

**SOUTH CENTRE AND CIEL IP QUARTERLY UPDATE:  
SECOND QUARTER 2005**

**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. The present Update discusses, in Section II, the proposals in the World Intellectual Property Organization (WIPO) Development Agenda process and their potential role in ensuring the consideration of development in WIPO's work program and all activities. Then, Section III provides a brief factual update of international intellectual property-related developments in the second quarter of 2005.

## **II. MOVING FORWARD THE WIPO DEVELOPMENT AGENDA PROCESS: PROPOSALS FOR CONSIDERATION AT THE THIRD SESSION OF THE IIM**

### **II.1. Introduction**

3. In October 2004, the WIPO Assemblies launched discussions on a WIPO Development Agenda, in a decision considered a watershed in the intellectual property and development debate.<sup>1</sup> Although for several years civil society and developing countries had been raising serious questions regarding the sustainable development implications of the activities being undertaken by WIPO, it was the first time WIPO was called upon to expressly address its role with respect to internationally agreed development goals. In this regard, the discussion of a WIPO Development Agenda has indeed been a turning point, with Member States voicing agreement on the need to view intellectual property rights as a tool, not an end in themselves, and to examine, in particular, how the work of WIPO is contributing to the use of such a tool in a manner coherent with development and other public policy concerns.<sup>2</sup>

4. As the time approaches for the Inter-sessional Intergovernmental Meeting on a WIPO Development Agenda (IIM) to report back to the WIPO Assemblies, however, it is still uncertain whether concrete steps towards an effective mainstreaming of development concerns into the program and activities of WIPO will be taken. For all the rhetoric noted above, the position of many developed countries still seems firmly anchored in the belief that increasing levels of intellectual property promote economic growth and thus *per se* contribute to reducing poverty. In other words, WIPO, by focusing solely on promoting the protection of intellectual property around the world, would already be doing its part for sustainable development. Switzerland, for instance,

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<sup>1</sup> See WIPO document WO/GA/31/15 Prov., paras 148-218.

<sup>2</sup> See, e.g. general statements made by the Asian Group, Group B, and the European Union in the first session of the Inter-sessional Intergovernmental Meeting on a Development Agenda for WIPO.

expressed its surprise at the call for incorporating a development dimension, highlighting the “immense amount of work” already accomplished by WIPO in regards to development.<sup>3</sup> Similarly, the United States affirmed that intellectual property facilitated, rather than hindered development, and thus considered the current work of WIPO as “a part of the solution” to development challenges.<sup>4</sup> As a result, discussions have not always focused on the concerns that prompted the WIPO Development Agenda process, or on the specific proposals put forth to address these concerns. In this regard, despite the importance of advancing awareness and discussion of the gaps in the vision, governance, and activities of WIPO in regards to development, the comprehensive consideration and concrete implementation of measures to address these gaps remains the primary objective and fundamental challenge of the WIPO Development Agenda process.

5. The purpose of this note is to focus on the proposals put forth in the WIPO Development Agenda process, describing the specific measures suggested by Member States and their potential role in promoting an institution whose objectives and functions expressly include, and reflect, a development objective. To this end, Section II.2 provides a brief background of the WIPO Development Agenda process and the proposals presented thus far. Section II.3 then analyzes the specific measures suggested in those submissions and their possible contribution to effectively incorporating a development dimension to WIPO. Finally, Section II.4 presents some concluding thoughts.

## **II.2 The WIPO Development Agenda**

6. In the 2004 WIPO Assemblies, Member States agreed on the need for WIPO to enhance its contribution towards attaining international development objectives and launched the WIPO Development Agenda process. The proposal for the establishment of a development agenda for WIPO had been presented 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 (Group of Friends of Development or FOD).<sup>5</sup> The proposal called for WIPO, as a member of the United Nations system, to fully incorporate development concerns into all its activities, and design and conduct its work in a manner coherent with and supportive of internationally agreed development goals. The proposal contained, in this regard, a number of concrete ideas to advance the establishment of a broad and cross-cutting development dimension, including adopting amendments to the WIPO convention to expressly include the development dimension, investigating the potential of open collaborative models of knowledge generation, and enhancing civil society participation.

7. 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. Further, the decision required the International Bureau to organize, with other relevant international organizations, an international seminar on intellectual property and development, which took place on May 2, and 3, 2005.

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<sup>3</sup> See WIPO document IIM/1/6/Prov, para 59.

<sup>4</sup> Id. at para 79.

<sup>5</sup> See WIPO document WO/GA/31/11.

8. The WIPO Development Agenda process has provided an important opportunity for developing countries and public interest civil society organizations to comprehensively address development concerns in the WIPO context. Indeed, many of the suggestions being put forth and examined in the first two sessions of the IIM came from developing countries. In the First Session of the IIM, which took place on April 11 to 13, 2005, the FOD, for instance, elaborated on their initial proposal in an extensive document that offered a conceptual platform for the intellectual property and development debate in WIPO, as well as presented concrete proposals in four key areas: 1) the mandate and governance of WIPO; 2) norm-setting; 3) technical assistance; and 4) transfer of technology.<sup>6</sup> The proposal was not discussed in detail, but received the broad support of all regional groups that include developing countries. The Asian Group, for instance, affirmed that it found the FOD proposal to be a “good basis for a constructive dialogue and successful outcome,” also emphasizing the importance of mainstreaming the development dimension in all WIPO activities.<sup>7</sup> The Group of Latin America and the Caribbean (GRULAC) and the African Group also highlighted the importance of the broad scope of the Development Agenda. In particular, the African Group stressed certain elements contained in the FOD proposal as fundamental, including the assessment of the costs and benefits of the establishment and implementation of the intellectual property protection, the need to take into account countries’ different levels of development, the preservation of balance between the interests of rights’ holders and those of the society in general, and the facilitation of technology transfer.<sup>8</sup>

9. Other developing country proposals have been more limited in scope, as well as in perspective. A proposal presented by Mexico to the First Session of the IIM, for instance, is based on the notion that intellectual property is “a means of benefit for all people” all of the time.<sup>9</sup> In this regard, the lack of supportive considerations for such unqualified positions and the failure to address the concerns raised by other developing countries were criticized during discussions, although the proposal received the general support of countries such as the United States, Japan, and Switzerland. The proposal submitted by Bahrain in the Second Session of the IIM, which took place on June 20 to 22, 2005, was co-sponsored by Jordan, Kuwait, Lebanon, Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, Syrian Arab Republic, United Arab Emirates, and Yemen, and also focused exclusively on the benefits and relevance of intellectual property rights.<sup>10</sup>

10. The WIPO Development Agenda process has also been significant in its engagement of developed countries in the intellectual property and development debate – even if, as mentioned above, their response has not been as constructive as developing countries would have hoped. The United States, for instance, presented a proposal focused primarily on technical cooperation.<sup>11</sup> The proposal suggested building upon a “positive role” of intellectual property protection for development by establishing a WIPO Partnership Program to improve transparency and avoid duplication of efforts in the intellectual property technical assistance. The United Kingdom proposal presented to the First Session of the IIM also consisted of suggested steps in respect of technical cooperation, though it did recognize the intellectual property and development debate is much broader and referred to the work of the Commission on Intellectual Property Rights.<sup>12</sup> In the Second Session of the IIM, the United Kingdom build upon its previous observations through a

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<sup>6</sup> See WIPO document IIM/1/4.

<sup>7</sup> See *supra* note 3 at para 40.

<sup>8</sup> *Id.* at para 50.

<sup>9</sup> See WIPO document IIM/1/3.

