

A Development Agenda for Intellectual Property Negotiations in 2004 and Beyond

I. Introduction

1. In 2003, activities in the World Trade Organization's (WTO) Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS) were fairly subdued, save for the negotiations relating to the implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health. This low level of activity is largely attributable to the fact that the year was (rightly) dominated by the preparations for and dealing with the aftermath of the Fifth WTO Ministerial Conference in Cancun where the focus of negotiations was on agriculture, non-agricultural market access (NAMA) and Singapore Issues. However, it would be incorrect to conclude that the Cancun preparatory process was the sole reason for 2003 being a quiet year in the TRIPS Council. There are at least two other relevant trends that underlie this development. The first relates to the increased intensity and profile of negotiations at the World Intellectual Property Organization (WIPO) on patent law harmonisation, the reform of the Patent Cooperation Treaty (PCT) system, on intellectual property and genetic resources, traditional knowledge and folklore, on copyright matters and on enforcement. The second trend relates to the increasing number of new negotiations on free trade agreements which contain intellectual property components with TRIPS-plus implications. These two trends are, on the one hand, the result of the shift in focus by the major players in this field. The United States, in particular, has strategically shifted its focus to WIPO activities and bilateral dealings and its main interest in the TRIPS Council is to maintain the status quo. On the other hand, these trends also reflect, in part, the growing political profile of WIPO and bilateral negotiations for developing countries which has led to the reduction in the political visibility of TRIPS issues including in civil society circles.

2. WIPO, on its part, had a busy year compared to the Council for TRIPS. Intense negotiations and/or discussions characterised the various committees and assemblies of the organisation throughout the year. Negotiations on the draft Declaration for the Beijing Summit on Intellectual Property and the Knowledge Economy, eventually postponed, elicited strong political interest by a large number of countries in WIPO activities. In addition, the Patent

Agenda, launched in 2001, continued to be the main focus of patent law related activities in WIPO and its two main processes; the negotiations on a draft Substantive Patent Law Treaty (SPLT) in the Standing Committee on the Law of Patents (SCP) and the reform of the PCT in the Working Group on the

Reform of the PCT, also evidenced growing interest especially from developing countries. The other subject on which there were high profile discussions was the relationship between intellectual property and genetic resources, traditional knowledge and folklore. Although no agreement was reached during the fifth session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) on a renewed mandate in July, the WIPO General Assembly extended and modified its mandate in September 2003 for another two years.

3. In this evolving scenario of international intellectual property negotiations and discussions, developing countries face complex challenges in not only coordinating their strategies and positions across fora but also in addressing the various substantive issues that are under negotiation and or discussion. Consequently, this background paper has been prepared by the South Centre and the Centre for International Environmental Law (CIEL) to assist developing countries to think through the various issues under negotiation/discussion in the WTO and WIPO by reviewing the current status of the various issues on the TRIPS Council and WIPO's agenda and outlining some of the questions that countries need to address. The paper should also help countries to start a process of long-term strategic thinking in the area of intellectual property standard setting and the place of the WTO and WIPO in the larger scheme of things. The paper is divided into four parts. In addition to this introduction, there are three main parts. The first is a matrix on TRIPS issues. The second is a matrix on the various issues under discussion and or negotiation at WIPO. The third and final part contains a concise overview of important developments in bilateral processes and other international fora on matters of intellectual property. This third component of the background paper is aimed at ensuring that as developing countries think through the various issues on the TRIPS Council and WIPO's agendas, they do not lose sight of the larger context and are able to have a global view of trends in international intellectual property standard setting.

II. Matrix on TRIPS Issues

4. The issues on the TRIPS Council's agenda have been divided into eight main areas (rows), namely, TRIPS and public health; patentable subject matter and exceptions to patentability; non-violation and situation complaints; geographical indications; transfer of technology to least-developed countries (LDCs); special and differential treatment under TRIPS; the review of the TRIPS Agreement; and E-Commerce. There are seven columns for each of the eight issue areas covered. The first column covers the main issue or theme. The second covers the various sub-issues under each main issue. The third column identifies the mandate under the TRIPS Agreement and the Doha Ministerial declarations and decisions for each of the issues and/or sub-issues identified, while the fourth column contains, where applicable, important timelines and or deadlines for particular items. The fifth column highlights the current status of negotiations/discussions on the issues and sub-issues in the TRIPS Council. The sixth column then identifies some projected outcomes of

the various negotiations in 2004. The seventh and final column raises various questions that need to be addressed by developing countries in order to have a proactive and coherent strategy for intellectual property negotiations in the WTO in 2004 and beyond.

