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

CONTENTS

I. INTRODUCTION

1. Developing countries face complex challenges in the evolving scenario of international intellectual property policy-making. Multiple fronts of discussions and negotiations require a coordination of strategies and positions that is not always easy to achieve. Nonetheless, since the shift in fora has been carefully designed by developed countries to take advantage of these difficulties and thus attempt to circumvent the options, flexibilities, and unresolved issues present at the multilateral level, it is crucial to develop a global view of international intellectual property standard-setting and to take the larger context into consideration during any negotiation or discussion.

2. The present overview 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, the overview will focus on a significant topic in the intellectual property and development discussions, in this case non-violation complaints, to demonstrate the importance of following developments in different fora and the risks of lack of coordination between the various negotiations. Thus, Section II of the present note will analyze the treatment of non-violation complaints in bilateral and regional trade agreements and the concerns it raises for on-going discussions at the World Trade Organization (WTO). Then, Section III will provide a brief factual update of intellectual property-related developments in a number of different fora. Similar updates will be made available by the South Centre and the Center for International Environmental Law (CIEL) to developing country delegates and their capitals on a quarterly basis and may also be more widely circulated when appropriate.

II. NON-VIOLATION COMPLAINTS IN REGIONAL AND BILATERAL TRADE AGREEMENTS: MAKING THE WTO PROCESS IRRELEVANT?

A. Introduction

3. While developing countries have augmented their participation and influence in international discussions on intellectual property, with important attainments as a result, developments at the bilateral and regional levels, threaten to make those efforts, and those accomplishments, increasingly irrelevant. The trend of countries such as the United States turning to bilateral and regional agreements to build on the minimum standards achieved at the international level has several implications for developing countries. The "TRIPS-plus" provisions are not limited to those requiring countries to implement standards more extensive than those set out by the TRIPS Agreement. In addition, the process of forum shifting causes many of the flexibilities of the TRIPS Agreement to be eroded and many of the ongoing discussions to become foreclosed. The question of applicability of non-violation complaints in the context of intellectual property is a case in point. While it still being debated at the international level, it has been made applicable to intellectual property disputes in a number of bilateral free trade agreements with potentially serious consequences for the efforts of developing countries in the WTO to make non-violation complaints not applicable to intellectual property.

4. Bilateral agreements such as the recently concluded US-Chile, Central American Free Trade Agreement (CAFTA), and US-Australia, for instance, irrevocably place intellectual property within the scope of non-violation complaints. Discussions for a Free Trade Area of the Americas (FTAA) Agreement may also result in the applicability of non-violation complaints in the intellectual property framework. The effects of these complaints in relation to the rights of

Parties to regulate intellectual property in the public interest could be significant. In addition, bilateral agreements eliminate particular elements of dispute settlement rules as they apply to non-violation, another issue the United States has long advocated. The loss of these characteristics, designed to protect countries from challenges based on an inherently ambivalent claim, may prejudice developing countries with scarce resources to respond to an increasing number of vague claims, as well as make them more vulnerable to pressure to refrain from using flexibilities offered by intellectual property standards.

5. The purpose of this note is thus to focus on non-violation complaints to exemplify the challenges faced by countries in light of trends in current international intellectual property policy setting. Section B will briefly describe the discussion as it has occurred at the international level. Section C will analyze the developments at the bilateral and regional level and the concerns they raise for developing countries. The conclusion will summarize the main points and highlight the risks of such developments for ongoing discussions at the WTO.

B. Non-violation Complaints and the TRIPS Agreement

6. The suitability of establishing non-violation complaints is not controversial only in the intellectual property context but in the WTO system in general.[1] Under Article XXIII of GATT 1994, WTO Members can challenge one another not only for actions contrary to their obligations under the WTO agreements, but also for actions that, though consistent with these agreements, otherwise nullify or impair a benefit arising from them. While such an ambiguous remedy played a key role in the GATT 1947 system, which sought to preserve the value of tariff concessions from measures taken in the many areas it did not cover, its place seems uncertain in a system where the concern of non-tariff barriers has been addressed through an extensive network of substantive rules. Moreover, non-violations complaints are seen as an obstacle to the predictability and impartial dispute settlement the WTO system set out to achieve, thus endangering the legitimacy of the system.