<sup>10</sup> See WIPO document IIM/2/2.

<sup>11</sup> See WIPO document IIM/1/2.

<sup>12</sup> See WIPO document IIM/1/5.

second submission, which focused on the potential role of the Permanent Committee on Cooperation for Development in the intellectual property and development debate.<sup>13</sup>

**11.** Public interest non-governmental organizations also actively contributed to discussions in the IIM sessions, providing fundamental information as to the impact of intellectual property on the availability of electronic information for libraries in developing countries, consumer rights, and access to medicines.<sup>14</sup> Moreover, these organizations presented suggestions for a number of measures that could potentially address these challenges. Consumers International, the Transatlantic Consumer Dialogue, and *Médecins Sans Frontières*, for example, referred to a number of new initiatives to finance pharmaceutical innovation that aimed to overcome the gaps of patent driven research and development.<sup>15</sup> The Union for the Public Domain suggested WIPO standing committees on patents and copyrights discuss the implementation of Article 40 of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement) on the control of anti-competitive practices and consider how developing countries could adopt, *per se*, rules that would encourage transfer of knowledge and promote the access to knowledge.<sup>16</sup> Finally, the majority of public-interest non-governmental organizations supported the comprehensive approach of the FOD proposals, as well as many of the concrete suggestions made in those proposals.

### **II.3 Specific Proposals Presented to the IIM**

**12.** Although the wide engagement in the intellectual property and sustainable development debate has been important, the WIPO Development Agenda process was not requested or established as a forum for discussion. As mentioned, the original proposal for the establishment of a development agenda for WIPO emphasized the need for Member States to take “immediate action” toward incorporating development concerns across the WIPO work program, highlighting a number of concrete measures deemed particularly important.<sup>17</sup> The First and Second Sessions of the IIM have underscored the importance of “specific action oriented proposals,” on which discussions are currently based.<sup>18</sup> Nevertheless, it will be the Third Session of the IIM, which will take place in Geneva on July 20-22, 2005, that will prove the critical point for ensuring translate into the effective incorporation of development concerns in WIPO.

**13.** Given its charge of preparing a report for the WIPO Assemblies, the Third Session of the IIM will indeed be highly influential in the outcome of the WIPO Development Agenda process. Given the political nature of the WIPO Assemblies and the many issues that are addressed by WIPO Member States in that context, the report of standing committees and other bodies generally carry much weight. It is therefore essential for the report of the Third Session of the IIM to concentrate on the need for action and to include specific language and recommendations in order to provide the necessary momentum to the WIPO Development Agenda.

**14.** In this regard, a detailed and in-depth examination of the proposals during discussions in the Third Session of the IIM will play an important role. The following paragraphs briefly describe and analyze the proposals currently being discussed in the IIM: twelve from the FOD submissions,

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<sup>13</sup> See WIPO document IIM/2/3.

<sup>14</sup> According to the WIPO Assemblies decision on the WIPO Development Agenda, the IIM sessions were open to WIPO-accredited non-governmental organizations, and a number of non-governmental organizations also received ad hoc accreditation to the IIM.

<sup>15</sup> See supra note 3 at paras 123 and 129.

<sup>16</sup> Id. at para 133.

<sup>17</sup> See supra note 5.

<sup>18</sup> See supra note 3 and WIPO document IIM/2/10.

two from the UK submission, and one from the US submission. The suggestions of the Mexican proposal, which included a series of measures in line with ongoing WIPO activities to develop “intellectual property culture,” were not included at the request of Mexico, which considered its ideas to be reflected in other proposals. The Bahrain proposal did contain some suggestions as to how WIPO, developed countries in WIPO, and Member States of WIPO could address the development dimension, which are included in the list of specific proposals. However, Bahrain was unable to present or comment on the document, which is therefore not considered in this note.

A. Proposals from the Group of Friends of Development

15. Of the several issues raised by the original proposal for the establishment of a development agenda for WIPO, the FOD submission to the First Session of the IIM focused four fundamental aspects of WIPO and its activities: WIPO’s mandate and governance; norm-setting; technical cooperation; and transfer of technology and access to knowledge.

16. In the area of governance, the FOD put forth three concrete proposals:

- *Proposal to amend the WIPO Convention to include explicit language on the development dimension.* Although the 1974 Agreement between the United Nations and WIPO makes WIPO responsible for “promoting creative intellectual activities and for facilitating the transfer of technology ... to the developing countries in order to accelerate economic, social, and cultural development,” WIPO has long interpreted its mandate as one of promoting intellectual property – a misconception that is reflected in many of WIPO’s activities. The suggested means of overcoming such a narrow conception of its mandate is to expressly include a reference to development in the WIPO Convention. While other countries have questioned whether such an inclusion is necessary, the International Bureau’s understanding of the organizational mandate has proved to have crosscutting implications – an express clarification of the objectives of WIPO in light with UN and other international goals and principles may thus be a necessary step to ensure a WIPO Development Agenda.
- *Proposal to establish an independent WIPO evaluation and research office (WERO).* The need for a transparent, independent, and objective mechanism of evaluation has been widely recognized by international organizations, including the World Bank, the United Nations Development Program (UNDP), and the International Monetary Fund (IMF). UNDP, for example, has an Evaluation Office that provides systematic and independent assessment of the results, effectiveness, and impact of its substantive activities. In the IMF, the Independent Evaluation Office systematically conducts objective and independent evaluations on issues relevant to the mandate of the IMF, thus complementing internal review and improving the ability of the IMF to draw lessons from its experience and more quickly integrate improvements into its future work. Given the broad implications of intellectual property for development, it is only logical for an independent evaluation office to provide similar oversight to the work program and activities in the WIPO context.
- *Proposal for the consideration of measures to ensure wider participation of civil society and public interest groups in WIPO.* In particular, the proposal aims to ensure that discussions and recommendations in the context of the WIPO advisory commissions – the Policy Advisory Commission (PAC) and the Industry Advisory Commission (IAC) – are balanced by the input of a broader range of stakeholders. Again, the extensive implications of intellectual property for issues such as access to medicines, the conservation of biodiversity, and others require the broader consultation and participation – an issue also

linked to the rights of the stakeholders and the public at large as users of the intellectual property system.

17. In the area of norm-setting, the FOD submission also contains three concrete proposals:
- *Proposal to formulate and adopt principles and guidelines for norm-setting activities.* To date, international intellectual property rules have been developed with little consideration of their impact on or actual relevance to both general development objectives and specific public policy objectives such as innovation and access to essential goods. The negotiations of a proposed Substantive Patent Law Treaty, for example, were launched with no consideration of the concerns of developing countries or many of the stakeholder groups that would be impacted by broad patent harmonization. As a result, one of key proposition of the FOD is establishing certain principles and guidelines to reverse such a biased approach to norm-setting in WIPO. The guidelines include promoting transparency in regards to norm-setting initiatives and ensuring all initiatives are compatible and supportive of other international obligations.
  - *Proposal to undertake independent, evidence-based “Development Impact Assessments” with respect to norm-setting activities.* The independent consideration of the impact of each norm-setting initiative for core development indicators – such as innovation, access to knowledge and products, job creation, poverty alleviation, equity, protection of biodiversity, health, and education among others – would be an extremely valuable contribution to development. Impact assessments, pioneered by the environmental community, are increasingly considered critical to ensure adequate laws and policies more generally and have already been implemented at the international and national levels with great success. In the United Kingdom for instance, regulatory impact assessments analyze the likely impact of a policy change and the range of opportunities for implementing it, including in the context of intellectual property.<sup>19</sup> Impact assessments are also utilized at the European level. For instance, the European Commission is conducting an *ex ante* impact assessment in relation to the collective management of copyright.<sup>20</sup> The need for such assessments is equally clear in the context of WIPO activities.
  - *Proposal to establish a system of holding public hearings prior to the initiation of any norm-setting activities.* In light of the fact not only intellectual property rights-holders but also a number of different groups of society, as well the public at large, constitute the users of the intellectual property system, the participation of a broad range of stakeholders before and during norm-setting at WIPO is an essential measure for equity and transparency.
18. In the area of technical assistance, the FOD propose four measures:
- *Proposal to formulate and adopt principles and guidelines for the development and implementation of technical assistance.* The misconception regarding the role of development in the WIPO mandate has been particularly reflected in the technical assistance activities, which have tended to over-emphasize the benefits of intellectual property and not address the costs and limitations. The guidelines proposed by the FOD thus aim to ensure that, as WIPO incorporates a development agenda, that agenda is also clearly reflected in technical assistance. In particular, the proposal notes that technical