Issue	Sub-issues	Mandate	Important Timelines/deadlines	Current status	Possible Outcomes in 2004	Possible Strategies in 2004
<p>TRIPS AND PUBLIC HEALTH</p>	<p>Effective use of compulsory licensing by countries without manufacturing capacity</p>	<p>Para. 6 of the Doha Declaration on TRIPS and Public Health</p>	<p>30 June 2004</p>	<p>The General Council adopted an interim Decision on 30th August 2003 implementing para. 6. Under paragraph 11 of that Decision, the TRIPS Council shall initiate work by the end of 2003 on the preparation of the amendment with a view to its adoption within six months. According to the 2003 TRIPS Council Annual Report (IP/C/30, para. 12) the Council has already initiated this work.</p>	<p>Agreement on a permanent amendment to implement paragraph 6 is reached in 2004.</p>	<p>How satisfied are developing countries with the 30 August Decision?</p> <p>What form should the amendment take? Should it simply be an adaptation of the 30 August Decision or should it include new elements? What is the chance that new elements could be introduced in the amendment negotiations successfully?</p> <p>When should the amendment negotiations take place and be concluded? Should the discussions start immediately and be concluded as soon as possible or should there be a tactical delay to the process? What are the pros and cons of a fast amendment strategy on the one hand and a delay</p>

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						strategy on the other?
PATENTABLE SUBJECT MATTER AND EXCEPTIONS TO PATENTABILITY	<p>The relationship between the TRIPS Agreement and the CBD</p> <p>Protection of TK and Folklore</p> <p>Patenting of life forms and clarification of distinctions between biological and microbiological processes</p> <p>Transition for entry into force of any new obligations under article 27.3b</p> <p>Plant variety protection through <i>sui generis</i> systems</p>	<p>Para 19 of the Doha Ministerial Declaration</p> <p>Para 19 of the Doha Ministerial Declaration</p> <p>Review of Article 27.3b and Para 12.b of the Doha Ministerial Declaration</p> <p>Para 12.b of the Doha Ministerial Declaration</p> <p>Review of Article 27.3b</p>	1 Jan 2005 (Scheduled end of the Doha Round)	Three communications were presented on the various sub-issues in 2003. The Swiss paper (IP/C/W/400/Rev.1); the communication by India on behalf of 9 developing countries (IP/C/W/403) on TRIPS and CBD; and the communication by Morocco on behalf of the African Group (IP/C/W/404) suggesting ways of taking forward the review of article 27.3b. It is also noteworthy that para. 23 of the Derbez text contained some language on Doha para. 19 issues which include the review of 27.3b and CBD issues. This suggests that while there has been no significant movement on these issues they remain very much on the table and are likely to come up in the process of reviving	There could be convergence on what to do with respect to the relationship between the TRIPS Agreement and CBD and, in particular, how to address the question of benefit sharing and misappropriation issues.	<p>Is there room for prioritisation of these sub-issues in 2004? For example, owing to the difficulties associated with achieving changes under the article 27.3b review, is there room for concentrating on benefit sharing and TK issues?</p> <p>Either way, can developing countries establish an agenda; define the process and a prospective deadline for resolving these issues? What would such an agenda look like and what would have to be achieved in 2004?</p> <p>With respect to genetic resources and TK issues which approach –the article 27 or the article 29- is the best approach, from both the legal and political perspectives, for preventing wrongful misappropriation of biological material and related TK?</p>

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				the Doha agenda and beyond.		The mandate of the IGC in WIPO has been extended for another two years, how far should the discussions on TK go in WTO? What are the implications of the IGC process for developing country positions in the TRIPS Council? What should be the counter strategy to the argument that everything should wait for the WIPO IGC process?
NON-VIOLATION AND SITUATION COMPLAINTS		Article 64.3 read together with Para 11.1 of the Doha Decision on Implementation Issues.	1 January 2005 and/or Sixth Ministerial Conference in Hong Kong	No specific recommendations were forwarded to the Cancun Ministerial Conference on the subject. In general, there has been no significant change in the country positions on this issue. This is confirmed by the language in para. 22 of the Derbez text which was intended to maintain the status quo. At its post Cancun meeting, the TRIPS Council did not discuss the issue. The General Council meeting of 15 th December did not provide any clear	In the current scenario it is likely that 2004 will be like 2003 when the issue may be discussed but not resolved. In other words, the status quo will be maintained.	Assuming that the United States is not pushing hard for the resolution of this issue, should the strategy be one of maintaining the status quo or should developing countries seek to resolve this issue once and for all? There is an increasing tendency for the United States to include non-violation in bilateral agreements. If this trend continues what does it mean for the WTO process? Will it in the end weaken the opposition by developing countries in the WTO meaning that the earlier the