7. The potential application of non-violation complaints to the TRIPS Agreement increases these apprehensions. As has been repeatedly stated by developing countries in the TRIPS Council, the application of non-violation and situation complaints to the TRIPS Agreement raises fundamental concerns.[2] The application of non-violation complaints is, first of all, unnecessary, as the TRIPS Agreement is a *sui-generis* agreement not designed to protect market access or the balance of tariff concessions but rather to establish minimum standards of intellectual property protection. Moreover, these minimum standards were also the maximum value many developing countries were prepared to accept. Any balance of rights and obligations is thus already reflected in the Agreement's principal obligations and flexibilities. The use of non-violations complaints, insofar as it would further restrict regulation in the public interest (such as that relating to public health, nutrition, the transfer of technology and other issues fundamental to socio-economic and technological development), would upset the delicate balance of rights and obligations in the TRIPS Agreement by elevating private rights over the interests of the users of intellectual property and over other important public policy considerations.

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[1] Stilwell and Tuerk, "Non-violation Complaints and the TRIPS Agreement: Some Considerations for WTO Members" T.R.A.D.E. Occasional Paper 1(South Centre, 2000).

[2] See, e.g., the communication from Argentina, Bolivia, Brazil, Colombia, Cuba, Ecuador, Egypt, India, Kenya, Malaysia, Pakistan, Peru, Sri Lanka and Venezuela titled "Non-violation and Situation Nullification or Impairment under the TRIPS Agreement" dated October 30, 2002 (IP/C/W/385).

8. The application of non-violation complaints to the TRIPS Agreement also raises systemic concerns, as it threatens to introduce incoherence among WTO agreements by allowing something which a WTO Member has agreed to accept in one part of the single undertaking to be challenged on the basis that it could nullify or impair benefits in another area. Finally, the unpredictability of non-violation complaints would be even greater in the intellectual property field as there is no guidance from jurisprudence, which is why the Appellate Body has stated that the issue of the applicability must be resolved by Members.[3]

9. Discussions in the TRIPS Council, however, in spite of the large number of countries that share these concerns, have not yet been able to resolve the issue. The vague language of Article 64 of the TRIPS Agreement, which establishes a moratorium on the application of non-violation complaints and directs the Council for TRIPS to examine the scope and modalities for such complaints and submit its recommendations to the Ministerial Conference for approval, is still being debated. Nevertheless, in general there has been no significant change in the country positions on this issue, which was confirmed by the language in para. 22 of the Derbez text seeking to maintain the status quo.

C. Non-violation Complaints at the Regional and Bilateral Levels

10. The examination of the suitability of non-violations complaints within the intellectual property context currently taking place at the WTO, however, is increasingly being precluded by bilateral and regional trade agreements. Such agreements not only apply non-violation complaints to their intellectual property provisions, but the issue is, in many cases, agreed to without any debate. One of the reasons the issue has sometimes been overlooked at the bilateral level is that it is not dealt with in the intellectual property chapter of these agreements. Rather, it is the dispute settlement chapters that explicitly establish that if Parties consider that any benefit under a provision of the Chapter on Intellectual Property Rights is being nullified or impaired, even by a measure not inconsistent with the Agreement, there is recourse to dispute settlement.[4]" Since most chapters are negotiated in a separate manner by different experts, the issue of the application of non-violation complaints to intellectual property is often neglected.

11. Another development that could further obscure the application of non-violation complaints is the elimination of the conditions established for such complaints at the multilateral level. At the WTO, Article 26 of the DSU imposes important procedural limitations to prevent misuse of non-violation complaints. Two crucial conditions are that the complaining Member must present a detailed justification in support of a non-violation complaint and that, where a WTO-consistent measure has been found to nullify or impair benefits of an agreement, there is no obligation to withdraw the measure.[5] In light of the vagueness of non-violation complaints, requiring the complaining Member to substantiate their case is fundamental to prevent the abuse of the remedy. Moreover, WTO jurisprudence has explained that the justification must be tangible and concrete, going beyond a mere description of the measures, and must establish a causal relationship between the invoked measure and the nullified benefits. In addition, since many of the measures challenged by non-violation complaints may be responding to important public policy objectives, WTO rules establish that, even if the measure if found to nullify or impair expected benefits, the respondent is under no obligation to withdraw the measure. While

[3] See the India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, Report of the Appellate Body, WT/DS50/AB/R, at para. 42.
[4] Annex 22.2 of the US-Chile FTA, Annex 20.2 of CAFTA.
[5] Article 26.1 (a) and (b) of the DSU.

the panel or Appellate Body may recommend that the Member make a mutually agreed compensation, its sovereign rights to regulate are thus preserved.