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<sup>19</sup> Regulatory Impact Assessments are part of the Better Regulation Executive established in May 2005 in the United Kingdom.

<sup>20</sup> The importance of impact assessments in the intellectual property context was described by the Acting Head of the Copyright Unit, DG Internal Market and Services, Tilman Lueder, at the 13<sup>th</sup> Annual Conference on International Intellectual Property Law & Policy at the Fordham University School of Law.



assistance should be development-oriented, coherent with broader international obligations and national public policies, neutral and unbiased, and transparent.

- *Proposal to commence exploratory work on defining and separating the WIPO Secretariat's technical assistance functions from norm-setting related functions.* Closely linked with the previous proposal, the idea of separating these different tasks within WIPO also seeks to advance compliance with the key principles and guidelines mentioned above. It is worth noting that the International Bureau intervened during the Second Session of the IIM to imply that these principles and guidelines are already being complied with in its technical assistance work. However, the very situation that there is no opportunity for an independent review or evaluation of such statements and of WIPO technical assistance more generally only highlights the need for the separation of certain functions within WIPO.
- *Proposal to formulate and adopt a code of ethics for technical assistance staff and consultants.* Again, the relevance of such an ethics code would be to ensure both WIPO staff and the many consultants hired to provide technical assistance provide information and support that considers and focuses on broader development objectives.
- *Proposal for developing indicators and benchmarks for the evaluation of WIPO technical assistance.* The adequate evaluation of the impact of the information provided is increasingly recognized as an essential element in effective technical assistance. The appropriate review of technical assistance, in this regard, ensures efficiency and effectiveness and also guarantees the information meets the needs and addresses the concerns of recipients. While developing credible criteria for evaluation is not an easy task, a framework to determine the contribution of WIPO technical assistance projects to development is fundamental.<sup>21</sup>

19. Of the several proposals put forth in the area of transfer of technology and access to knowledge, the suggestion currently on the table is:

- *Proposal to consider the elaboration of a treaty on access to knowledge and technology.* Although intellectual property rules should reconcile private and public benefits by balancing the rewards to innovators and the dissemination of ideas, little of WIPO's attention and activities have focused on the design and implementation of these rules towards promoting access to knowledge. A treaty on access to knowledge could provide an important instrument to highlight, protect, and develop the notion of exceptions and limitations to intellectual property rights, as well as of alternative ways of producing and maximizing the propagation of knowledge. Elements currently discussed by public interest civil society organizations include an update of the Appendix of the Berne Convention, specific provisions on anti-circumvention, norms for the importation of educational, scientific, and cultural materials, and the limitation of patents associated with certain public good databases.<sup>22</sup>

## B. Proposals from the United Kingdom

20. The two UK proposals reflect, to some degree, its general approach to the WIPO Development Agenda process: a focus on technical assistance while affirming the flexibility to expand the discussions at a later stage.

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<sup>21</sup> Sisule F. Musungu, "Towards a Development-oriented IPR Agenda: TRIPS-plus, Technical Assistance and Technology Transfer," UNCTAD-ICTSD Bellagio Series of Dialogue, 2003.

<sup>22</sup> The different civil society proposals for the Treaty on Access to Knowledge are available at [www.cptech.org](http://www.cptech.org).

- *Proposal to improve information sharing on technical assistance including the establishment of databases and a dedicated webpage.* General concerns regarding the efficiency and efficacy of WIPO technical assistance, including in regards to coordination with other providers and management of resources, were clear in both IIM sessions. The FOD, the United Kingdom, and the United States proposals all contained references in this regard, which received the support of other Member States. Nevertheless, it is disappointing that such a limited management issue now forms the core of the UK and US positions on the WIPO Development Agenda process.
- *Proposal to Reinvigorate the PCIPD.* In the same way, the issue of an adequate forum for development considerations in WIPO, which was only mentioned in passing in the first UK proposal, became central in its second submission. The UK delegation explained its thinking during the Second Session of the IIM, stating that deciding the most appropriate vehicle to take the WIPO Development Agenda forward was key due to the unlikelihood of reaching consensus on such complex issues without more in-depth consideration. The identification of the PCIPD as the “ideal forum” in which to consider intellectual property and development issues, which are much broader than technical assistance, raised considerable concern from developing countries. However, the UK clarified that the PCIPD would be a “reinvigorated committee” that would not isolate development-related discussions but contribute to their consideration across WIPO. Nevertheless, the issues suggested for the initial work plan show a much narrower intention: the UK proposes, for instance, that the PCIPD oversee research on intellectual property and development issues and undertake a more active management of WIPO technical cooperation programs. As a result, the proposal does not seem to provide a useful or effective step towards a more development-oriented WIPO.

#### C. Proposal from the United States

**21.** As mentioned above, the US *proposal of a “WIPO Partnership Program”* is not questionable in terms of what it contains as much as in terms of what it is lacking. The proposed “WIPO Partnership Program” is an Internet-based tool to “facilitate the strategic use of intellectual property by developing countries and to maximize WIPO’s positive impact on development.” Utilizing existing WIPO resources, the Program would bring together all stakeholders in technical assistance to focus resources on the specific needs of developing countries. As stated by the delegation of Pakistan in the Second Session of the IIM, “the US proposal would definitely improve and strengthen the on-going technical assistance activities of WIPO,” but is missing the fundamental change in mind set required by the larger discussion on the WIPO Development Agenda: “the proposal is about having intellectual property in development, whereas what is discussed is having development in the intellectual property system.”<sup>23</sup>

#### **II.4 Conclusion**

**22.** The need to introduce development into the international intellectual property system, because it has already been widely recognized by different international organizations, is indeed not even the core of the debate. The Doha Declaration on the TRIPS Agreement and Public Health recognized the need for the TRIPS Agreement to be part of the wider national and international action addressing public health problems afflicting many developing and least-developed countries. While affirming that intellectual property protection is important for the development of new

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<sup>23</sup> See WIPO document IIM/2/10, para 118.

medicines, it also acknowledged concerns about its effects on prices and stressed the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. The Sao Paulo Consensus, the resulting document of the 2004 meeting of the highest decision-making body in the United Nations Conference on Trade and Development (UNCTAD) noted the need to ensure that the framework of intellectual property contributes to technological development, including through analysis of ways to improve the transfer of technology to developing countries, the development dimensions and implications of the establishment and enforcement of intellectual property rights, and the protection of genetic resources, traditional knowledge, folklore.