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				<p>direction either. Consequently, the issue could be said to be one of the pending issues.</p>		<p>issue is sorted out the better?</p> <p>What are the prospects that the issue will become a bargaining chip in the process of finalising the Doha Round? If the United States comes on the table with non-violation as a bargaining chip what should be the developing countries strategy? Is this a concession issue and if so, what concession?</p>
<p>GEOGRAPHICAL INDICATIONS</p>	<p>Establishment of a register for wines and spirits</p> <p>Extension of protection to other products other than wines and spirits</p>	<p>Para 18 of the Doha Ministerial Declaration</p> <p>Para 12.a read together with Para 18 of the Doha Ministerial Declaration</p>	<p>1 Jan 2005</p>	<p>An agreement has not yet been reached and negotiations are still on-going in the Special Session of the TRIPS Council.</p> <p>The TRIPS Council's discussions have focused on a checklist of issues prepared by the Chair. The WTO Secretariat prepared a compilation of elements contained in oral statements and written submission regarding those issues.</p>		<p>How can these negotiations best promote the goals of development?</p> <p>How can developing countries ensure that the balance of benefits does not go to developed countries with numerous products that could be covered by GIs?</p>

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TRANSFER OF TECHNOLOGY TO LDCs	Establishment of a monitoring mechanism	Article 66.2 read together with Para 11.2 of the Doha Decision on Implementation and the Decision of February 2003 on "Implementation of Article 66.2 of the TRIPS Agreement (IP/C/28).	31 Dec 2003	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 review was done in the last meeting although according to the Annual Report of the TRIPS Council the review took place.	It is possible that a proper review could be carried out in 2004 for last year's reports if LDCs pursue this and follow-up.	<p>What is the strategic interest of LDCs in ensuring that this review is properly carried out?</p> <p>What should LDCs do to ensure that the mechanism works to their advantage and is further developed if necessary? In particular, what needs to be done to ensure that this mechanism leads to better results than the previous system?</p> <p>Can other international organizations assist LDCs in identifying ways of improving the mechanism? How?</p>
SPECIAL AND DIFFERENTIAL TREATMENT UNDER TRIPS		Para 40 of the Doha Ministerial Declaration	1 January 2005	Various S&D proposals were referred to the TRIPS Council for consideration by the Chair of the General Council in May 2003. These were the LDC proposal on article 66.1 (TN/CTD/W/4.Add.1)		<p>What should be the overall approach to S&D issues in the context of the dispersion that happened in May 2003?</p> <p>What needs to be done with respect to those issues that had been referred to the TRIPS Council?</p>

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				<p>and the African Group proposals on articles 65, 66.1, 70.8 and 70.9 (TN/CTD/W/3/Rev.2). The African Group proposal was later modified and a text forwarded to the General Council in August (JOB(03)/171). There has not been any significant progress thereafter.</p>		
<p>REVIEW OF THE TRIPS AGREEMENT</p>	<p>The operationalisation of articles 7 and 8 of the TRIPS Agreement.</p> <p>Review of the TRIPS Agreement under article 71.1.</p>	<p>Article 71.1 read together with Para 19 of the Doha Ministerial Declaration and the Decision on Implementation</p>	<p>1 Jan 2005</p>	<p>Since some of the issues raised under the review overlap with other items on the TRIPS Council's Post-Doha agenda, the Council invited Members to submit ideas on which issues to take up. While article 71.1 continued to appear on the agenda of the TRIPS Council throughout the year, there was neither communication submitted nor any substantive discussions undertaken.</p>	<p>There are possibilities that the discussion under article 71 will remain low key in 2004. However, as things move near to the end of the Doha Round (the scheduled end that is) it might come up as various sides try to get issues on which to bargain.</p>	<p>Do developing countries see any particular strategic or political benefit in pursuing the article 71.1 review agenda? If yes, to what use should the review mandate be put?</p> <p>Assuming that developing countries still consider the review strategically and politically important, what issues should be raised under the review? Should this be in 2004 or should the strategy be not to rock the boat on this one for now?</p>

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E-COMMERCE		Article 71.1 read together with Para 34 of the Doha Ministerial Declaration	1 January 2005	The Item has been on the TRIPS Council Agenda for all meetings in 2003, but no substantive discussions have taken place. The Secretariat updated it factual background note on intellectual property and electronic commerce in May 2003 (IP/C/W/128/Add.1).	It is possible that this issue will still remain quiet in 2004. However, new developments in the electronic world including the results on the WSIS Summit, issues related to terrorism etc. could lead to some discussions in the WTO sooner than later.	How do developing countries view this agenda item, in the TRIPS Council and in the WTO generally? What is their strategic interest? In the event that proposals are made by developed countries, what defensive strategy should be employed (as well as in respect of other electronic commerce issues in other WTO bodies)?

