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INTEGRATING DEVELOPMENT INTO WIPO ACTIVITIES AND PROCESSES: STRATEGIES FOR THE 2004 WIPO ASSEMBLIES*

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I. INTRODUCTION

1. The fortieth Series of Meetings of the Assemblies of Member States of the World Intellectual Property Organization (WIPO) will take place in Geneva from 27 September to 5 October 2004.[1] The Assemblies will address various matters including issues currently under negotiation in various WIPO committees and bodies. In particular, the Assemblies will be asked to debate and or provide direction on issues crucial to developing countries and development friendly civil society organizations.[2] Subjects such as the future of the Substantive Patent Law Treaty (SPLT) negotiations, the inter-linkages between the different fora addressing the issues of genetic resources and traditional knowledge, the protection of broadcasting organizations and enforcement, all which raise important questions from a development perspective, are among the issues on the agenda. Although in general developing countries and civil society organizations have in the last couple of years become increasingly involved and influential in a number of WIPO committees and working groups, their effective participation at the WIPO Assemblies remains a challenge.

2. WIPO has had a fairly busy year so far compared to the World Trade Organization's Council for Trade-Related Aspects of Intellectual Property (TRIPS). The intense negotiations and or discussions that have characterized a number of WIPO committees, including the discussions/negotiations at the Sixth Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) in March; at the Tenth Session of the Standing Committee on the Law of Patents (SCP) in May; at the Sixth Session of the Working Group of the Reform of the Patent Cooperation Treaty (PCT) also in May; at Eleventh Session of the Standing Committee on Copyright and Related Rights (SCCR) in June; and at the Second Session of the WIPO Advisory Committee on Enforcement (ACE) also in June, among others, provide an important backdrop to the discussions at the Assemblies.

3. The scenario that emerges from these negotiations and discussions at WIPO is a complex one and one which indicates that developing countries are likely to face significant challenges at the Assemblies. The challenges not only relate to coordinating strategies and positions with respect to issues arising across various fora

[1] There are seven Assemblies and other WIPO bodies that will be meeting, namely, the WIPO General Assembly, the WIPO Conference, the WIPO Coordination Committee, the Paris Union Executive Committee, the Berne Union Executive Committee, the International Patent Classification (IPC) Union Assembly and the Patent Cooperation Treaty (PCT) Union Assembly. For further details and other general information, see WIPO document A/40/INF/1 dated 29 March 2004. For the Draft Agenda and Preliminary Annotated Agenda, see documents A/40/1 Prov. 1 dated 29 March 2004 and A/40/1 Prov. 2 dated 28 June 2004 respectively. The documents are available at http://www.wipo.int/documents/en/document/govbody/index04.htm.

[2] For an overview of some of these issues see South Centre and CIEL, (2004), "Intellectual Property and Development: Overview of Developments in Multilateral, Plurilateral and Bilateral Fora", *South Centre and CIEL IP Quarterly Update*, Second Quarter 2004. Available at http://www.southcentre.org/info/sccielipquarterly/index.htm. Also available at http://www.ciel.org/Publications/IP_Update_Summer04.pdf.

in WIPO but also in tackling the various substantive issues that will be addressed at the Assemblies.

4. Consequently, this background paper has been prepared by the South Centre and the Center for International Environmental Law (CIEL) to assist developing countries to think through the various issues on the agenda of the 2004 WIPO Assemblies by reviewing the status of the various issues in the individual WIPO committees and other bodies and outlining some broad substantive as well as strategic and political questions that developing countries need to address as they prepare for and participate in the Assemblies.

5. Although there is a long list of issues on the agenda of the Assemblies, this paper only addresses matters relating to the SPLT, the request by the Convention on Biodiversity (CBD) to WIPO, the possible diplomatic conference on the protection of broadcasting organizations, the PCT reform, the WIPO Policy Advisory Commission (PAC) and the WIPO Advisory Committee on Enforcement (ACE). The paper should not therefore be seen a detailed and exhaustive analysis of each of the issues that will be discussed at the Assemblies. The paper should also not be seen as suggesting that the issues on the agenda that are not discussed here are less important. The paper is divided into two main parts. The next section discusses the issues and challenges that arise with respect of each of the above areas. The final part then draws some conclusions and summarises the considerations that developing countries need to take into account on the various issues before the Assemblies.