**23.** The WIPO Assemblies themselves referred to the recognition of the relationship between development and intellectual property in these and other multilateral fora when initiating discussions of the proposals for a WIPO Development Agenda. They did not mandate a discussion on the need to introduce development in all WIPO activities; they mandated a discussion on the ways to make this happen. In the Doha Plan of Action, adopted by the Heads of State and Government of the Group of 77 and China, meeting in Doha, Qatar, from 12 to 16 June 2005, on the occasion of the Second South Summit, developing countries reaffirmed that WIPO, as a UN Agency, needed to include in all its plans and activities, “a development dimension that includes promoting development and access to knowledge for all, pro-development norm-setting, establishing development friendly principles and guidelines for the provisions of technical assistance and the transfer and dissemination of technology.”

**24.** As the Third Session of the IIM commences, therefore, the crucial point is not the broader intellectual property and development debate, but rather moving the WIPO Development Agenda forward with concrete recommendations to the 2005 WIPO Assemblies. A detailed and in-depth analysis of the proposals during discussions will play, as mentioned, an important role in this regard. The parameters for this analysis are clear from the statements and decisions described above: the WIPO Development Agenda requires specific steps for WIPO to place development at its center, as well as for the more balanced, comprehensive, and coherent approach to promoting innovation and creativity to be reflected in all WIPO work and activities.

### **III. AN OVERVIEW OF RELEVANT IP DEVELOPMENTS IN VARIOUS FORA**

**25.** The following is an overview of the developments in the various fora dealing with intellectual property issues in the second quarter of 2005. For earlier developments, please see previous South Centre and CIEL IP Quarterlies, available at [www.southcentre.org](http://www.southcentre.org) and [www.ciel.org](http://www.ciel.org).

#### **III.1 World Trade Organization (WTO)**

**26.** With the Sixth Ministerial Conference of the WTO to be held in Hong Kong in December 2005 in view, WTO members are intensifying negotiations on all areas, including those related to intellectual property. The Hong Kong Ministerial Conference is likely to be one of the last before the conclusion of Doha Development Round, which now has a 2006 deadline. In turn, the results of the July “first approximations” will be highly influential for the outcome of the Hong Kong Ministerial Conference. Crucial issues for developing countries in regards to intellectual property

remain public health, the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD), and the resolution of the outstanding implementation issues.<sup>24</sup>

A. Council for TRIPS

27. Issues addressed at the last meeting of the Council for TRIPS, held on June 14 – 15, 2005, included:

- *TRIPS and Public Health*: The discussions on implementing Paragraph 11 of the 30 August decision remain deadlocked. So far, there has been little narrowing of differences on the key issues: the provisions of the amendment, how the amendment could be made, or how the Chairman's statement should be reflected, if at all, in the final solution. Discussions again proceeded on the basis of the previous communications of the African Group, with Members reiterating their positions.<sup>25</sup> The African Group -supported by several developing countries, including Argentina, Brazil, China, India, Malaysia, and the Philippines, and LDCs maintained that the permanent solution should be the amendment of Article 31 of the TRIPS Agreement, based on the waivers adopted in the Decision with modifications, but not including the Chairman's Statement either as part of the amendment text or as a footnote. On the other hand, the United States, Switzerland, Japan, Canada and the EU continue to press for references to the Chairman's Statement. The EU, on its part, announced that it would soon submit a new proposal. Approval of the proposal is apparently being delayed by Germany.<sup>26</sup> The African group remained hopeful that an agreement could be reached by the end of July. However, this seems unlikely as the WTO breaks in August and the TRIPS Council will not be meeting until October. **The Chairman of the Council, H.E. Ambassador Choi Hyuck of Korea will continue to hold informal consultations on this issue.**
- *The Relationship between the TRIPS Agreement and the CBD*: Discussions continued on the need to introduce disclosure requirements and evidence of prior informed consent and benefit sharing in patent applications, without any substantial progress being made. The discussions again focused on the Checklist of issues and subsequent submissions made by a group of developing countries, though three new submissions were presented and discussed. The United States, in response to the submission made by Brazil and India with regards to the country's first submission, reasserted its position against disclosure requirements arguing that "there are many troubling questions with respect to patent disclosure requirements proposed that would lead to significant uncertainties," and that any potential solution, including rules for providing fair and equitable benefit sharing, should operate outside of the intellectual property system.<sup>27</sup> Peru presented a revised submission on its efforts to prevent and determine cases of bad patents and misappropriation and

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<sup>24</sup> For a more broad picture and strategic analysis of the negotiations and discussions on intellectual property in the WTO in the run – up to the Hong Kong Ministerial Conference in 2005 and possible strategies, see South Centre and CIEL IP Quarterly Update: Fourth Quarter 2004.

<sup>25</sup> See Communication from Rwanda on behalf of the African Group, "The TRIPS Agreement and Public Health," 6 April 2005 (WTO document IP/C/W/445), 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), and Communication from Nigeria on behalf of the African Group, "Implementation of the Paragraph 11 of the 30 August 2003 Decision," 10 December 2004 (WTO document IP/C/W/437).

<sup>26</sup> See "Trade Negotiations have stalled", TRALAC, 22 June 2005. <http://www.tralac.org/scripts/content.php?id=3744>.

<sup>27</sup> See Communication by the United States, (WTO document IP/C/W/449, Para. 8). The earlier submission of the United States is in WTO document IP/C/W/434 and the response from Brazil and India in WTO document IP/C/W/443.

reasserted the need for disclosure requirements to be introduced in patent applications.<sup>28</sup> Switzerland presented a communication containing a list of questions on the proposals that have been made by members.<sup>29</sup> With regards to the Checklist of issues submitted by developing countries, some of the questions were directed at defining terms such as “bio-piracy”, “misappropriation” and “source.”

Concurrently, the former Chairman of the Council -Tony Miller from Hong Kong, China- is holding informal consultations on outstanding implementation-related issues, which includes to the relationship between the CBD and the TRIPS Agreement, in order to prepare a report to the WTO Director General (DG), providing guidance for the “July approximation.”<sup>30</sup> During the informal consultations several developing countries, particularly India, Brazil, Peru and China, reaffirmed that these issues should figure in the July “first approximations.” Several developed countries showed resistance on moving the issue forward, though the United States, Japan, and Korea expressed their willingness to discuss the issue substantially. **Members agreed that the report of the former Chairman should present a factual description of the positions held by all Members.**

- *Enforcement of Intellectual Property Rights:* The EU presented a highly contentious submission calling for the TRIPS Council to “carefully examine the compliance of Members with the enforcement provisions of TRIPS” on a regular basis with the aim of identifying “where the main problems, difficulties and shortcomings are” and “make recommendations on ways to improve the situation...to ensure a full implementation of TRIPS obligations in this field.”<sup>31</sup> The proposal met strong opposition from many developing countries who argued that such “examination” role was outside the field of competence of the Council and recalled that most developing countries were striving to implement their TRIPS obligations.
- *Transition Periods for Implementation of TRIPS by LDCs:* The TRIPS Council approved the formal request that had been made by Maldives for an extension of the transition period under Article 66.1 of the TRIPS Agreement.<sup>32</sup> Maldives is the first LDC to make the request.

## **28. The next formal meeting of the Council for TRIPS is scheduled for October 25 – 26 2005.**

### **B. Special Session of the Council for TRIPS**

**29.** The meeting of the Special Session of the Council for TRIPS took place on June 16 - 17, 2005. The issue under discussion was the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits. As in the past Session, no progress was achieved on the sets of issues discussed, particularly on the most controversial issues: legal effects and participation.

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<sup>28</sup> See Communication from Peru, (WTO document IP/C/W/441/Rev.1).