III. Matrix on WIPO Issues

5. The relevant activities and issues in WIPO have been divided into five main areas (rows), namely, the negotiations on the SPLT; the discussions in the IGC; the reform of the PCT; copyright and related issues under the digital agenda; and, other patent agenda and related broader policy issues, processes and activities. There are six columns for each of the five issue areas covered. The first column covers the main issue or theme. The second column identifies the WIPO body responsible for the negotiations or discussions on the issue identified, while the third column contains the timelines/dates for the forthcoming meetings of the WIPO bodies identified in column two. The fourth column highlights the current status of negotiations/discussions on the various issues. The fifth column then identifies some projected outcomes of the various negotiations or discussions in the forthcoming meetings of the various WIPO bodies. The sixth and final column raises various questions that need to be addressed by developing countries in order to have a proactive and coherent strategy for intellectual property negotiations in the WIPO in 2004 and beyond.

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<p>NEGOTIATIONS ON A DRAFT SUBSTANTIVE PATENT LAW TREATY (SPLT)</p>	<p>Standing Committee on the Law of Patents (SCP)</p>	<p>Tenth Session 10 – 14 May 2004</p>	<p>Negotiations are continuing on the draft treaty, the draft regulations and practice guidelines. The discussions are focussing on issues related to prior art, novelty, utility and inventiveness, disclosure, drafting and interpretation of claims, grounds for refusal of applications and revocation and invalidation of patents while reserving negotiations on a number of controversial areas including where the major powers (US-EU) do not agree such as first to file versus first to invent principles and matters relating to post-grant opposition proceedings.</p> <p>There continues to be strong resistance from the bulk of the developed countries to the idea of providing for general exceptions that preserve developing countries' policy space in areas of public health, traditional knowledge, genetic resources, environment etc through general exceptions. Discussions on this item have also been put on hold.</p> <p>Other areas of controversy include matters related to</p>	<p>Developing countries could be able to maintain their high level of engagement making it difficult to introduce clauses in the draft that may undermine the current policy flexibilities that enable them to take necessary development measures in important social and economic sectors, exclude certain subject matter from patentability and retain the flexibility to impose strict standards of inventiveness.</p> <p>On the other hand, it is also possible that there will be a renewed push by the United States and even the International Bureau to accelerate the negotiations and to exclude from discussions any issues which they consider "alien" to the patent system such as discussions on defensive measures against misappropriation etc.</p> <p>There is also likely to be a push to: retain the current permissive draft on the concept of "prior art"; remove the requirement of "technical character" of inventions substantially expanding the scope of the patent system, beyond the TRIPS Agreement and the current PCT; eliminate exceptions to</p>	<p>What should developing countries aim to achieve in these treaty negotiations? Is it acceptable to have a more limited treaty provided that the concept of general exceptions is expanded or should the long-term strategic aim be to stall the treaty without appearing to be obstructionist? Can the United States and the other major proponents of the treaty such as Canada and Australia accept a balanced SPLT?</p> <p>What are the strategic development issues that need to be addressed by or taken into account by this treaty?</p> <p>In light of the continued resistance shown by developed countries and ostensibly the International Bureau towards development-related positions taken by developing countries, what strategy should be adopted by developing countries in the SPLT negotiations?</p> <p>What needs to be done to bridge the gap between the policy-oriented approach of Geneva delegates towards the draft treaty and the technical approach (including the workload concerns) by patent office officials who attend the negotiations?</p> <p>Besides ensuring that all developing countries are aware of the risks and</p>

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			<p>technical character of inventions, patentable subject matter and whether states can impose further conditions on patent applicants at the national level.</p> <p>While the earlier sessions of the SCP were characterised by an asymmetrical participation of developing countries as compared to developed countries, the past few meetings witnessed increasing developing country involvement. At the Ninth session, in particular, a number of developing countries were quite active proposing various changes to important draft articles and opposing unfavourable language on others. For reasons which are not very clear, the Tenth Session was pushed back by six months and is taking place one year since the Ninth Session. It is thought that one of the reasons for this move had to do with the increased participation by developing countries in these negotiations which was frustrating the United States and other major proponents of the treaty.</p>	<p>patentability except the so-called “essential security interests”; to prohibit countries from imposing any conditions at the national level to obtain and maintain a patent other than those specifically provided for in the Treaty which would make it difficult to require compliance with other national laws, for example, those on access and benefit sharing.</p>	<p>coordinate their positions in the SPLT negotiations with their positions in the TRIPS Council, what else needs to be done to ensure that the flexibilities under TRIPS are not undermined by the SPLT?</p>

