and CIEL IP Quarterly Update: Second Quarter 2004, the United States, Japan and the European Patent Office proposed a new approach to discussions during Tenth Session of the Standing Committee on the Law of Patents (SCP). The submission suggested focusing on a limited set of SPLT provisions, namely prior art, grace period, novelty, and inventive step/non-obviousness, as a more productive model of negotiations. Nevertheless, as such an approach would exclude provisions considered essential by the developing countries, such as those dealing with exceptions and limitations to patentability and disclosure requirements, the proposal was rejected by a number of countries, including Brazil, India, Egypt, and Argentina. In particular, developing countries emphasized the close inter-linkages between the different provisions, as well as the need for any discussion to be comprehensive enough to achieve a balance between the interests of intellectual property right applicants and those of society as a whole. As a result of this disagreement, the Chairman concluded at the end of the Tenth Session that there was no consensus on a future work plan for the SCP.

35. The presentation by the United States and Japan of the same proposal to the Assemblies (WO/GA/31/10) again received no consensus.[41] The United States and Japan emphasized that their aim was simply to choose four issues in which harmonization would be of benefit to all Members, with the general support of other developed countries. Developing countries, on the other hand, were overwhelmingly against the proposal, noting that, by excluding from initial negotiations the "complex and controversial" issues, the proposal would avoid the discussion of articles that could offer an opportunity for balancing the rights of right-holders and the public interest or

[40] 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.
[41] The EPO was not among the proponents as it is not a Member of WIPO and only has observer status.

preserving policy flexibilities. **The only decision taken therefore was that the date of the next SCP meeting should be determined by the Director General following informal consultations.**[42]

D. Proposal to Increase Patent Cooperation Treaty (PCT) Fees

36. At the Assemblies, Members debated the proposal by WIPO Secretariat to increase the fees charged for processing patent applications under the Patent Cooperation Treaty (PCT) by 12%. The Secretariat informed Members that WIPO is facing a large budge deficit due to a lower than expected number of PCT applications and argued that an upward adjustment of the fees was necessary to reduce the deficit and to ensure that WIPO was able to continue with all its program activities, including its technical and development assistance work. Developing countries generally supported the Secretariat's proposal and emphasized the importance of WIPO having a solid and stable financial base to deliver its services and activities. Nevertheless, the proposal was opposed by the United States and other developed countries, which were not convinced that WIPO's financial predictions were accurate or that a fee increase was justified. Concerns expressed went beyond the level of fees to reflect broader questions of financial management, including that the Secretariat had not made sufficient efforts to implement cost saving measures. Developed countries were, however, prepared to support further consideration of the issue within the framework of budget discussions. Therefore, the decision reached was to continue consideration of the issue, particularly through the Program and Budget Committee. **An extraordinary session of the PCT Assembly will be convened, if needed, to consider any proposal on the adjustment of PCT fees**. In the meanwhile, WIPO will have to draw on its reserves in order to maintain its present activities.[43]

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

37. Members also considered the recommendation from the SCCR that it consider the possibility of convening, at an appropriate time, a diplomatic conference on the protection of broadcasting organizations at the Assemblies. Concerns raised by a number of Members in the SCCR regarding the need for more time to discuss divergences were voiced once again. In addition, substantial concerns were raised in relation to the potential for a new broadcasting treaty to introduce TRIPS-plus levels of protection when developing countries were still struggling to implement Article 14 of TRIPS. The need to ensure that any new treaty promoted access to knowledge and its dissemination in the digital environment and balanced broadcasters' rights with the preservation of the public domain was also emphasized. As a result, the Assemblies did not call for a diplomatic conference, but will consider the matter once more at its 2005 session. Nevertheless, the

[42] 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. 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. Whether or not a session will be convened anytime after that remains to be seen.

[43] See International Patent Cooperation Union (PCT Union) Assembly – Thirty-Third (19th Extraordinary) Session, September 27 to October 5, 2004 – Draft Report (PCT/33/7/Prov.) at paras. 22 – 76.