II. SELECTED STRATEGIC ISSUES FOR DEVELOPING COUNTRIES TO CONSIDER AT THE 2004 WIPO ASSEMBLIES

6. Over the last several years, a number of important trends have been emerging in the field of international intellectual property standard-setting generally, and at WIPO in particular.[3] These general trends relate both to institutional developments and to issue-specific developments. At the substantive level, for example, there has been a trend towards upward patent law harmonisation although these processes have also elicited renewed and growing interest in WIPO discussions from developing countries and civil society groups. This interest has seen; in particular, the strong participation in the SPLT negotiations by developing countries.[4]

7. On the other hand, a discernible institutional trend has been the continuing activism of the International Bureau of WIPO. There is, at least, anecdotal evidence that the International Bureau does not always act as the servant of its membership as a

[3] For a discussion of general trends in the field of intellectual property see Musungu, Sisule, (2004) "General Trends in the Field of Intellectual Property: Issues and Challenges for the Establishment of a Development-Oriented Framework", a paper presented at the UNCTAD, ICTSD and TIPS Dialogue on Intellectual Property, Innovation and Sustainable Development, Cape Town, South Africa 29 June – 1 July. Available at http://www.iprsonline.org/unctadictsd/dialogue/2004-06-29/2004-06-29_musungu.pdf.

[4] See the discussions in section II.1 below.

whole but as a free agent with its own agenda.[5] At the same time, WIPO's technical and legal assistance activities have come in for serious criticism for a variety of reasons in the recent past. Two main concerns underlie the various criticisms levelled at WIPO's technical assistance.[6]

8. The first is that the International Bureau's work especially with relation to legal technical assistance has over-emphasised the benefits of intellectual property while giving very little attention to its costs for developing countries[7]. The second concern is that because of the nature of activities under the technical assistance programmes; legal technical assistance, automation of offices and provision of software, training etc., the International Bureau may exercise undue influence on developing countries which may affect the stances of these countries in WIPO negotiations including at the Assemblies. Despite these criticisms, however, there has been no discernible reorientation of design and delivery of WIPO's technical assistance.

9. These general trends that emerge with respect to WIPO as an institution provide an important background to understanding the processes and dynamics at the WIPO Assemblies. Consequently, by examining the specific issues and processes at the Assemblies in the context of these broader trends and developments, the strategy of developing countries at the Assemblies and beyond should stand on a firmer foundation.

II.1 The Draft substantive Patent Law Treaty: Commentary on the Proposal by the U.S, Japan and the EPO

10. The United States (U.S), Japan and the European Patent Office (EPO) have presented a proposal for discussion at the Assemblies on establishing a new work plan for the SCP.[8] This proposal is a slightly modified version of the unsuccessful proposal by the three that was presented at the last session of the SCP in May**.**[9] In essence, the proposal is that, the General Assemblies:

[5] For a discussion of the role of the International Bureau, for example, in the patent agenda process, see Musungu, Sisule and Graham Dutfield, (2003), "Multilateral Agreements and a TRIPS-plus World: The World Intellectual Property Organization (WIPO)", *TRIPS Issues Papers 3*, QUNO-Geneva and QIAP-Ottawa, pp. 13-14. Also see, Correa, Carlos, and Sisule Musungu, (2002), "The WIPO Patent Agenda: The Risks for Developing Countries", *T.R.A.D.E Working Papers 12*, South Centre, Geneva.

[6] For further discussion regarding WIPO's technical assistance, see the IPR Commission, (2002), *Integrating Intellectual Property Rights and Development Policy*, IPR Commission, London. Also see, Musungu and Dutfield, supra, note 5.

[7] See, e.g., IPR Commission, *ibid*.

[8] See Annex to document WO/GA/31/9 dated 23 July 2004. Available at http://www.wipo.int/documents/en/document/govbody/index04.htm.