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<p>THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE (IGC) PROCESS</p>	<p>IGC</p>	<p>Sixth Session (First Session under the new mandate) 15-19 March 2004</p>	<p>In September 2003, the WIPO General Assembly extended the mandate of the IGC for another two years. In terms of structure, the Committee remains an ad hoc intergovernmental committee. The substantive mandate of the Committee was, however, significantly broadened from its original discussion mode with instructions to ‘accelerate its work’, ‘focus on the international dimension of intellectual property, genetic resources, traditional knowledge and folklore’ and ‘exclude no outcome, including the possible development of an international instrument or instruments in this field’. The first session under the new mandate (the Sixth Session), will be key for defining objectives and mechanisms, for the future.</p> <p>While developed countries supported the continuation of the IGC, they, except Switzerland and the EU which have shown some flexibility, remain keen not to see any substantive outcome from the IGC process.</p>	<p>There could be an endless argument about the direction of the committee and whether the issues are ripe for discussion of norms.</p> <p>Or,</p> <p>An agreement could be reached on clearer objectives and outcomes in the Committee moving away from the discussion of studies which characterised the last phase of the work of the IGC. The IGC would thus provide momentum in seeking solutions to these issues, even if it does not achieve them itself.</p> <p>Or,</p> <p>It may still be that the process will continue to be secretariat driven, so that work at the IGC remains stalled or is directed in ways to counter rather than promote developing country interests.</p>	<p>What is the strategic purpose of the IGC process for developing countries? Can the objectives of developing countries be achieved in the IGC as a stand alone forum or only in the context of other WIPO Committees, the TRIPS Council, the CBD and FAO etc.? For example, can a separate and distinct instrument on genetic resources, traditional knowledge and folklore achieve the objectives of developing countries?</p> <p>Even assuming that a legal instrument was formulated and norms developed in the IGC, will the United States, the biggest culprit on misappropriation, and other developed countries ever sign onto such a treaty? If it is unlikely that the United States and others would ever sign onto a new treaty, would developing countries be better served by addressing the issues in the context of already existing treaties of WIPO such as the PCT, and in those under negotiations, such as the SPLT than attempting a stand alone treaty?</p> <p>In this context, to what extent should the issues under discussion in the IGC be tackled in other WIPO negotiations such as the SPLT negotiations and the PCT reform negotiations and/or in other international fora, such as, in the WTO?</p>

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					<p>What needs to be done to ensure that the IGC process is not used to undermine the efforts by developing countries in WTO to get an agreement on TRIPS and CBD issues and other related matters as has been the case before? If the IGC process is doing more harm than good, is it a realistic option to consider 'killing it' now or at the end of the renewed mandate?</p>
<p>THE REFORM OF THE PATENT COOPERATION TREATY (PCT)</p>	<p>Working Group on the Reform of the PCT</p>	<p>Sixth Session 3 - 7 May 2004</p>	<p>The first phase of the reform of the PCT, which started in 2000 and was aimed at simplifying and streamlining procedures while aligning it to the new standards of the Patent Law Treaty (PLT), has been completed. Significant changes to the PCT system with regard to the international search and examination procedures were adopted at the PCT Assembly in September/October 2002 and came into effect in January 2004. There is now a push by the International Bureau, strongly supported by the United States and other developed countries, to move to a second phase of reforming the PCT which would involve a more fundamental overhaul of the system. In the last two sessions of the Working Group, the Bureau presented</p>	<p>The idea of an optional protocol and other similar options for the future could start being discussed premised on the argument that it is just a discussion and there is no reason why consensus should be required to simply discuss an issue.</p> <p>Or,</p> <p>There could be a push to revisit some of the issues, such as patent quality and examination standards, which had come up in the earlier phases of the reform but were never followed through. There could also be a debate as to whether the Working Group has a mandate to undertake any further work after the completion of the earlier process of reform.</p>	<p>What should be the strategic objectives of developing countries in the reform process? How can the PCT reform be approached to avoid an overhaul of the PCT system that would facilitate global patenting and other practices that can be detrimental to the interests of developing countries?</p> <p>It is likely that the International Bureau and its supporters will continue pushing the idea of an optional protocol and other similar options for the future, what should be the defence strategy by developing countries? Could these countries simply resist the onslaught or should they possibly raise issues such as patent quality and examination standards as matters that should be addressed before any move towards further overhaul of the PCT system?</p> <p>With respect to the Swiss proposal on</p>