12. These two elements are lost in bilateral trade agreements. In agreements such as US-Chile, CAFTA, and US-Australia, the rules of procedure for dispute settlement are not pre-established but will be later determined by a "Free Trade Commission" or "Joint Committee" created to administer the agreement. Given the fact that the United States has repeatedly expressed its rejection of a particular procedure for non-violation complaints, it is likely these rules of procedure will follow that general tendency. Moreover, the agreements already establish that, if the panel determines a measure is causing nullification or impairment despite being consistent with the agreement, the resolution should, whenever possible, eliminate the nullification or impairment.[6]

13. Nonetheless, these bilateral agreements establish some limitations for non-violation complaints that must be taken into account. In the US-Chile FTA and in CAFTA, for instance, benefits expected under the intellectual property chapter cannot be invoked with respect to measures taken under the general exception provisions. That is, measures taken under Article XX of GATT 1994 (incorporated, along with its interpretive notes, into the agreements *mutatis mutandis)*, cannot be challenged on the basis of nullification or impairment of benefits expected under the intellectual property provisions.[7] Another example can be found in the US-Australia FTA, where Parties can agree to modify dispute settlement provisions as they apply to non-violation complaints under the intellectual property chapter.[8]

14. The case of the FTAA is a particular one as most of its text is still in brackets. Thus, the dispute settlement chapter could still allow for non-violation complaints to be inapplicable in the context of intellectual property. In fact, the subparagraph in Article 3 of the dispute settlement chapter that would enumerate the provisions that cannot be invoked for non-violation complaints still has no language. Moreover, tentative language in other parts of that chapter would maintain some of the modifications of the dispute settlement procedure for non-violation complaints, such as the lack of obligation to withdraw the measure in case of an adverse ruling. However, other tailoring of the dispute settlement procedure for non-violation complaints would disappear. For example, one proposed provision would ensure that the burden of proof in non-violation complaints is not any greater than in violation complaints.

D. Conclusion

15. Though a large number of countries share concerns over the potential application of non-violation complaints to the TRIPS Agreement, discussions currently taking place at the WTO may be of increasingly minor consequence as bilateral and regional trade agreements decide the issue in their provisions. Agreements such as US-Chile and CAFTA, for instance, are incorporating intellectual property into the areas covered by non-violation complaints and further complicating the situation by equalizing the process for these complaints with that of violation complaints. If bilateral and regional trade agreements continue to build on the standards of the

[6] Article 22.14 of the US-Chile FTA, Article 20.15 of CAFTA, Article 21.10 of US-Australia.

[7] Moreover, the general exceptions provisions clarifies that Article XX(b) of GATT 1994 is understood to include environmental measures necessary to protect human, animal, or plant life or health, and that Article XX(g) of GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible natural resources.

[8] Article 21.2 of the US-Australia FTA.

TRIPS Agreement and to restrict its flexibilities, there is a clear danger that the WTO discussions will soon become an academic exercise. Coordination between strategies and efforts at the WTO and bilateral context are thus the only way to ensure these issues are resolved in the most appropriate forum and in a manner supportive of development interests.

III. AN OVERVIEW OF RELEVANT IP DEVELOPMENTS IN VARIOUS FORA

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

III.1 WORLD TRADE ORGANIZATION (WTO)

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

17. Activities in the TRIPS Council during 2004 have so far been fairly subdued. The TRIPS Council meeting scheduled for March 8 - 9, in fact, only lasted a day. As in 2003, these developments reflect in part the growing political profile of intellectual property negotiations in other fora, such as the World Intellectual Property Organization (WIPO) and bilateral and regional trade agreements, but also reflect the continuing informal consultations on some of the main outstanding issues. Nonetheless, some developing countries did attempt to move the debate forward on the key issue of the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD). Such efforts are essential so that the ebb of discussions in the TRIPS Council does not undermine the previous work of developing countries. Equal consideration must be paid to ensure such work is not undermined by negotiations in WIPO and in the bilateral arena. **The next TRIPS Council is scheduled for June 15-17, with the following key issues still on the table:**