<sup>29</sup> See Communication from Switzerland, (WTO document IP/C/W/446).

<sup>30</sup> See “Disclosure Continues to Divide TRIPS Council”, Bridges, Vol.5, No. 12, June 24, 2005.

<sup>31</sup> See Submission by the European Union on the Enforcement of the provisions of the TRIPS Agreement (WTO document IP/C/W/448), at paras 3 and 24.

<sup>32</sup> See Communication from Maldives, “Request for the Extension of the Transition Period under Article 66.1 of the TRIPS Agreement”, 15 April 2004 (WTO document IP/C/W/425). Given that Maldives’ status as a Least Developing Country will expire on December 2007, it was granted the extension only until such period as opposed to the five years that it had originally solicited.

**30.** A new detailed proposal for the extension of protection under TRIPS Article 23 and a binding multilateral register system for geographical indications was submitted by the EU.<sup>33</sup> While some countries supported the proposal, including Bulgaria, India, Kenya, Romania, Switzerland and Turkey, many others, including Australia, Argentina, Brazil, Canada, Chile and the United States, opposed it. **The next meetings of the Special Session are scheduled for September 16 and October 27 – 28, 2005.**

C. Working Group on Trade and Transfer of Technology

**31.** At the eleventh session of the Working Group, which took place on 11 April, 2005, **H.E. Mr. Manuel A.J. Teehankee of Philippines was elected as the new Chairman of the Working Group**, replacing the former Chairman, H.E. Mr. Chitsaka Chipaziwa from Zimbabwe.

**32.** In considering the relationship between trade and transfer of technology, the discussions continued to focus on analyzing the role of home-country measures in encouraging flows of technology to developing countries, based mainly on a study carried out by UNCTAD, which surveyed home country measures. On the issue of possible recommendations on steps that might be taken within the mandate of the WTO to increase flows of technology to developing countries, the first two recommendations of the joint submission made by Cuba, India, Indonesia, Kenya, Nigeria, Pakistan, Tanzania, Venezuela and Zimbabwe,<sup>34</sup> namely 1) the examination of the different provisions contained in various WTO Agreements to technology transfer, and 2) the provisions contained in various WTO Agreements which may have the effect of hindering transfer of technology to developing countries, were discussed only briefly. Hence, these and several other developing countries reiterated that they expect to continue discussing the recommendations at the next meeting.<sup>35</sup> **The next meeting of the Working Group is scheduled for July 6, 2005.**

### **III.2 World Intellectual Property Organization (WIPO)**

**33.** A number of relevant meetings and discussions took place in WIPO in the Second Quarter of 2005, including:

A. The Program and Budget for the 2006 – 2007 biennium

**34.** Among the main issues discussed during the Eight Session of the Program and Budget Committee (PBC) that took place on 27 – 29 of April 2005 were the Proposed Program and Budget for the 2006 – 2007 biennium presented by the Director General<sup>36</sup> and the report of the Joint Inspection Unit (JIU) of the United Nations -the only independent external oversight body of the United Nations system mandated to conduct evaluations, inspections and investigations system-wide-, which carried out a review on the management and administration of WIPO.<sup>37</sup>

**35.** The decision and text adopted by the PBC to be forwarded to the General Assembly, **recommending that the Proposed Program and Budget for the 2006-2007 be approved**

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<sup>33</sup> See Communication by the European Communities, June 13, 2005 (WTO Document TN/IP/W/11).

<sup>34</sup> See Submission by Cuba, India, Indonesia, Kenya, Nigeria, Pakistan, Tanzania, Venezuela and Zimbabwe, (WTO document WT/WGTTT/W/6).

<sup>35</sup> See Working Group on Trade and Transfer of Technology, “Note on the Meeting of 11 April 2005”, June 9 2005, (WTO document WT/WGTTT/M/11).

<sup>36</sup> See WIPO document WO/PBC/8/3.

<sup>37</sup> See document JIU/REP/2005/1, available at [http://www.wipo.int/meetings/en/details.jsp?meeting\\_id=7127](http://www.wipo.int/meetings/en/details.jsp?meeting_id=7127).

**without modifications and the recommendations of the JIU report be implemented**, was not agreed to by all the Members. Several developing countries, Argentina, Brazil and India, did not support the proposal. As many developing countries argued in the discussions, more in-depth discussions on the proposed Program and Budget were required before making any recommendations to the General Assembly, particularly given their concerns regarding the considerable decrease in resources allocated to the technical cooperation programs of WIPO and the need for more complete information from the Secretariat on how the resources were being allocated under the different proposed programs. An additional concern was the potential mismatch between the priorities and programs being established in the proposed Program and Budget and substantive discussions on the priorities of the organization taking place in other bodies, particularly those on the establishment of a Development Agenda for WIPO.<sup>38</sup> The text adopted by the PBC does however state that the Committee “recommends that Member States, at the September 2005 Assemblies, make adjustments as appropriate to the proposed Program and Budget for 2006-2007 in order to take into account any budgetary implications resulting from on-going discussions on the WIPO Development Agenda, and other issues.”

B. The Working Group of the Program and Budget Committee

**36.** A working group established under the PBC met in an informal session from May 23-25, 2005 to examine different proposals that were put forth during the course of discussions in the PBC for the establishment of an Audit Committee. The role of the Audit Committee would be to conduct independent audits of WIPO management to increase the oversight and control exerted by Member States on the organization. This comes at a time when WIPO is being placed under increased scrutiny following the critical review by the JIU and serious allegations of financial mismanagement.<sup>39</sup> The working group **agreed to recommend to the General Assembly to consider the establishment of an Audit Committee in its 2005 Session**, and will forward to the General Assembly the proposal for such Committee that was agreed to by the Working Group.

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

**37.** The Eight session of the IGC took place on 6-10 June 2005. While no agreement was reached on the process or substance of an international legal binding instrument for the effective protection of genetic resources, traditional knowledge and folklore, after extensive informal discussions members **agreed to recommend to the General Assembly of WIPO at its September 2005 session to extend the mandate of the IGC as it stands for the 2005 – 2007 biennium**.

**38.** The limited substantive discussions that took place during the Eight Session focused on the revised texts of the draft provisions for the protection of traditional knowledge and cultural expressions/expressions of folklore against misappropriation, based on the comments received at the Seventh Session and the Inter-sessional commentary process.<sup>40</sup> While many developing countries considered the documents to be a solid basis for future work in the Committee -though noting that more emphasis needs to be given to the intellectual property aspects of the draft provisions-, developed countries were unwilling to continue discussions on substantive provisions, particularly those relating to specific measures to prevent the misappropriation of traditional knowledge in the patent system, including disclosure requirements for genetic resources in patent applications. The situation led developing countries to question whether the IGC remains the

<sup>38</sup> See Intervention by Brazil, WIPO document WO/PBC/8/5/Prov., para 62.

<sup>39</sup> See “WIPO Faces Persistent Complaints, Allegations of Mismanagement”, available at [ip-watch.org](http://ip-watch.org).

<sup>40</sup> See WIPO documents WIPO/GRTKF/IGC/8/4 and WIPO/GRTKF/IGC/8/5.

appropriate forum to address the intellectual property related concerns that arise out of genetic resources, traditional knowledge, and folklore, and accordingly whether its mandate should continue at all or in its present form. In this regard, in discussing on the future work of the IGC, India, supported by Brazil, Peru and South Africa, proposed narrowing the mandate of the IGC to exclude issues related to genetic resources, which in turn was opposed by several developed countries, including the United States, Japan, and the EU. While an agreement was finally arrived at to recommend the General Assembly to renew the mandate of the IGC unchanged, the stalemate at which substantive discussions have arrived at seriously put into question the usefulness of the IGC for developing countries in advancing these issues *vis a vis* other interrelated fora.