[9] See WIPO document SCP/10/8 dated 22 April 2004. Available at http://www.wipo.int/documents/en/document/scp_ce/index_10.html. The South Centre and CIEL had already made comments on that proposal. See the Document titled "A Commentary on Developing Countries' Interests and the Proposed Graduated Approach to the SPLT Negotiations" April 2004, mimeo. This section is partially based on that note. Also see Correa, Carlos (2004), "The WIPO Draft Substantive Patent Law Treaty: A Review of Selected Provisions", *T.R.A.D.E Working Papers 17*, South Centre, Geneva, for a technical analysis of the draft SPLT.

> "(1) decide modalities for the future work of the SCP; and (2) adopt a revised approach that limits the work of the SCP to an initial package of priority items as set forth below, with a view to concluding a more limited substantive patent law treaty as soon as possible. Specifically, it is proposed that a logical place to begin discussions is with the following prior art-related issues:
>
> 1. Definition of Prior Art
> 2. Grace Period*
> 3. Novelty
> 4. Non-obviousness/Inventive Step
>
> Discussion on other issues of substantive patent law in the SCP would be deferred pending resolution of these priority issues."[10]

11. The draft SPLT raises a number of serious issues for developing countries. These issues and challenges were highlighted in the United Kingdom (UK) Commission on Intellectual Property's (IPR Commission) report[11] and in the South Centre T.R.A.D.E Working Papers 12[12] as well as other recent studies and commentary.[13] The South Centre T.R.A.D.E Working Paper 12, in particular, assessed the implications of the WIPO patent agenda initiative for developing countries in the context of the on-going debate on the benefits and costs of patent protection in these countries. After analysing the main issues under the various pillars of the patent agenda, the Working Paper concluded that the further harmonisation of patent law was not in the best interests of developing countries since a harmonised system would reduce the flexibility currently available to these countries to take into account their development needs in developing their intellectual property policy.

12. Some of the risks identified with respect to the SPLT include the danger that: harmonised standards would leave little room for developing countries to adapt their patent laws to local conditions and needs; harmonisation will likely take place at the highest level of protection (based on the standards currently applied by developed countries) meaning that the process will exert an upward force on national laws and policies in developing countries resulting into the narrowing of limitations and exceptions to patent rights; the higher standards are likely to have a negative effect on local innovation in developing countries; and that the current draft contained standards that were primarily aimed at benefiting the "international industries" and not individual inventors or small and medium enterprises.

13. In the last three or so sessions of the SCP, developing countries have become increasingly active in articulating their interests and arguing the case for provisions to address their development concerns. There has also been a marked increase in the

* Since Grace period and first-to-file are linked, grace period, although included in the first package for discussion, is subject to movement on first-to-invent.

[10] See para 8 of the Annex to document WO/GA/31/9, *supra* note 8.

[11] *Supra* note 6.

[12] *Supra* note 5.

[13] For additional discussions on the SPLT and its dangers see, GRAIN "One Global Patent System?" available at http://www.grain.org/front/ and Musungu and Dutfield, *supra* note 5.

number of civil society organizations participating as observers or otherwise commenting on this process. This increased participation by developing countries in the SPLT negotiations has, however, elicited an interesting response from the so-called user groups (associations of corporations and patent lawyers), the International Bureau of WIPO and the major patent offices. According to the International Bureau, the debate in the SCP about the benefits of harmonisation, the balance between right-holders and the public interests and the relationship between the patent system and other policy and regulatory issues such as public health, "suggests that the original objective of the SCP to achieve broad and deep harmonisation of patent laws might be too ambitious and not easily achieved".[14]

14. On their part, the United States, Japan and the EPO argue that, "Although the work of the SCP has produced some useful results, the lack of progress at recent SCP sessions clearly demonstrates that the current model for discussion is not workable."[15] They cite two main reasons for the lack of progress in the SCP. First, they argue that the sheer volume and complexity of issues discussed has led to inadequate time for discussions. Secondly, but more interesting, they argue that several provisions of the draft treaty have been extremely controversial and of high political sensitivity, leading to postponement of discussions on some provisions and protracted debates on others. It is apparently for these reasons that the proposal to decide the modalities of future work in the SCP and the scope of the SPLT has been made to the WIPO Assemblies.