- TRIPS and Health: At the last TRIPS Council meeting, the outgoing Chair reported on informal consultations on the proposed amendment of the TRIPS Agreement to implement paragraph 6 of the Doha Declaration on TRIPS and Public Health. The issue, however, was not formally discussed, as wide divergences remain as to the content, legal form, and timing of an amendment. For example, the advantages of an amendment over the current waiver are still unclear. While the Secretariat indicated it will study the legal implications of the different forms an amendment could take (in particular how the US footnote approach would affect the legal status of the Chair's statement), it did stress that clarification of the issue was ultimately a responsibility of Members. Ambassador Joshua Law, of Hong Kong China, current Chair of the TRIPS Council, will continue informal consultations before the next TRIPS Council, but an amendment by the June deadline seems unlikely.
- Patentable Subject Matter and Exceptions to Patentability: A proposal by Brazil, Bolivia, Cuba, Ecuador, India, Pakistan, Peru, Thailand and Venezuela attempted to facilitate a more focused and result-oriented discussion by concentrating on the need for coherence

between the TRIPS Agreement and the CBD, an issue that developing countries have repeatedly raised in the TRIPS Council. Specifically, the proposal deals with the concern that the TRIPS Agreement allows the granting of patents for inventions that use genetic material and associated knowledge without requiring compliance with the provisions of the CBD. On the basis of points made by delegations in previous discussions, the proposal puts forth a checklist of elements that need to be addressed to prevent misappropriation. These elements relate to disclosure of source and country of origin of biological resources and traditional knowledge and of evidence of prior informed consent and benefit sharing under relevant national regimes. The proposal was supported by Zimbabwe, China, South Africa and Kenya demonstrating the cross-regional support for the issue of disclosure to be discussed in the TRIPS Council. Nonetheless, Members such as the United States and the EU continue to advocate prioritizing work conducted at the Intergovernmental Committee in WIPO. The issue will also be included in the informal consultations led by the Chair of the TRIPS Council.

- Non-Violation and Situation Complaints: No specific recommendations on this issue were forwarded to the Cancun Ministerial Conference and the General Council meeting of 15th December also did not provide any clear direction (which may explain why the issue was not included in the agenda of the last TRIPS Council). However, in general there has been no significant change in the country positions on this issue, which was confirmed by the language in para. 22 of the Derbez text, intended to maintain the status quo. Consequently, though the status of the moratorium may be considered uncertain, the issue is still pending and a large number of countries consider that the moratorium continues until the examination of scope and modalities takes place.
- Transfer of Technology to Least Developed Countries: According to the February 2003 Decision, reports by developed countries should have been submitted by the end of the year and the Council reviewed them in the last meeting of the year. While some developed countries submitted reports, not all of them did and the reports that were submitted did not show any significant improvement from the previous practice. At the same time, no serious review has yet taken place in the TRIPS Council.

B. Working Group on Transfer of Technology

18. The objective of the WTO Working Group on Transfer of Technology is to help developing countries in the implementation of policies that facilitate the transfer of technology, in particular for their export-oriented activities. One of the key concerns expressed during discussions of the Working Group refers to the linkage between intellectual property and technology transfer, as noted for example in the Report of the Working Group on Trade and Transfer of Technology to the General Council (WT/WGTTT/5), of July 14, 2003. Issues raised include the development impacts of the patenting of technologies developed out of public sector funding. **The next meeting of the Working Group is scheduled for May 3, 2004.**

III.2 WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

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

19. Negotiations on the draft treaty continue at the Standing Committee on the Law of Patents (SCP) simultaneously with negotiations on the draft regulations and the draft practice guidelines. While earlier sessions of the SCP showed an asymmetrical participation of developing countries in relation to developed countries, the past few meetings have been characterized by increasing developing country involvement and influence. In the meantime, different groups of patent owners, patent lawyers, and other user organizations have attempted to find ways to jump-start the negotiations. These initiatives have been collected by the International Bureau (IB) in document SCP/10/8 and share the characteristic of trying to limit, though not to the same extent, the scope of the draft SPLT, by cutting out some of the more controversial issues. The proposal by Trilateral patent offices,[9] for instance, identifies issues such as prior art, grace period, novelty, inventive step/non-obviousness as ripe for immediate consensus, and suggests the discussion of other issues such as first-to-file/first-to-invent, patentable subject matter/technical character and utility/industrial applicability be postponed to a later stage. All suggestions in document SCP/10/8 seem in fact to assume that the provisions that have not been the focus of discussion so far have thus been accepted by all Members of the SCP, ignoring the broader concerns raised by developing countries regarding the international harmonization of patent law. **The next session of the SCP is scheduled for May 10-14, 2004.**