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			<p>proposals on “options for future work,” including the idea of an “optional protocol”. This issue was intensely debated at the Fifth Session but no agreement was reached on how to proceed. It was then agreed that the Director General would hold consultations to find a consensus on how to move forward.</p> <p>Another issue that has been hotly debated in the Working Group is the proposal by Switzerland to amend PCT rules to enable countries to require patent applicants to disclose the source of origin of genetic resources and traditional knowledge in patent application. Although the proposal has received considerable support from a significant number of developing countries and, to a limited extent from the EU, it has been strongly opposed by the United States and other developed countries especially Canada and Australia.</p>		<p>disclosure, how should developing countries approach the issue considering that while they think it doesn’t go far enough, it is a step in the right direction? Should they simply aim to support the Swiss or should they consider ways of moving the process forward in a manner that keeps the Swiss on board but also takes into account any concerns they may have with the proposal?</p> <p>Is there likelihood that the Swiss would fight this to the bitter end and push it or is it good enough for them that the issue is on the table?</p>

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<p>COPYRIGHT AND RELATED ISSUES UNDER THE DIGITAL AGENDA</p>	<p>Standing Committee on Copyright and Related Rights (SCCR)</p>	<p>Eleventh Session 7 – 11 June 2004</p>	<p>The WIPO digital agenda was announced by the Director General of WIPO in 1999. One of the main activities under the agenda involves encouraging WIPO member states to accede to or ratify the 1996 ‘Internet treaties’, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), and to negotiate the further development of international intellectual property rules in the digital environment.</p> <p>In addition, the SCCR is currently discussing the possibility of a new treaty to deal with the rights of broadcasting organisations. The proposed treaty would create a system of ownership for material transmitted over wireless means such as television, radio and satellite, as well as communications over cable networks, and also over the Internet. At the Tenth Session of the SCCR, it was agreed that a consolidated text of proposals by member states be prepared by the Chairman and the International Bureau for the Eleventh Session where the issue of whether to call</p>	<p>An agreement could be reached to call a diplomatic conference despite possible fights over webcasting and cablecasting, on the basis that not all issues need to be resolved before such a conference.</p>	<p>Is there a sufficient understanding by developing countries of the possible benefits and/or risks of this proposed treaty?</p> <p>Considering that quite a number of developing countries have indicated support for this treaty and have made extensive proposals, is there a possibility of getting an overall developing country strategy?</p> <p>What needs to be done to bridge the gap between the policy oriented approach of a number of Geneva delegates towards the draft treaty and the technical and narrower approach by representatives of national broadcasting organisations from developing countries who are deeply involved in these negotiations?</p>

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			<p>a diplomatic conference will be discussed.</p> <p>Informal discussions are also being held on the need to update the rights of performers in their audiovisual performances, an issue left unresolved by the 2001 diplomatic conference on the protection of audiovisual performances. There were also informal discussions at the Tenth Session on issues related to the visually impaired.</p>		
<p>OTHER PATENT AGENDA AND RELATED BROADER POLICY ISSUES, PROCESSES AND ACTIVITIES</p>	<p>The International Bureau</p>	<p>September/ October 2004 (Fortieth Series of Meetings of the Assemblies of the Member States of WIPO)</p>	<p>There are a number of cross-cutting and broader policy issues which are discussed at the WIPO Assemblies that are of importance to the issues of intellectual property and development. These include matters related to the patent agenda, matters concerning the Advisory Committee on Enforcement (ACE), technical assistance and capacity building and other issues such as on programme and budget.</p>		<p>Are there any budget or programme concerns for developing countries? For example, there is the recurring discussion about PCT fees, what is the importance for developing countries following and actively participating in this discussion?</p> <p>The studies produced by WIPO consultants and discussed at the 2003 Assemblies on the impact of the Patent Agenda failed to seriously address the issues part of the problem being with the selection of experts. Consequently, if developing countries cannot be sure about the selection of consultants, their expertise and objectivity, what is the danger of ending up with a multiplicity of studies that uncritically legitimise the patent agenda? Should developing</p>

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					<p>countries continue asking for more studies?</p> <p>What are the implications of the ACE for the implementation of the TRIPS Agreement as well as dispute settlement at the WTO and the enforcement of the proliferating bilateral agreements on intellectual property? What should be the strategy of developing countries in the enforcement discussions?</p> <p>How is WIPO's technical assistance and the influence that comes with it affecting the ability of developing countries to fully defend their interests in various WIPO negotiations? What needs to be done to reform the delivery of technical assistance and how can this be achieved? What can Geneva delegates do as opposed to this being a capital issue? What do countries need to be asking for with respect to technical assistance and capacity building?</p> <p>Is there a way in which the issue of carrying out an assessment of the WIPO technical assistance programme can be pushed at the WIPO Assemblies?</p>

IV. An Overview of Relevant Developments in Other Fora

6. There are a number of on-going processes and activities in various international fora as well as in bilateral settings relating to intellectual property issues that are affected by and or affect the intellectual property processes and negotiations in the WTO and WIPO. The following is an overview of the current state of activities and processes in these other fora.