II.1.1 Developing Countries' Interests and the SPLT

15. As has already been noted, the draft SPLT covers fundamental areas of patent law on which there are so far no international standards. This means that, if adopted, the SPLT will eliminate the flexibility that WTO and WIPO Members enjoy to legislate in such areas. As a general premise therefore, patent law harmonisation in general and as proposed in the SPLT, in particular, will result in a net loss for developing countries.[16] The first question that arises with respect to the proposal by the U.S, Japan and the EPO is therefore the following: Does the cutting down on the number of provisions to be adopted in the treaty change this basic premise? The short answer is no.

16. The first reason for the negative answer is self evident: by introducing new standards, most likely based on the standards in the major patents offices and developed countries, in areas that are either not addressed by the TRIPS Agreement or in other WIPO treaties or on which there exist flexibility under TRIPS and WIPO treaties, the SPLT will inevitably result in loss of sovereign flexibility on the covered issues. Less evident, however, is the second reason for the negative answer. The proposal suggests that any article that could offer an opportunity for balancing the

[14] See the Memorandum of the International Bureau titled "Information on Certain Recent Developments in Relation to the Draft Substantive Patent Law Treaty (SPLT)", WIPO Document SCP/10/1, dated 17 March 2004, para. 2. Available at http://www.wipo.int/documents/en/document/scp_ce/index_10.html.
[15] See Annex to document WO/GA/31/9, *supra* note 8.
[16] For further discussion on the main disadvantages of the harmonisation as proposed in the SPLT see, Correa and Musungu, *supra* note 5.

rights of right-holders and the public interest or that is aimed at preserving policy flexibilities should not be discussed at all as these are "controversial". This approach is, however, being presented as a compromise.[17] Whatever is the compromise, that is, what developing countries get if there can be no discussion on balance or flexibilities, is not clear.

17. Finally, the proposal argues that 20 years is far too long to have dwelt on a subject so important to the global economy, to the users of the patent system and to patent offices worldwide. By citing the 20 year period and the 'importance' of the SPLT to the global economy, the proposal is aimed at setting the stage for the argument that this treaty is long over due and anyone who opposes any aspect of the "compromise" draft should not be taken seriously and should be seen as obstructionist. The truth, however, is that in those 20 years, the Trilateral offices have failed to agree to any one of the issues under discussion in order to protect their interests and they continue to apply different standards. To suggest that developing countries' are to blame for this is quite absurd.

II.1.2. Possible Strategies for Dealing with the Proposal on a New Work Plan

18. At the Tenth Session of the SCP where the initial proposal by the U.S, Japan and the EPO was discussed,[18] all developing countries that intervened and some other countries such as Russia opposed the idea of a pre-determined set of priority areas which did not take into account the interests of all delegations. For developing countries, in particular, the issues covered in paragraphs 2 and 3 of article 2 of the draft SPLT relating to the protection of genetic resources and traditional knowledge and public interest exceptions aimed at the preservation of policy flexibilities to address public health, environment and other public interests concerns respectively have to be included in any package of the SPLT.[19]

19. At the same time, these countries also opposed the idea of the General Assembly addressing the issue of future work on the SPLT for a variety of reasons.[20] This opposition meant that the SCP itself could not refer any matter to the Assemblies necessitating the formal presentation of the proposal to the Assemblies by the co-sponsors. There are a number of procedural, substantive and systemic political issues that arise with respect to this proposal that developing countries need to carefully consider in developing their strategy on this issue. These include consideration of whether: the proposal is validly before the Assemblies, that is, if the procedures of the Assemblies have been met for the proposal to be on the agenda and to be debated; even if the proposal has met all the procedural requirements, whether the Assemblies have a basis to make the decisions requested; and the political implications of discussing and or accepting the proposal at the Assemblies.