B. The Patent Cooperation Treaty (PCT) Reform

20. The process for reforming the PCT started in 2000 to simplify and streamline procedures while aligning it to the new Patent Law Treaty standards. A second stage sought by the United States and other developed countries would involve a more fundamental overhaul of the PCT system to facilitate global patenting. Proposals in past meetings seeking to move the process forward, including the idea of an "optional protocol," have been among the most debated issues, as has the proposal presented by Switzerland on disclosure of source of origin of genetic resources and traditional knowledge in patent application. **The sixth meeting of the Working Group on Reform of the PCT will be held from May 3 to 7, 2004, and several proposals dealing with these issues will be put forth.** A proposal by the European Patent Office (EPO) – document PCT/R/WG/6/7 – seeks to further accelerate the PCT reform by the greater use of the electronic forum to deal with drafting matter. Thus, the EPO envisions that proposals be posted in advance of meetings, giving the IB the chance to incorporate drafting suggestions, and that those proposals "unlikely to arouse any political sensibilities" and raising no objections be then put directly to the PCT Assembly for adoption. Switzerland, in light of the significant support for their previous proposal, is preparing a new submission on disclosure. The submission will likely not modify the substance of the previous proposal, but rather complement it and provide more detail, particularly regarding the terms "source" and "traditional knowledge."

[9] The three are the United States Patents and Trademarks Office (USPTO), the European Patent Office (EPO) and the Japanese patent office.

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

21. The sixth session of the IGC took place from March 15 to 19, 2004. Despite a new mandate which substantively broadened the scope of work of the Committee, instructing it "accelerate its work," "focus on the international dimension" and "exclude no outcome, including the possible development of an international instrument or instruments in this field," the session was characterized by a division between countries stating that the IGC is a place to share national experiences and discuss the issues in a general manner and others affirming that the Committee should move to concrete actions at the international level. These divergences were reflected in the different positions on how to deal with the international dimension, whether as an integral part of the issues covered by the IGC or as a separate issue. Nevertheless, a proposal by the African Group putting forth objectives, principles, and elements of a possible international instrument was accepted by many delegations as a basis for future discussion. Another controversial issue was the appropriate way to respond to the invitation presented to WIPO by the Seventh Conference of the Parties (COP-7) of the CBD. Many developing countries, concerned about the implications of discussions on disclosure being limited to the IGC, affirmed that it was the WIPO Assemblies, rather than the IGC, that should respond, while the European Union and others argued for the IGC to make the decision, adding that it was "the only body with a legitimate mandate to discuss these issues." **As a result of this discussion, the invitation will go to the Assemblies, with no consensus reached as to whether the IB should start the work in the meantime. The IB will prepare, nonetheless, a factual report to enable the Assemblies to make a decision.** Whether the invitation will still be presented to other bodies, such as the Working Group on the Reform of the PCT, remains unclear.

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

22. The WIPO "Digital Agenda," approved by Member States in 1999, is geared, *inter alia*, to modify the international legislative framework by adapting broadcasters' rights to the digital era and extending the principles of the WIPO Performers and Phonograms Treaty to audiovisual performances. The SCCR is currently discussing the possibility of a new treaty to deal with the rights of broadcasting organizations. The proposed treaty would create a system of ownership for material transmitted over wireless means such as television, radio and satellite, as well as wired communications over cable networks, and also over Internet computer networks. A consolidated text of proposals for this treaty will be presented by the Chairman of the SCCR and the IB at the next meeting, at which time a decision will be made on whether a diplomatic conference should be organized to conclude negotiations. The consolidated text covers all the necessary articles for a new treaty and each provision is preceded by explanatory comments. The IB plans to develop a basic proposal for the treaty after assessing the outcome of discussions on this text. Informal discussions continue on the need to update the rights of performers in their audiovisual performances, an issue left unresolved by the 2000 diplomatic conference on the protection of audiovisual performances. **The next meeting of the SCCR is on June 7-11, 2004.**

III.3 OTHER MULTILATERAL FORA

A. Convention on Biological Diversity (CBD)

23. COP-7 of the CBD took place in February, 2004. Decisions in several areas have a direct link to intellectual property issues. One of the major decisions, for instance, mandated the

Working Group (WG) on access to genetic resources and benefit-sharing (ABS) to elaborate and negotiate an international regime on ABS. The terms of reference annexed to the decision include provisions on process, nature, scope, and elements, establishing a broad enough framework, however, to enable further talks. The ABS WG will carry out its work in close collaboration with the WG on Article 8(j), dealing with indigenous issues, which was mandated to make recommendations to ensure that the ABS regime includes sui generis systems and measures for the protection of TK. Moreover, decision UNEP/CBD/COP/7/L.19/Rev.1 requests the Working Group on Article 8 (j), in collaboration with relevant international organizations, to, inter alia, consider and develop elements for *sui generis* systems for the protection of traditional knowledge and explore the conditions under which the use of existing intellectual property rights can contribute to reaching the objectives of Article 8(j). **The ABS Working Group will hold two sessions before COP-8. The Working Group on Article 8 (j) is scheduled to meet once before COP-8.**