Assemblies did ask the SCCR to accelerate its work.[44] **The next meeting of the SCCR will take place from November 17 to 19, 2004.**

F. Observership

38. The Assemblies also considered applications for permanent observership. All intergovernmental organizations and non-governmental organizations that applied for observer status for the Assemblies were granted that status. This included private sector organizations such as the European Generic Medicines Foundation and **public interest NGOs including CIEL and the Civil Society Coalition (CSC)**.[45]

G. Other WIPO Issues

39. Upcoming meetings include the **Working Group for the Reform of the PCT, scheduled to run from 29 November until 3 December 2004** and the **Seventh Session of the IGC, scheduled to take place from November 1 to 5, 2004.**[46]

III.3 Other Multilateral Fora

40. Please note that intellectual property related issues are often considered in a number of international organizations. Not all, however, are discussed in this South Centre and CIEL IP Quarterly Update, which only focuses on developments in the covered timeframe. Please see previous South Centre and CIEL IP Quarterly Updates for the latest developments in other relevant fora.

A. Convention on Biological Diversity

41. COP-7 of the CBD took place in February 2004. As mentioned in the South Centre and CIEL IP Quarterly Update: First Quarter 2004, the decisions taken at COP-7 have direct links to intellectual property in several areas. One of the major decisions, for instance, mandated the Ad-hoc Open Ended Working Group on Access and Benefit-Sharing to negotiate an international regime on access to genetic resources and benefit sharing. **The Working Group is scheduled to meet twice before COP-8: on 14-18 February 2005 and 13-17 March 2006.**

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[44] 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.

[45] Assemblies of the Member States of WIPO – Fortieth Series of Meetings Geneva, September 27 to October 5, 2004 – Draft Report (A/40/7 Prov.) paras. 176 – 178.

[46] The documentation for the Seventh Session of the IGC is available online at http://www.wipo.int/meetings/en/details.jsp?meeting_id=6183. There will be an informal briefing on that documentation. It should also be noted that the IGC held an informal information meeting on intellectual property and genetic resources on 15 September 2004. The presentations given at that meeting are available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_gr_im_ge_04/presentations.html

42. Another major decision at COP-7 mandated the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j), in collaboration with relevant international organizations and bodies such as the United Nations Permanent Forum on Indigenous Issues, to consider and develop elements for *sui generis* systems for the protection of traditional knowledge, explore the conditions under which the use of existing intellectual property rights can contribute to reaching the objectives of Article 8(j) and make recommendations concerning the international regime on access and benefit-sharing. The Inter-Sessional Working Group is scheduled to meet once before COP-8 in March 2006. **Any contributions from Parties and Governments, indigenous and local communities, and relevant organizations on these two issues are requested by 31 May 2005.**

B. World Health Organization (WHO)

43. As mentioned in the South Centre and CIEL IP Quarterly Update: Second Quarter 2004, the WHO has established a Commission on Intellectual Property and Public Health (CIPIH) to report on the links between intellectual property rights, innovation and public health, including the question of appropriate funding and incentive mechanisms for the creation of new medicines and other products against diseases that disproportionately affect developing countries. **In July 2004, CIPIH published a framework paper describing the range of issues that the Commission considers important in addressing its terms of reference.[47] Comments on this paper are welcome.** Further, CIPIH has organized a number of meetings in the last quarter, including a presentation on patenting and licensing of research elements and biomedical innovation on 8 September 2004. A seminar on how patents may affect the development of a SARS vaccine is also planned for 22 October 2004.[48] The CIPIH is expected to present its report in January 2006.

44. Further, the WHO will be convening, in cooperation with the Government of Mexico, a **Ministerial Summit on Health Research** from 16 to 20 November 2004 in Mexico City, Mexico. One of the summit's aims is 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. Discussion on this topic will likely involve consideration of intellectual property rights regimes. Recommendations from the meeting will be forwarded to the 58th World Health Assembly.

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

45. From 22 to 24 September 2004, the Electronic Commerce Branch of UNCTAD hosted an intergovernmental **Expert Meeting on Free and Open Source Software** (FOSS) in Geneva, Switzerland. The meeting focused on questions such as: what are the

[47] Available at http://www.who.int/intellectualproperty/documents/framework_paper/en/.