IV.1 The Convention on Biological Diversity (CBD)

7. The seventh meeting of the Conference of the Parties of the CBD (COP-7) took place in Kuala Lumpur, Malaysia (9 - 20 February 2004). The COP-7 draft report is available as **(UNEP/CBD/COP/7/L.4, L.4/Corr.1 and Add.1)**. The COP focussed, *inter alia*, on developing an international regime on access and benefit sharing (ABS). The Working Group (WG) on Access and Benefit-sharing met in December in Montreal, Canada, to develop recommendations on the international regime on ABS to be forwarded to COP-7, but discussions only resulted in a heavily bracketed text. In its final decision **(UNEP/CBD/COP/7/L.28)**, the COP mandated the ABS Working Group, with the collaboration of the Working Group on Article 8(j), to elaborate and negotiate an international ABS regime, with the aim of adopting an instrument/instruments. It further invited the cooperation of organizations such as FAO, WTO, WIPO, and the International Union for the Protection of Plant Varieties (UPOV); and noted that the scope of the international regime covers access to genetic resources and promotion and safe-guarding of benefit-sharing and traditional knowledge, innovations and practices in accordance with Article 8(j).

8. **The Working Group on Article 8(j) and Related Provisions** also met in Montreal and made recommendations to COP-7. The COP reviewed the report of the Working Group and in its final decision **(UNEP/CBD/COP/7/L.19/Rev.1)**, the COP requested the Article 8(j) Working Group, in collaboration with relevant international organisations, such as WIPO, WHO, FAO, UNESCO, WTO etc, to consider forms of, and develop elements for *sui generis* forms of protection of traditional knowledge as well as exploring, taking into account the work of other bodies, the potential of existing as well as new forms of intellectual property rights to contribute to achieving such a protection. In addition, it also requested the Article 8(j) Working Group to develop draft elements of an ethical code of conduct to ensure respect for the cultural heritage of indigenous and local communities for biodiversity conservation and sustainable use. Considerations at the meeting included elements for a *sui generis* system for the protection of indigenous and local communities' knowledge, innovations and practices. The WG agreed, for example, that the CBD is the primary international instrument with the mandate to address these issues but there is a need to

collaborate with other relevant organisations working on related issues, such as WIPO, the World Health Organization (WHO), the Food and Agricultural Organization (FAO), the United Nations Educational and Scientific Organization (UNESCO), WTO, etc.

IV.2 The United Nations Food and Agriculture Organization (FAO)

9. Some countries are already moving to implement the FAO's International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), since **it is likely to enter into force some time in 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.** A number of issues do remain unclear and could pose challenges in the future. Access to crops in the multilateral system, for instance, is subject to certain conditions, one of the most contentious of which relates to intellectual property rights. The ITPGRFA states 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 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.

IV.3 Regional Trade Agreements with Intellectual Property Provisions

10. The most active forum in intellectual property negotiations today is perhaps not at the multilateral level, but at the bilateral one. 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 the 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)

11. In the FTAA, the draft Chapter on IPRs creates "TRIPS-plus" standards both in provisions establishing the general principles of the system and in provisions dealing with specific IPRs 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. **The Third Issue Meeting of the FTAA Committee of**

Government Representatives on the Participation of Civil Society, in January, 2004, focused on intellectual property and dealt with both general aspects of intellectual property negotiations in the FTAA as well as specific issues raised by various forms of intellectual property rights.

12. Due to disagreements over various major issues such as farm subsidies, government procurement, intellectual property and foreign investment 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 will only demand some basic provisions in each negotiating area, with interested parties being able to commit additionally through a bilateral process. **In the Trade Negotiations Committee (TNC) meeting on February 2-6 in Puebla, Mexico, differences over key issues again prevented any agreement. The Joint Communiqué issued at the end of the meeting stated that “Delegates need more time” and that the TNC would be recessed to reconvene in Puebla in the first week of March, after further consultations.**