24. In both these discussions, the role of WIPO was particularly controversial. In the context of an international regime on ABS, several international organizations are invited to cooperate with the WG in elaborating the international regime, but a specific reference to WIPO was much debated. The compromise text invited WIPO, rather than just the IGC, to address "where appropriate" the interrelation of access to genetic resources and disclosure requirements in intellectual property applications, while ensuring "this work is supportive of and does not run counter to the objectives" of the CBD.[10] Moreover, the decision also called on UNCTAD and other relevant organisations to examine these issues. In the decision taken in reference to Article 8 (j) issues, WIPO was invited to report the results of relevant work, particularly regarding the protection of TK and its recognition as prior art. WIPO was also referenced in the decision regarding technology transfer, in which it was invited, along with UNCTAD and other organizations, to prepare technical studies on the role of intellectual property in technology transfer in the context of the CBD. **The next meeting of the COP-8 will be held in Brazil in the first half of 2006.**

B. Food and Agriculture Organization (FAO)

25. In March, 2004, twelve European countries and the European Community ratified the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), which will therefore enter into force on June 29, 2004. Once the treaty comes into force, a COP will be called and a Governing Body, composed of all Contracting Parties, will be established with the responsibility for the full implementation of the ITPGRFA. The Treaty sets a framework for the conservation and sustainable use of plant genetic resources for food and agriculture, in harmony with the CBD, and establishes institutional machinery to oversee the implementation of its provisions. In particular, the Treaty provides for a multilateral system of facilitated access and benefit sharing for selected resources. Another significant provision is the explicit recognition of Farmers' Rights.

26. Some of the most important implementation issues in the ITPGRFA relate to intellectual property. Access to crops in the multilateral system, for instance, is subject to certain conditions, including that "recipients shall not claim any intellectual property or other rights that limit the facilitated access to the plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the multilateral system." Whether the provision means

[10] The invitation was discussed in WIPO's IGC, as described in section III.2 (C) above, in its session of March, 2004.

that no intellectual property rights of any sort can be claimed or that intellectual property rights could be obtained *as long as* those rights do not limit the facilitated access is still uncertain. In addition, facilitated access of plant genetic resources are to be provided on the basis of a standard Material Transfer Agreement (MTA). The ITPGRFA does not provide guidance on the exact content of an MTA, but it is expected that some of the key provisions will devote attention to intellectual property rights and benefit sharing.

C. World Health Organization (WHO)

27. Last year, the World Health Assembly (WHA) established a Commission on Intellectual Property, Innovation and Public Health (CIPIH) *"…to produce an analysis of 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…"* The WHO drafted the terms of reference for the Commission and selected Members on the basis of demonstrated expertise and wide experience in the issues under consideration.[11] The first meeting of the CIPIH took place on April 5 – 6, 2004, with Commission members taking decisions on the work plan of the Commission, the calendar of upcoming meetings and other relevant issues. According to the WHA resolution, **the CIPIH is to submit a progress report to the Fifty-seventh WHA and a final report with concrete proposals to the Executive Board at its 115th session (January 2005).**

28. The work of the Commission will complement WHO's work on essential drugs and medicines policy, within which WHO has addressed the potential impact of intellectual property rights on access to pharmaceuticals. Another area of focus within the essential drugs and medicines team is traditional medicine, including the intellectual property rights of traditional practitioners over traditional medicine formulas and texts. In addition, under WHO's Human Genetics Programme there is on-going work **on the impact of gene patents on access to genetic technologies in developing countries.** In particular, a paper has been commissioned by the WHO to review the literature on this subject.

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

29. Though UNCTAD has played a key role in international intellectual property discussions, conducting work fundamental to understand their development implications, its current efforts on the issue are limited to certain specific areas. The major focus has been on traditional knowledge, including a February, 2004 workshop, organized along with the Commonwealth Secretariat, on the "**Elements of National Sui Generis Systems for the Preservation, Protection and Promotion of Traditional Knowledge, Innovations and Practices and Options for an International Framework"**. Other initiatives include a joint capacity building project on intellectual property rights and sustainable development with the International Centre for Trade and Sustainable Development (ICTSD), a Project on Dispute Settlement in International Trade, Investment and Intellectual Property, and the E-commerce and Development Report that, in its 2003 edition, stated that free and open-source software may "dramatically improve the digital inclusion of the developing world."