[48] For further information on these and other CIPIH meetings see http://www.who.int/intellectualproperty/en/

economic and social development implications of FOSS? Why should FOSS be of particular interest to developing countries and transition economies? Is FOSS applicable to commercial and business activity? And finally, how does the FOSS idea and process affect other spheres of human activity important for development, such as health, education or copyright and patent law? Documents from the meeting can be found on the UNCTAD website.[49]

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

46. From 20 to 25 September 2004, UNESCO held a meeting of government experts to which it presented a **preliminary draft convention on the protection of the diversity of cultural contents and artistic expressions**. UNESCO's specific mandate within the United Nations system is to preserve "the fruitful diversity of the cultures," as well as to "recommend such international agreements as may be necessary to promote the free flow of ideas by word and image."[50] Through the UNESCO Universal Declaration on Cultural Diversity and its action plan, adopted in 2001, Member States deemed it advisable to draw up a binding standard-setting instrument on cultural diversity. As a result, the UNESCO Director-General set up a multidisciplinary international group of 15 experts, which met three times between December 2003 and May 2004 and produced the draft convention. Consultations were also held with the WTO, UNCTAD and WIPO. The WIPO Secretariat welcomed the objectives of the text as well as its recognition of the importance of intellectual property rights protection. The WTO indicated that it wished to consult its specialized councils and its General Council in a formal manner before giving an opinion.[51]

47. The preliminary draft convention aims to protect and promote the diversity of cultural expressions.[52] It recognizes that cultural diversity is nurtured by constant exchanges between cultures, and that it has always been a result of the free flow of ideas by word and image. It also emphasizes the vital role of artists and other creators and the need to endow them with appropriate intellectual property rights.[53] The draft convention applies to cultural policies and measures that State Parties take for the protection and promotion of the diversity of cultural expressions.[54] It would thus cover cultural goods and services that embody or yield cultural expressions, including goods and services in the categories of publishing, printing and literature; music and the performing arts; visual arts; audiovisual and new media.[55] The draft convention would allow State Parties to take measures to ensure the production, distribution, dissemination and consumption of cultural goods and services, as well as oblige them to promote the diversity of cultural expressions by providing opportunities to create, produce, disseminate, distribute and

[49] At http://www.unctad.org/Templates/meeting.asp?intItemID=1942&lang=1&m=8936&info=highlights.
[50] UNESCO Constitution, Article I.2 (a).
[51] Preliminary Report of the Director-General, UNESCO CLT/CPD/2004/CONF (July 2004).
[52] 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).
[53] Id. at Preamble.
[54] Id. at Article 3.
[55] Id. at Article 3.4 and Annex I.

access cultural goods and services. The draft convention also provides that State Parties shall ensure that **"intellectual property rights are fully respected and enforced according to existing international instruments, particularly through the development or strengthening of measures against piracy."**[56] In regards to its relationship with other instruments, the draft convention 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.[57]

48. The September intergovernmental meeting of experts provided an opportunity for all Member States and invited observers to express their views on the preliminary draft, with further intergovernmental expert meetings planned to take the debate forward. In addition, **suggestions and observations by Member States on the preliminary draft may be sent to UNESCO by mid-November 2004.** These comments and observations will be the subject of a consolidated report to the Executive Board at its April 2005 session and will be distributed to future intergovernmental meetings of experts.

E. The United Nations Human Rights Bodies and Committees

49. As mentioned in the South Centre and CIEL IP Quarterly Update: Second Quarter 2004, over the last four years, there has been a clearly discernible trend for the human rights community and various UN bodies to examine and explore the implications of intellectual property for the protection and promotion of human rights.