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

39. Although the November 2004 session of the SCCR ended with the Chairman's conclusions not adopted by the Committee, with the effect that the conclusions are not actionable and do not bind the Committee, during the second quarter of 2005 the WIPO Secretariat has proceeded to hold regional consultations on the proposed broadcasting treaty,<sup>41</sup> the main issue contested in the November 2004 discussions. Several developing countries - including Argentina, Brazil, Chile, Honduras, India and Iran – had called for regional consultations on the proposed treaty for the protection of broadcasting organizations, to be undertaken only when requested by a particular group, stressing that the process should remain Member-driven. They argued that consultations should as far as possible take place in Geneva and that they be cross-regional. If the idea is to narrow differences, then holding regional consultations will not narrow differences, particularly between developed and developing countries and LDCs.

E. Standing Committee on the Law of Patents

40. The June 1 – 2, 2005 meeting of the SCP ended without any agreement among Members on the future work program for the Committee, which to date has essentially been addressing patent harmonization. The WIPO Secretariat had presented at the meeting a document on the “Future Work Program” for the SCP, inviting the Committee to consider and adopt the recommendations, the objectives, and the work program for the Committee in the Casablanca statement, and to transmit them to the 2005 WIPO Assemblies.

41. The proposed work program rehashed the main elements of the previous proposals that had been made by the United States and Japan to limit discussions in the SCP to issues of prior art, grace period, novelty and inventive step -issues advocated by developed countries-, while sidelining important issues for developing countries. It proposed that crucial issues that developing countries have been raising in the context of the SCP, e.g. sufficiency of disclosure and genetic resources in the context of the patent system, be dealt with in the IGC instead. The Group of Friends of Development<sup>42</sup> as well as many other developing countries opposed the Casablanca outcome and process and expressed at the meeting their opposition to the approach of separating issues under the process of negotiations on the SPLT, reiterating that the draft text needs to be discussed as a whole if the negotiations are to continue. Moreover, the proposal by the Group of Friends of Development on the future work of the SCP expressly noted that ensuring a “balanced treaty on the substantive harmonization of patent law that will address the concerns of all parties to the negotiations” would require that “provisions of the technology transfer, on anti-competitive practices, on the

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<sup>41</sup> See “WIPO Takes Broadcasting Treaty Negotiation outside Geneva”, available at [ip-watch.org](http://ip-watch.org).

<sup>42</sup> See Statement by the Group of Friends of Development, WIPO document SCP/11/4.

<sup>42</sup> See COP Decision VII/19E, paragraph 8.



safeguarding of public interest flexibilities, as well as specific clauses on principles and objectives."<sup>43</sup>

**42.** Consequently, for the third time in a row, the proposal for a reduced package of the SPLT was rejected. The meeting ended with the adoption of a Summary by the Chair agreed to by all the Member States.<sup>44</sup> The summary is basically a statement of the main lines of arguments and views expressed in the meeting. **No recommendations will therefore be forwarded by the SCP to the General Assembly for its consideration in its 2005 meeting, given the lack of agreement on the work of the Committee.**

F. Other developments and Upcoming WIPO Meetings

**43.** A one-day *ad hoc* intergovernmental meeting to discuss the WIPO response to the CBD took place on June 3, 2005. At its 2004 Session, the WIPO General Assembly decided to respond positively to the invitation made by the Conference of the Parties (COP) of the CBD to examine, and where appropriate address issues regarding the interrelation of access to genetic resources and disclosure requirements in intellectual property rights applications,<sup>45</sup> and defined a timeframe and methodology for its response.<sup>46</sup> The meeting discussed the second draft version<sup>47</sup> of the response prepared by the Secretariat. The Secretariat is currently preparing -in accordance to the discussions and comments made at the *ad hoc* meeting- the final response to be presented to the WIPO General Assembly in its September 2005 Session for further action. The document responds to the CBD request, basically, by citing the commentaries made by Member States on the issues and relevant proposals that have been made in WIPO and other fora, incorporating elements from the Technical Study that had previously been submitted by WIPO to the CBD, and by pointing to the key issues, including disclosure requirements in patent applications, without seeking to prejudge them.

**44.** The Second Inter-sessional Intergovernmental Meeting (IIM) on a WIPO Development Agenda took place on June 20-22. For more information on the developments, please see Section II above.

**45. The third –and last- IIM meeting is scheduled for July 20 - 22.**<sup>48</sup>

**46.** The Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) met on April 18 – 22, 2005, to finalize the draft text on a revised Trademark Law Treaty (TLT) to be negotiated at the Diplomatic Conference to be held from March 13 to 31, 2006 and discuss the future work of the Committee. Members and accredited observers to the Committee were invited to submit to the Secretariat by July 1, 2005, in writing, concise proposals for the future work of the SCT, including issues to be dealt with and priorities for addressing them. **The next SCT meeting is scheduled for November 28 - December 2, 2005.**

**47.** The Permanent Committee on Cooperation Related to Intellectual Property (PCIPD) was held on April 14 – 15, 2005 where issues related to technical cooperation were discussed. Many developing countries reiterated that while WIPO had provided countries with technical assistance

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<sup>43</sup> See Statement by the Group of Friends of Development, WIPO document SCP/11/4, Para 5.

<sup>44</sup> See Summary by the Chair, WIPO document SCP/11/5.

<sup>45</sup> See COP Decision VII/19E, paragraph 8.

<sup>46</sup> See WIPO document WO/GA/31/8.

<sup>47</sup> See WIPO document WIPO/IP/GR/05/3 (revised draft).

<sup>48</sup> See Section II.

more had to be done to ensure that such assistance fully complemented the development objectives of developing countries.<sup>49</sup> The date for the Fifth session of the PCIPD has not been determined.

**48. Finally, the Forty-First Series of Meetings of the Assemblies of the Member States of WIPO will be held from the 26 of September 2005 to the 5 October 2005.** A number of the issues discussed in the various meeting during the quarter will come up for decision or directions at the next WIPO General Assembly which takes place in September 2005.<sup>50</sup> Among the key issues are those related to the establishment of a Development Agenda for WIPO,<sup>51</sup> the approval of the new Program and Budget for the 2006 – 2007 biennium and an Audit Committee and the renewal of the mandate of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). The proposed treaty for the protection of the rights of broadcasting organizations is the other important issue that will be discussed at the General Assembly.<sup>52</sup>

### III.3 Other Multilateral Fora

#### A. The World Health Organization (WHO)

**49.** During its May 26 – 28, 2005 Session, the Executive Board of the WHO discussed, but decided to postpone decision on, a draft resolution on International Trade and Health. The resolution is intended to support initiatives for the WHO to become more involved on the issue of the public health impacts of trade and related issues, including intellectual property rights. Among the developing country proponents of the draft resolutions were Benin, Bolivia, Brazil, China, Iraq, Jamaica, Kenya, Nepal, Thailand, and Vietnam.