B. Central American Free Trade Agreement (CAFTA)

13. Negotiations for CAFTA, a regional trade agreement between the United States and El Salvador, Guatemala, Honduras, and Nicaragua, concluded in December, with negotiations to include Costa Rica finishing on 25 January 2004. The full text of the agreement was released on January 28 and includes a number of TRIPS-plus provisions. For example, CAFTA includes the obligation to ratify or accede to UPOV 1991 and to undertake “all reasonable efforts” to make patent protection available for plants. CAFTA also includes the extension of patent terms to compensate for delays, limits the grounds for revoking a patent, and introduces rules for pharmaceutical and agricultural chemicals market exclusivity and test data protection that go way beyond the TRIPS requirements. In addition, provisions in CAFTA raise the levels of copyright protection by extending terms of protection, criminalising end-user piracy, and mandating both statutory and actual damages for copyright infringement. **Negotiations continue to add the Dominican Republic to CAFTA.**

C. EU – Mercosur

14. The eleventh meeting of the EU-Mercosur Bi-regional Negotiations Committee took place in Brussels from 2 to 5 December 2003. Negotiators proceeded with their on-going discussions on the political, cooperation and trade aspects of the Interregional Association Agreement between the EU and the Mercosur. **The next meeting will take place from 8 to 12 March 2003 in Buenos-Aires.**

15. In intellectual property, one of the subjects being discussed, there are significant substantial differences and not much progress has been made. The EU seeks, among other things, the incorporation of a number of treaties. Mercosur, on the other hand, has asked, for instance, for provisions stating the need for a balance between intellectual property rights, access to genetic resources and traditional knowledge.

IV.4 Bilateral Trade Agreements with Intellectual Property Provisions

16. Ongoing negotiations include:

- **US-Morocco:** Though originally set to conclude by the end of 2003, the agreement was delayed because of differences over key sectors. Nonetheless, recent media reports indicate that Morocco and the United States had reached a compromise over the controversial textile and farming sectors. The signing of the agreement is expected in April or May 2004.
- **US-Bahrain:** Negotiations began in January 2004 with the goal of completing the agreement by the end of the year. The next round of talks will be in March 2004.
- **US-Southern African Customs Union:** The sixth round of negotiations took place in February in Namibia.
- **US-Thailand:** Although announced, there has been no formal notice to US Congress to begin negotiations, but they should begin in the next few months.
- **US-Andean countries:** Formal notice of intent to begin negotiations has been sent to the US Congress and the negotiations should begin by the end of the first quarter of 2004.

17. 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 other international intellectual property agreements, such as the WCT, the WPPT, and the PCT.

IV.5 The World Health Organization

18. One of the main objectives in of WHO’s work on essential drugs and medicines policy is to ensure their equitable availability and affordability, with an emphasis on priority health problems and poor populations. Within that context, WHO has addressed the potential impact of intellectual property rights on access to pharmaceuticals, stressing that, since essential drugs are part of the broader right to health care, intellectual property rules should also protect public health. WHO will continue focusing on the interface between intellectual property rights and public health. Last year, the World Health Assembly (WHA) asked WHO to establish the terms of reference for a time-limited body to build on existing work. **Consequently, in January 2004 the Executive Board of**

the WHO approved the terms of reference for a Commission on Intellectual Property, Innovation and Public Health. The Commission has been constituted and was formally announced on 12 February 2004. The Commission is likely to start its work by the end of the first quarter of this year. According to the terms of reference, the Commission will summarise the existing evidence on the prevalence of diseases of public health importance; review the volume and distribution of existing research and innovation efforts directed at these diseases; consider the importance and effectiveness of intellectual property regimes and other incentive and funding mechanisms; analyse proposals for improvements to the current incentive and funding regimes; and produce concrete proposals for action by national and international stakeholders.

19. Access is also a key objective in another area of focus within the essential drugs and medicines team: traditional medicine. **The unresolved relationship between traditional medicine with intellectual property rights, similar to that of other components of traditional knowledge, was one of the key problems recognised in increasing access.** In May 2003, WHA resolution 56.31 took note of WHO's strategy for traditional medicine and urged Member States, inter alia, "to take measures to protect, preserve and to improve if necessary traditional medical knowledge," including, where appropriate, "the intellectual property rights of traditional practitioners over traditional medicine formulas and texts, as provided for under national legislation consistent with international obligations, and the engagement of WIPO in development of national *sui generis* protection systems."

20. Finally, under WHO's Human Genetics Programme there is on-going work **on the impact of the gene patents on access to genetic technologies in developing countries.** In particular, a paper, currently undergoing peer review, has been commissioned by the WHO to review the literature on this subject. Although this issue is likely to be addressed by the Commission on Intellectual Property, Innovation and Public Health, the work in the Genetics Programme on gene patents and related issues will continue.

IV.6 The World Summit on Information Society (WSIS)

21. 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 threat of WSIS being used as another forum to support higher intellectual property protection levels has thus diminished. Nonetheless, it is still unclear whether the issue will resurface in the second phase of

WSIS. 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.



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