50. A particular focus has been the potential consequences of including intellectual property in bilateral free trade agreements. For example, the UN Committee on the Rights of the Child in a document made public on 4 October 2004, strongly recommended that Botswana, a member of SACU, ensure that "regional and other free trade agreements do not have a negative impact on the implementation of children's rights" and noted that trade agreements should not "affect the possibility of providing children and other victims of HIV/AIDS with effective medicines for free or at the lowest price possible".[58]

51. Another recent development arising from the trend of exploring the implications of intellectual property for the protection and promotion of human rights is the Committee on Economic, Social and Cultural Rights (CESCR) decision to draft a **General Comment on article 15(1)(c) of the International Covenant on Economic,**

[56] Id. at Article 7.2 (b).
[57] Id. at Article 19.
[58] See 3D (Trade, Human Rights, Equitable Economy) Press Release, 4 October 2004, 'Access to Affordable Drugs: Victims of HIV/AIDS Should not Suffer from Trade Rules – UN Committee Warns Botswana that Trade Agreement Should Not Undermine Access to HIV/AIDS Treatment' (available at http://www.3dthree.org/en/page.php?IDpage=26&IDcat=5).

Social and Cultural Rights (ICESCR) which provides that the State Parties to the Covenant recognize the right of everyone:

> "(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

52. General comments adopted by the CECSR are today widely accepted as authoritative interpretations of the ICESCR. For that reason it is important that the General Comment be a clear and accurate explanation of the treaty provision concerned. A first draft of the general comment on Article 15(1)(c), prepared by a member of the CESCR (Eibe Reidel), was completed in June 2004. The draft has been criticized by a number of individuals and organizations working on intellectual property and development. For instance, there is concern that dealing with 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. Moreover, the draft does not always clearly distinguish between intellectual property rights, which are only a policy tool, and the human right protected by sub-paragraph (1)(c) of Article 15.[59] **Comments and drafting suggestions are still being received by the Rapporteur. A second draft will be made available around 27 October 2004 and a public meeting will be held on 11 November 2004 to discuss and incorporate final amendments.**

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

53. In spite of the extensive list of international fora dealing with intellectual property, the most active intellectual property related negotiations are currently taking place not at the multilateral but at the 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.

III.4.1 Free Trade Agreements involving the United States

54. 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).[60] US FTAs include a chapter on intellectual

[59] 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).

[60] See, e.g., the statement of USTR Robert Zoellick upon the release of the 2003 "Special 301" Report, available at

property protection, as well as references to intellectual property in the investment and dispute settlement chapters.[61] The intellectual property chapter contains 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.[62]

A. Free Trade Area of the Americas (FTAA)

55. Due to disagreements over various major issues, including intellectual property, the 2003 Miami Ministerial Declaration, while reaffirming a commitment to a "comprehensive" FTAA by January 2005, opted for an "FTAA Light" in the sense that it would only demand some basic provisions in each negotiating area, with interested parties being able to commit additionally through a plurilateral process. However, the subsequent TNC meetings and informal consultations held since have confirmed the divergence between countries' positions, with the number of brackets in the negotiating text (drafted by the Co-Chairs United States and Brazil) reportedly increasing. **The United States and Brazil called off a meeting of the co-chairs scheduled for June 3rd and ministers are now likely to attempt to extend the deadline for concluding negotiations at a ministerial in November.**[63]

B. US – DR – CAFTA

56. The ratification of the United States – Dominican Republic – Central America Free Trade Agreement by the US Congress, an agreement whose TRIPS-plus provisions were discussed in the South Centre and CIEL IP Update: First Quarter 2004, remains in doubt. In September 2004, the Dominican Republic passed a 25 percent import tax on corn syrup, which the US argues is in contravention of the FTA. This prompted the US Government to suspend plans to ratify the FTA with the Dominican Republic. In addition, a US presidential candidate, John Kerry, has called for a renegotiation of the treaty, citing the current agreement's deficient standards for worker's rights and environmental protection.[64]

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http://www.ustr.gov/Document_Library/Press_Releases/2004/May/Special_301_Report_Finds_Continued_Progress_But_Significant_Improvements_Needed.html.

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

[62] 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.

[63] For further information about the FTAA see http://www.ftaa-alca.org/.

[64] See US-DR-CAFTA page at Bilaterals.org: http://www.bilaterals.org/rubrique.php3?id_rubrique=13.