30. UNCTAD XI, the Conference's highest decision-making body, will take place from June 13-18, 2004 in Brazil, and will establish UNCTAD's mandate for the next four years.

[11] Members are renowned experts in the field, such as Professor Carlos Correa of the South Centre.

One of the proposals scheduled for discussion is that UNCTAD undertake analysis on strengthening the development dimension in international intellectual property rule-making, including effective transfer of technology to developing countries; protection of TK, genetic resources, and folklore; and fair and equitable benefit sharing. In the pre-negotiating text, however, comments by the United States, Switzerland, and the European Union have attempted to condition any work on genetic resources and TK by references to other institutions, particularly WIPO. Moreover, there are broader concerns about objections raised by the United States to the inclusion of intellectual property in the mandate of UNCTAD.

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

31. UNESCO work in several areas touches upon intellectual property issues. For instance, UNESCO's intersectoral project, ***Local and Indigenous Knowledge Systems in a Global Society (LINKS)***, launched in **2002-2003,** focuses on the interface between local and indigenous knowledge, and addresses the different ways that indigenous knowledge, practices and worldviews are drawn into development and resource management processes. Moreover, in August, 2003, UNESCO adopted the ***International Convention for the Safeguarding of Intangible Cultural Heritage,*** a legal instrument which aims to safeguard oral traditions and expressions.

32. In addition, UNESCO's work on copyright dates back from 1952, when the Universal Copyright Convention, of which it is the depositary institution, was adopted. According to UNESCO, as "copyright and related rights are challenged by the rapid development of the digital technologies as well as by rampant piracy, UNESCO contributes to the promotion of copyright protection and to the prevention of piracy through public awareness campaigns, information, training and research, and assistance in legal and technical matters". In addition, within the framework of the Global Alliance for Cultural Diversity, UNESCO is currently "developing new initiatives and projects in order to fight against piracy." **On April 23, 2004, UNESCO will celebrate the World Book and Copyright Day, intended "to promote reading, publishing and the protection of intellectual property through copyright."**

F. World Summit on Information Society (WSIS)

33. WSIS was conceived as an opportunity to discuss the dynamics of an evolving global information society and its impact on the international community. Held under the patronage of the UN Secretary-General, with the International Telecommunication Union (ITU) taking the lead role, the first phase of WSIS took place in Geneva in December 2003, and addressed a broad range of themes, including intellectual property. In fact, discussions regarding references to intellectual property in the Declaration of Principles and in the Plan of Action were among the most divisive. While developing country efforts to include allusions to the need for flexibility in intellectual property were not successful, the language proposed by the United States on the recognition of the importance of intellectual property and international intellectual property instruments was also removed from final drafts. In addition, the Declaration of Principles establishes a "common desire and commitment to build a people-centred, inclusive and development-oriented Information Society" and includes very positive language, mirrored in the Plan of Action, on access to information and knowledge. **The second phase of WSIS will take place in Tunis from 16 to 18 November 2005, focusing on development themes and will adopt any further plan of action**.

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

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

A. Free Trade Area of the Americas (FTAA)

35. In the FTAA, the draft Chapter on intellectual property creates "TRIPS-plus" standards both in provisions establishing the general principles of the system and in provisions dealing with specific intellectual property areas. For instance, the FTAA draft requires each Party to adopt, within five years after the Agreement enters into force, the principle of regional exhaustion. In the patent provisions, moreover, the FTAA would require parties to extend the term of a patent's protection in certain circumstances, to expand the scope of patents to include any biological material derived through multiplication or propagation of the patented product or directly obtained from the patented process, and to limit the use of compulsory licenses.

36. Due to disagreements over various major issues, including intellectual property, the Miami Ministerial Declaration, while reaffirming a commitment to a "comprehensive" FTAA by January 2005, opted for an "FTAA Light" in the sense that it would only demand some basic provisions in each negotiating area, with interested parties being able to commit additionally through a plurilateral process. However, the subsequent February Trade Negotiations Committee (TNC) meeting in Puebla, Mexico, was unable to reach agreement even on minimal commitments. Informal consultations held since have also reaffirmed 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. Consequently, **the TNC meeting scheduled for April 22-23 was postponed**

B. Central American Free Trade Agreement (CAFTA)

37. Negotiations for CAFTA, a regional trade agreement between the United States and El Salvador, Guatemala, Honduras, Nicaragua, and Costa Rica concluded in January 2004. The Dominican Republic concluded talks with the United States on March 15, 2004, to be integrated into the agreement. Draft Dominican Republic schedules and annexes, including a specific annex on intellectual property should be made public in the next weeks. Whether CAFTA, as well as other agreements due to be presented to the US Congress, will be approved in the current US political framework, however, is uncertain.