**50.** The draft resolution among other recommendations, urged Member States “to promote dialogue at national level to consider the interplay between international trade and health,” “to continue to develop capacity at national level to track and analyze the potential opportunities and risks of trade and trade agreements for health-sector performance and health outcomes”, and calls on the Director General to “provide support to Member States, at their request and in collaboration with the competent international organizations, to frame coherent trade and health policies”. However, the discussions on different amendments to either weaken or strengthen the draft resolution lead the Board to the decision of suspending discussions until its next session. **The next session of the Executive Board is scheduled for January 2006.**

**51.** The Commission on Intellectual Property Rights, Innovation and Public Health (CIPRH) held a two-day workshop on 30 – 31 May, 2005 to discuss the different commissioned studies and seek to advance work on the key the themes that the Commission is addressing,<sup>53</sup> and an Open Forum on 1

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<sup>49</sup> See the Revised Draft Report of the Session, WIPO document PCIPD/4/3 PROV.2.

<sup>50</sup> For a brief explanation of the WIPO General Assembly, its functions and procedures, see South Centre and CIEL IP Quarterly Update: Third Quarter 2004, available at [southcentre.org](http://southcentre.org) and [ciel.org](http://ciel.org).

<sup>51</sup> The third meeting of the IIM is scheduled for the 20-22 July 2002.

<sup>52</sup> See Draft Agenda of the Forty-First Series of Meetings of the Assemblies of the Members of WIPO, WIPO document A/41/1 PROV.1.

<sup>53</sup> These being 1) *Disease burden*, e.g. examining the future pattern of disease in developing countries, and what this means for R&D priorities, 2) *Intellectual Property*, e.g., how the IP system affects R&D and access, and whether there is a need to consider changes, 3) *Innovation*, e.g., what new ideas are there to stimulate innovation and promote access, 4) *Capacity building*, e.g. what can be done to improve the workings of regulatory systems and other national policies that impact R&D and access, and the role developing countries can play in innovation. For more information on the work of the Commission please see <http://www.who.int/intellectualproperty/en/>.

June 2005 to build upon the outcomes of the workshop and promote discussion among the diverse stakeholders. Discussions on the role of the patent system, how it affects R&D and access and how it might be improved was one of the most highly debated issues in the discussions. While it was noted that the evidence with regards to relationship between patents, research and access is mixed at best and requires more research, some important elements that were highlighted were the negative role that Regional Trade Agreements (RTAs) that include TRIPS-plus provisions can have on research and access in developing countries, the need to advise developing countries on ways to exploit the flexibilities allowed in the patent system to promote access, and that the current patent protection rationale must apply differently in developed and developing countries. **The next Meeting of the Commission is scheduled to for 1 – 2 September 2005.**

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

**52.** The third and final meeting of the Intergovernmental Committee of Experts on the Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions to finalize the drafting of the terms for a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions took place on 25 May – 5 June, 2005. **The Plenary recommended presenting the finalized text to the General Conference in its October 2005 session, pending the decision of the Executive Board at its September 2005 session.**

**53.** At the last session, discussions proceeded on the basis of a "composite text" reflecting the state of progress at the end of the Second Session of the Intergovernmental Meeting and a "consolidated text" that were prepared by the Chairperson of the Plenary.<sup>54</sup> There were several references to intellectual property had been included in the composite and consolidated text that raised important concerns. **All elements of the previous drafts that dealt with intellectual property rights have now been removed from the substantive clauses of the Convention.** The only reference to intellectual property is now in the preamble on the importance of the protection of indigenous knowledge.

C. The Economic and Social Council (ECOSOC)

**54.** The Economic and Social Council of the United Nations held a conference titled “Intellectual Property and Development” on June 7, 2005.<sup>55</sup> The conference included the attendance of high – ranking officials from ECOSOC, - **the President H.E. Ambassador Munir Akram-, WTO, WIPO and UNCTAD.** The conference sought to bring the three organizations which, as noted by the paper issued for the Conference, “are most concerned with the issues of intellectual property, development and trade” and have “a development dimension within their areas of competence” together, “to discuss policy directions, priority areas, strategies and deliverables”. ECOSOC seeks to function as a high-level forum for development cooperation to promote greater coherence among the development activities of all actors and strengthen the links between the UN system’s operational work and its normative and analytical work, process in which engaging more actively the specialized agencies is deemed crucial. As part of this overall objective, ECOSOC intends to further raise awareness of the linkages between intellectual property, trade and development.

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<sup>54</sup> See UNESCO website on the 3<sup>rd</sup> expert meeting on the Draft Convention, available at [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=26852&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=26852&URL_DO=DO_TOPIC&URL_SECTION=201.html)

<sup>55</sup> See Issue Paper “Intellectual Property and Development”, prepared by ECOSOC, available at [www.un.org/docs/ecosoc/meetings/2005/docs/ipdissuepaper.pdf](http://www.un.org/docs/ecosoc/meetings/2005/docs/ipdissuepaper.pdf).

D. The United Nations Human Rights Bodies and Committees

55. The CESCR -the UN body of independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR)- held its thirty-fourth Session on April 25 to May 13, 2005. On the 22<sup>nd</sup> of November 2004 the Committee began its consideration of a Draft General Comment on article 15 (1) (c) of the ICESCR, on “the right 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”.<sup>56</sup> At the last session **the CESCR decided to continue its consideration of Draft General Comments on article 15 (1) (c) at its 35th session from 7 - 25 November 2005.**<sup>57</sup>

56. The UN Committee on the Rights of the Child -the UN body of independent experts that monitors implementation of the Convention on the Rights of the Child (CRC) - in its Thirty-Ninth Session, expressed concern of the **possible negative role that Free Trade Agreements may have on the rights of children, in critical areas such as access to affordable medicines.**<sup>58</sup> States are required to take into account the best interest of the child at all levels of decision-making, including trade policy in fulfilling their obligations under the Convention, which under the child’s right to health (article 24) and the Child’s right to life (article 6), include obligations on access to affordable medicines and health care services.<sup>59</sup>

C. World Summit on the Information Society (WSIS)

57. The second WSIS will be take place in Tunisia, on 16 – 18 November 2005. As part of the preparatory process for the summit, informal open-ended consultations on implementation mechanisms and the way ahead after WSIS took place on Monday, 13 June 2005 in Geneva. **The third meeting of the Preparatory Committee will be held on September 19-30, 2005 in Geneva.** All governments and stakeholders are invited to continue making contributions to the third preparatory meeting.

F. Food and Agriculture Organization (FAO)

58. An Inter-sessional contact group was established by the Interim Committee for the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)<sup>60</sup> to develop a draft Standard Material Transfer Agreement (SMTA) for consideration by the Governing Body. The SMTA will define mutually agreed terms and conditions for the transfer of genetic material on the basis of the principles defined in the ITPGRFA; in particular that the listed plant genetic resources are freely accessible for research and breeding efforts on the basis of the SMTA, and benefit sharing

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<sup>56</sup> For more information on the previous session of the CESCR, see South Centre and CIEL IP Quarterly Update: Fourth Quarter 2004.

<sup>57</sup> See <http://www.ohchr.org/english/bodies/cescr/docs/note34.doc>.

<sup>58</sup> See e.g., the Concluding Observations of the Committee on the Rights of the Child with regards to the Report submitted by Nicaragua, document CRC/C/15/Add., available at <http://www.ohchr.org/english/bodies/crc/crcs39.htm>.

<sup>59</sup> See “United Nations Children’s Committee Warns About FTA Threats to Access to Affordable Medicines and Social Services for the Poor”, June 2005, available at 3 [www.3dthree.org](http://www.3dthree.org).