[17] See SCP/10/9 Annex, p. 2, last para.
[18] Note that the proposal was not formally on the agenda of the meeting. See the draft report of the session WIPO document SCP/10/11 Prov. dated 14 June 2004, para 12. Available at http://www.wipo.int/documents/en/document/scp_ce/index_10.html.
[19] See, e.g. paras 24, 26, 28, 29, 30, 31, 32, 33, 40 and 49 of the draft report, *ibid*, for developing countries' positions.
[20] See, e.g. paras 229, 231, 234, 236, 237, and 238 of the draft report, *supra* note 18.

A. Is the Proposal Validly before the Assemblies?

20. The International Bureau in introducing the proposal by the U.S, Japan and the EPO indicates that the proposal has been included in the agenda pursuant to Rule 5(4) of the WIPO General Rules of Procedure.[21] Rule 5(4) provides, *inter alia*, that:

> "[4] Any State member of a body may request the inclusion of supplementary items in the draft agenda. Such requests shall reach the Director General not later than one month before the date fixed for the opening session."

While the proposal obviously reached the Director General one month before the opening session of the Assemblies and the Director General has complied with the requirement to notify other members, the proposal has not been presented only by State members.

21. The proposal has been presented by the U.S and Japan, which are State members of WIPO, and the EPO which is not a State member and not even an observer at the Assemblies.[22] The question therefore is whether a proposal by a State member and an entity that is not even an observer at a body can be deemed to fulfil the requirement of 'any State member'. Even assuming that the EPO is the same legal entity as the European Patent Organization and therefore that the proposal should be considered as a proposal by the former, the question then is whether an observer at the General Assembly, can present proposals. While a reading of Rule 5(4) may suggest that there is some room of manoeuvre, Rule 24 clearly prohibits such a misuse of Rule 5(4).

22. Rule 24 of the General Rules of Procedure defines how observers can participate in sessions of the Assemblies and other bodies of WIPO. It provides under paragraph 2 that observers "May not submit proposals, amendments or motions". This prohibition on observers submitting proposals, amendments or motions can not be overcome simply by an observer getting a State member to jointly present a proposal. The reason for prohibiting observers from submitting proposals, amendments or motions was clearly to ensure that all matters before WIPO bodies be presented and decided on only by members and that observers should not have a direct role in decision making.

23. If observers were allowed to circumvent Rule 24 simply by getting a State member to jointly present proposals, amendments or motions, it would defeat the whole purpose of the Rule. Clearly, the requirement of 'a State member' under Rule 5(4) read together with the provisions of Rule 24 paragraph 2, can only be interpreted to mean that a proposal by an observer and a State member is invalid and can not be considered by the General Assembly. The EPO can not either individually or jointly with State members present proposals to the General Assembly. Consequently,

[21] See para 1 of document WO/GA/31/9, *supra* note 8.
[22] The International Bureau confirms that the EPO, that is the European Patent Office, will not be participating at the Assemblies either as a State Member or as an observer. Only the European Patent Organization will be participating as an observer. See paragraph 2 and 4 of document A/40/INF/1 dated 29 March 2004.

developing countries have a very strong case for arguing that the Assemblies should not consider the proposal on the SPLT on the grounds that: (a) the proposal has not met the requirements of Rule 5(4) under which it was ostensibly presented; and (b) the proposal breaches Rule 24 which specifically bars observers from submitting proposals, amendments or motions.

B. Does the WIPO General Assembly have a Basis for Making the Decisions Sought in the Proposal?

24. Irrespective of the invalidity of the proposal before the Assemblies, it is clear that no effort will be spared to get the Assemblies to address the SPLT and agree to the proposed new work plan. Objections on the basis of the Rules of Procedure are likely to be scoffed at as not being serious and not the type of debate to be had at the Assemblies. This is evidenced by the fact that that this proposal has been submitted to the Assemblies despite the strong and well reasoned opposition to it at the SCP session. Proper coordination and reasoned engagement by developing countries will therefore be key. The role of the International Bureau in this discussion should also be carefully watched. In the debate at the SCP, the International Bureau intervened several times on one side of the debate. For example, when the presence of the proposal on the agenda was questioned, instead of letting the co-sponsors defend the proposal; the International Bureau took upon itself to defend the proposal.[23] A number of important issues should be considered here.