38. The full text of the agreement includes a number of TRIPS-plus provisions, such as the obligation to ratify or accede to UPOV 1991 and to undertake "all reasonable efforts" to make patent protection available for plants and the extension of patent terms to compensate for delays. **In addition, some of the patentability provisions may be directly related to on-going negotiations at WIPO. For example, CAFTA defines "industrial application," one of the issues being discussed in the context of the negotiations of an SPLT. Moreover, CAFTA**

deals with disclosure in a way that has been interpreted to limit the information that can be requested by disclosure requirements.

C. EU – Mercosur

39. The 12th meeting of the EU-Mercosur Bi-regional Negotiations Committee took place in Buenos Aires, Argentina, in March, 2004, with reportedly "a lot of progress" made. An attempt will likely be made to conclude the agreement before October. Consequently, Mercosur was preparing improved offers on the issues considered most important to the EU, including intellectual property, and reaffirming a commitment to enforce existing intellectual property laws. The main priorities set by each party in intellectual property are the level of protection and geographical indications for the EU and the relationship between the TRIPS Agreement and the CBD, TRIPS and Public Health and technology transfer for Mercosur. **The next round of negotiations will take place in Brussels during April and the next Ministerial Meeting will be in May.**

D. Bilateral Free Trade Agreements (FTAs)

40. Ongoing negotiations include:

- The **US-Morocco agreement**, concluded on March 3, 2004, and the **US-Bahrain FTA,** with negotiations expected to be completed before the end of this year, are part of a US project for a Middle East Free Trade Area by 2013. United States currently has free trade agreements with Israel and Jordan.
- **US-Southern African Customs Union (SACU):** Countries are expected to meet in early May to discuss several issues, including intellectual property. The negotiation rounds are held every 6 to 10 weeks, with an end-of-2004 deadline for completion.
- **US-Thailand:** On February 12, 2004, the United States Trade Representative (USTR) notified the US Congress of the objectives and goals for the negotiations for a FTA with Thailand, highlighting the need to raise Thailand's intellectual property protection to standards set in other recently negotiated FTAs. Negotiations are scheduled to begin in June, 2004. The agreement is expected to be the first of a network of bilaterals between the United States and Association of South East Asian Nations (ASEAN) countries.
- The growing number of FTAs in Latin America will soon include agreements between the **United States and the Andean countries** of Colombia, Ecuador, Peru, and Bolivia. Talks between the United States and Colombia are set to begin on May 18, 2004, and will be "wide-ranging." In addition, the **United States and Panama** have announced the negotiation of an FTA.

41. Many of these negotiations will reportedly follow the precedent set by the US-Chile FTA on intellectual property provisions, which sets protection levels that go beyond not only the TRIPS Agreement but also the draft FTAA, including requiring parties to undertake "reasonable efforts" to make patent protection available for plants. The US-Morocco draft agreement, for instance, increases the duration of patent protection by almost ten years. Moreover, the USTR has clearly expressed, in its negotiating objectives for intellectual property in the FTA with the Andean countries (Colombia, Peru, Ecuador and Bolivia), that it seeks to establish standards "that build on" the TRIPS Agreement and several WIPO treaties.

42. Nonetheless, there are also examples of regional and bilateral cooperation efforts directed at protecting and reinforcing TRIPS Agreement flexibilities. In the first Ministerial Meeting of the trilateral Forum of Dialogue formed by India, Brazil, and South Africa (IBSA Forum), in March 2004, representatives of the three countries agreed on a number of measures in the area of intellectual property and public health. For instance, the three countries agreed that their national legal regimes must reflect all flexibilities permitted under the TRIPS Agreement, the Doha TRIPS and Public Health Declaration, and subsequent decisions regarding paragraph 6 and committed themselves to promoting the use of similar measures by other developing countries. Another example is the commitment to reject bilateral trade agreements with TRIPS-plus provisions. A book entitled "Utilizing TRIPS Flexibilities for Public Health Protection through South-South Regional Frameworks" will be published by the South Centre in April 2004.