<sup>60</sup> For a description of the ITPGRFA and its links to the intellectual property and development discussion, please see South Centre and CIEL IP Quarterly Update: Third Quarter 2004.

is required. **The Contact Group is to hold its first meeting on July 18 – 25, 2005, in Hammamet, Tunisia, to discuss the First Draft Standard Material Transfer Agreement.**<sup>61</sup>

G. Second South Summit

**59.** On June 12 – 16, 2005, the countries of the G77 and China<sup>62</sup> at the Second Doha Summit in Doha, Qatar, with the main aim of promoting collaboration between the members in view of the UN High Level Plenary schedule to take place in September 2005. The Summit in Doha focused on sustainable development in the countries of the South and alleviating poverty in least developed countries. The first South-South Summit was held in Havana, Cuba in 2000.

**60.** At the Summit, G77 and China adopted the Doha Declaration and the Doha Plan of Action, both which include important references and determine actions to be taken on intellectual-property related issues. The Declaration for example, urges the High Level Plenary Meeting of the General Assembly to “work expeditiously towards integrating the development dimensions in the rule making in the intellectual property regime that is development oriented and that facilitates the transfer of technology and knowledge to developing countries, and, in this context, to also work towards a legally binding international instrument on the preservation, protection and promotion of traditional knowledge and genetic resources.”<sup>63</sup> It also calls for “accelerating the negotiations on the development-related mandate concerning the TRIPS agreement in the Doha Ministerial Declaration, especially the amendments of the TRIPS Agreement in order for intellectual property rules to fully support the objectives of the convention on Biological Diversity as well as trade-related aspects of Intellectual Property Rights and Public Health.”<sup>64</sup>

**61.** The Doha Plan of Action, on the other hand, notes the need for action “to enhance the development dimension of the international Intellectual Property Rights System, taking into account the different levels of development of developing countries with a view of ensuring affordable access to necessary basic products, including medicines and educational tools and software, the transfer of knowledge, the promotion of research and stimulation of innovation and creativity.” In this regard, the Plan of Action calls “on WIPO, as a UN Agency, to include in all its future plans and activities including legal advice a development dimension that includes promoting development and access to knowledge for all, pro-development norm setting, establishing development friendly principles and guidelines for the provisions of technical assistance and the transfer and dissemination of technology.”<sup>65</sup>

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

**62.** Intellectual property continues to be central in the economies of the United States and the EU, and consequently, on their trade policies. Both countries thus continue to develop new ways to build their leverage on developing countries in the area of intellectual property, which is particularly troubling in the context of the new round of multilateral trade negotiations. In this regard, the United States published its Special 301 Report “on the adequacy and effectiveness of intellectual

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<sup>61</sup> The documents to be discussed in the First Meeting are available at <http://www.fao.org/ag/cgrfa/cgmta1.htm>.

<sup>62</sup> For more information on G77 see <http://www.g77.org/>.

<sup>63</sup> See Doha Declaration adopted at the Second Doha Summit, 12 – 16 June 2005, Doha, Qatar, Document G-77/SS/2005/1, Para 15(xiii).

<sup>64</sup> Ibid, Para 15 (xiv).

<sup>65</sup> See Doha Plan of Action, adopted at the Second South Summit, 12 – 16 June 2005, Doha, Qatar, Document G-77/SS/2005/2 Para 8 (vii).

property rights (IPR) protection around the world”, on April 29, 2005.<sup>66</sup> This year the countries’ on the Priority Watch List are Argentina, Brazil, China, Egypt, India, Indonesia, Israel, Kuwait, Lebanon, Pakistan, the Philippines, Russia, Turkey, and Venezuela. The particular listing merits serious questions. Negotiations at the bilateral and regional level have become one of the main venues for extracting “TRIPS-plus” concessions. The renewal of the Trade Promotion Authority (TPA) on July 1, 2005 will continue to facilitate the conclusion of these agreements. The following section highlights the latest developments in these bilateral and regional negotiations in the second quarter of 2005.

#### A. Free Trade Agreements involving the United States

**63.** 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. Future negotiations are expected with Egypt, South Korea, Malaysia, and Indonesia. The latest intellectual property-related developments in these negotiations include:

- *US - CAFTA.* The US Senate endorsed the agreement on March 30, 2005, after long uncertainty and strong lobbying efforts on behalf of the Bush Administration. The vote was 54 – 45 in favor of the Agreement. The last step in the process is for the House to give the final approval in July. It is not yet clear what the vote will be. The future of CAFTA and the Bush strategy on FTAs are at stake, given that the momentum on FTA negotiations has come to languish, and opposition growing both in the US and in its developing country counterparts.
- *US-Thailand.* The fourth Round of negotiations are due to take place on July 11-15, 2005 in Great Falls, Montana, United States. Among the most contentious issues will be data protection related to pharmaceuticals.
- *US-Andean Countries.* The Tenth round of negotiations took place on June 6-10 in Guayaquil, Ecuador, with little progress achieved. No advances were recorded on the work of the working groups on the critical issues; agriculture, market access and intellectual property. A Mini-Round on Agriculture has been scheduled for July 11 – 13, 2005 in Washington D.C, followed by the Eleventh round of negotiations to take place July 18 – 22 in Miami.

#### B. Free Trade Agreements involving the European Union

**64.** The promotion and enforcement intellectual property protection is increasingly becoming a central element of EU bilateral trade policy, as has been announced by Directorate-General for Trade Policy (DG Trade).<sup>67</sup> The EU has concluded FTAs with Algeria, Bangladesh, Chile, Egypt, India, Israel, Jordan, Mexico, among others. The intellectual property-related developments in the second quarter of 2005 in negotiations involving the EU include:

- *Negotiations between the EU - MERCOSUR.* The EU and the MERCOSUR block of countries have been attempting to set up an FTA for the past five years. While talks officially resumed on October 20, 2004 in Lisbon when they decided to hold a Ministerial Meeting in the first Quarter of 2005, so far no formal meeting has been scheduled for 2005. However, Spain and Portugal are pressing to restart negotiations.
- *Negotiation of EPAs (Economic Partnership Agreements).* The EU seeks to sign a large number of EPAs before early 2008, deadline which marks the expiry of the WTO waiver

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<sup>66</sup> The United States’ Special 301 Report is available at <http://www.ustr.gov>.

<sup>67</sup> For a description of the EU trade policy objectives with regards to bilateral agreements and intellectual property please see South Centre and IP Quarterly Update: Fourth Quarter 2004.

authorizing the EU to offer preferential access to ACP products. Negotiations on EPAs have been picking up in several of the different regions; Caribbean, Southern African Development Community (SADC), Eastern and Southern Africa (ESA), West Africa, Central Africa and the Pacific,<sup>68</sup> with civil society organizations expressing increased opposition.

*EU – SADC:* EPA negotiations with SADC countries began in July 2004. The latest round of negotiations took place in Brussels on 13-15 June, where issues such as rules of origin and trade facilitation were discussed. The next senior official meeting is scheduled for mid-July in Brussels.

*EU – ESA:* Regional negotiations were opened in February 2004 in Mauritius. On May 12-13, 2005 a joint senior-level brainstorming meeting took place. A ministerial level meeting is planned to take place at the end of 2005.

C. Other Free Trade Agreement negotiations

**65. SACU – EFTA FTA.** Negotiations between SACU (Southern Africa Customs Union) and EFTA (Iceland, Liechtenstein, Norway and Switzerland) began in November 2003 EFTA and SACU entered into direct negotiations. Six negotiating sessions have been held since. There were no major developments during the second quarter of 2005. The negotiations are expected to be concluded sometime in July, 2005.

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<sup>68</sup> See EPA Newsletter No.7, European Commission, Brussels, May 2005, available at [http://europa.eu.int/comm/trade/issues/bilateral/regions/acp/nswl07\\_en.htm](http://europa.eu.int/comm/trade/issues/bilateral/regions/acp/nswl07_en.htm).