C. Other US Free Trade Agreements (FTAs)

57. The US currently has FTAs in force with Australia, Canada and Mexico (NAFTA), Chile, Israel, Jordan, and Singapore.[65]

58. 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. Similarly to the DR – CAFTA FTA, the full text of the Agreement contains a number of TRIPS-plus provisions including an obligation to ratify or accede to UPOV 1991 and to make patents available for plant inventions. The final text also provides for the extension of patent terms to compensate for unreasonable delays and deals with disclosure in a way that has been interpreted to limit the information that can be required.[66] It appears the US – Bahrain Agreement will be ratified by the US Congress early next year.
- **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. The negotiation rounds have been held every 6 to 10 weeks, with an end-of-2004 deadline for completion. However, a meeting between US and SACU negotiators scheduled for this month has been cancelled in order for both sides to "clarify issues internally". This came after SACU offered to continue talks on market access but requested the issues of investment, intellectual property, labour and government procurement to be left out of the Agreement. The US rejected this approach, arguing that it has a Congressional mandate to negotiate on all subjects.[67]
- **US-Thailand:** Negotiations were launched in late June 2004, under the Southeast Asian framework. When the United States Trade Representative (USTR) notified the US Congress of the objectives and goals for the negotiations for an FTA with Thailand, it highlighted the need to raise Thailand's intellectual property protection to standards set in other recently negotiated FTAs. The second round of negotiations was held in Hawaii from 11 to 17 October. The agreement is expected to be completed by 2005. 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.[68]
- **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

[65] See http://www.ustr.gov/Document_Library/Press_Releases/2004/August/Dominican_Republic_Joins_Five_Central_American_Countries_in_Historic_FTA_with_U.S.html.
[66] See Chapter Fourteen – Intellectual Property Rights of the US – Bahrain FTA (available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Bahrain_FTA/final_texts/asset_upload_file211_6293.pdf).
[67] See 'US-SACU FTA Deadlocked' in BRIDGES Weekly Trade News Digest Vol. 8, Number 33; see also US – SACU page on Bilaterals.org: http://www.bilaterals.org/rubrique.php3?id_rubrique=15.
[68] See US – Thailand page at Bilaterals.org: http://www.bilaterals.org/rubrique.php3?id_rubrique=19.

Community.[69] Since May there have been four rounds of negotiations, the last one being held between 13 and 17 September in San Juan, Puerto Rico. The talks are scheduled to conclude in early 2005. 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. Indeed, negotiations on intellectual property in Puerto Rico were temporarily halted when a Columbian negotiator insisted that mention be made of the Doha Declaration on TRIPS and Public Health before discussions could continue. 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.[70] The next negotiating round is scheduled for October 25-29 in Guayaquil, Ecuador.

- **US-Panama:** The negotiations for this FTA, which began in April 2004, are ongoing.[71]

III.4.2 Free Trade Agreements Involving the European Union

59. Partnership, association, and trade agreements pursued by the EU increasingly 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.[72] 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. [73]

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[69] 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).

[70] 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).

[71] See Office of the United States Trade Representative: US – Panama FTA at http://www.ustr.gov/Trade_ Agreements/Bilateral/Panama_FTA/Section_Index.html.

[72] 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.

[73] 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.

A. EU – Mercosur

60. The XV[th] and latest Bi-Regional Negotiating Committee (BNC) took place in Brussels from 20 to 24 September 2004. At the conclusion of the meeting Mercosur made an offer with the aim of advancing the stalled negotiations. The EU submitted a response on 29 September, but neither offer helped move forward the negotiations. Talks resumed on 20 October in Lisbon, but meeting the 31 October deadline for the FTA seems increasingly unlikely. 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.[74]

B. EU – ACP Economic Partnership Agreements (EPAs)

61. 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 agreements aimed at protecting trademarks and geographical indications for products of particular interest of either party."[75]

C. Other EU Free Trade Agreements (FTAs)

62. 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. [76] FTAs are also under negotiation with Albania, Iran, Syria and with the Gulf Cooperation Council.[77]

[74] 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.php3?id_rubrique=24

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

[76] 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.

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