25. The first part of the proposal is that; the General Assemblies should decide modalities for the future work of the SCP as a WIPO body. This raises the question as to what is the mandate of the SCP. The SCP was set up in 1998 to "serve as a forum to discuss issues, facilitate coordination and provide guidance concerning the progressive development of the law of patents, including harmonization of national laws and procedures".[24] It was expected that the SCP would submit recommendations and policies to the WIPO General Assembly for approval. With respect to the issues to be discussed in the SCP, apart from matters relating to patent formalities, harmonization, central recording of changes in patents and patent applications, disclosure of technical information on the internet and its impact on patentability, among others, that were specifically discussed as possible issues at the First Session, the SCP had a broad mandate allowing it to deal with any other relevant issues.

26. In other words**,** the SPLT is but one of the issues that the SCP may discuss and a failure to progress on this one item does not mean that the future work of the SCP is uncertain. Indeed, as the Delegation of Brazil observed at the Tenth Session, the SCP took the decision to include the SPLT in its work programme in 2000 on its own motion.[25] If the Committee can not agree on how to proceed on this item that it chose

[23] See debate on the agenda in the draft report at paras 10-12, *supra* note 18.
[24] See the Memorandum of the International Bureau on Organizational Matters and Overview of the Issues to be considered by the SCP. WIPO document SCP/1/2 dated 4 May 1998. Available at http://www.wipo.int/documents/en/document/scp_ce/index.htm
[25] See para 229, 231 and 256 of the draft report, *supra* note 18. See also the interventions of the Delegations of India para 231, 236 and 251; Egypt para 237; Iran para 238; Argentina para 245; Kenya para 252; Dominican Republic para 254.

to deal with without seeking guidance or authority from the Assemblies can some members take the issue to the Assemblies and should the Assemblies, in the circumstances, seek to impose an item on the Committee? This is important because the question of the future work of the SCP as a whole was really not discussed at the Tenth Session. The issue that was discussed and on which consensus was not reached was on the future work on the SPLT.

27. The U.S, Japan and the EPO do not therefore have a basis for asking the Assemblies to decide on the modalities for the future work of the SCP as this will undermine the mandate and flexibility of the SCP which has allowed it to deal with different issues as need arises. Consequently, while the General Assembly may have residual authority to address any issue in WIPO, there is a strong case to be made that dealing with the issue of the future work of the SPLT without a recommendation from the SCP is not appropriate and will undermine the mandate of the SCP to "discuss issues" and; "provide guidance" on issues of development of patent law.

28. The second part of the proposal is that the Assemblies adopt a revised approach that limits the work of the SCP to an initial package of priority items identified by these two delegations and the EPO. It important to note at the outset that the idea of an initial package has come about in large measure because of the realisation that developing countries and civil society groups are now following the SPLT negotiations closely and business as usual, that is, simply ignoring developing countries' views and or dismissing them as misplaced will not work. While in an ideal situation many developing countries would rather not be dealing with the SPLT at the moment, it is a plus that the major players are now prepared to drop their deep harmonisation agenda. Strategically therefore, developing countries need to consolidate the retreat to 'SPLT light' by the major players, without accepting it as a compromise.

29. This could be done by focusing debate on the fact that the proposed priority areas are only priority for some delegations and that, in particular, the interests of developing countries have completely been sidelined. Developed countries having identified their priorities what needs to be discussed is what the priorities for developing countries are. A number of Delegations already made this point at the Tenth Session of the SCP in May.[26] This means that developing countries should aim to have as a minimum the issue of exceptions relating to genetic resources and traditional knowledge, public health and environment etc. clearly accepted as a priority issue. In addition, they could also argue that in order to determine what is priority and what is not, the SCP should discuss each and every draft article of the SPLT with a view to agreeing what is and what is not priority starting with draft article 1 in the next session. With this approach, the likely outcome is that when it gets to article 2 paragraphs 2 and 3 of the draft SPLT, the U.S is unlikely to agree on this as a priority which will effectively block further movement to any other issue if developing countries stand by their position that this is the priority issue in the SPLT.

[26] See, e.g. the interventions of the delegations of China para 24; Egypt para 26; India para 28; Brazil para 29; Dominican Republic para 30; Algeria para 31; Argentina para 32; Iran para 33; South Africa para 40; Morocco para 44 and Mexico para 49 of the draft report. *Supra* note 18.

30. In addition, it should also be argued that the determination of priority areas for the SPLT can not be properly done at the Assemblies. The arduous task of dealing with a number of varied and complicated issues means that it is not feasible for the General Assembly to reach a solution on what is and is not priority if this could not be achieved with more time and focus in the SCP.[27]

C. Are there any Systemic Political Implications for Accepting to Deal with the SPLT at the Assemblies?

31. As already noted, the proposal on the SPLT that has been submitted for consideration at the Assemblies was the subject of intense discussions at the last session of the SCP in May. In particular, the question of whether to refer the matter of the future work or new work plan for the SPLT to the Assemblies was specifically addressed. The Chair summed up the debate on the issue as follows:

> "[44] [T]hat there was no agreement in the Committee regarding its future work plan, noting that the report would reproduce all the interventions that were made in respect of this agenda item, including comments made by two delegations in respect of the Chair's conclusion".

Although the Chair refers to future work plan of the Committee, as the report of the meeting shows, the discussion was about the future work plan on the SPLT. In this context, the major question is: If there could be no consensus in the SCP on the future of the SPLT and taking into account the fact that the work on the SPLT was not mandated by the General Assemblies, why is it that the U.S, Japan and the EPO insist on bringing this issue to the Assemblies?

32. During the discussion at the SCP, the delegation of Argentina pointed out that "Since the SCP had not reached a consensus; it would be unlikely that the dissent could be overcome in the Assemblies".[28] On its part, the Kenyan delegation pointed out that "If the issue of future work was referred to the Assemblies, the position of delegates would not change unless new proposals on how to proceed were made". The proposal that has been submitted at the Assemblies is not new and is exactly the proposal that was before the SCP. Although one can only speculate at this point, there are several possible explanations for the U.S, Japan and the EPO insistence to come to the Assemblies with this issue.

33. In the first instance, the thinking may be that the arguments by developing countries at the SCP about the future of the SPLT was a bluff and so by bringing the issue to the Assemblies, the co-sponsors of the proposal will be able to call their bluff. A second related reason could be that while it may not be a bluff, the arguments and resistance to the proposal in the SCP was not fully backed politically so that by raising the political stakes these countries will back down. In this regard, the co-sponsors may be banking on the experience at the last Assemblies where developing countries, the

[27] See South Centre and CIEL; *supra* note 2, p. 8.
[28] See para 234 of the report of the Tenth Session, *supra* note 18.

African Group, in particular, was pushed to accept a compromise on the future of the IGC that was worse than what the Group had earlier rejected at the IGC itself.

34. Thirdly, it may also be that the co-sponsors of the proposal think that the senior capital based officials and the Permanent Representatives (Ambassadors) who will be participating at the Assemblies will understand the proposal better and will therefore agree to it. Another possible reason may also be that the co-sponsors consider that the senior officials and Permanent Representatives are more gullible than their Delegates and therefore it will be easier to convince them to accept the proposal.

35. If the reasoning behind the submission of the proposal is any or all of the above possible reasons, it raises important systemic considerations for developing countries. If its assumed that developing countries were only bluffing at the SCP or that there is no political backing for the strong and reasoned positions that were expressed by delegates at the SCP or that the senior officials or Permanent Representatives have a different understanding with their delegates who participate in Committees at WIPO or that the senior officials and Permanent Representatives are gullible, what will it portend for the future? Will developing countries be able to push through any of their interests in WIPO if the major powers are opposed to it? Reviewing the experience at the WTO is instructive in this regard.

36. Before the Fifth WTO Ministerial Conference in Cancun, there had developed a practice at the WTO to always try to circumvent the Geneva officials (negotiators and Permanent Representatives) of developing countries and take any issue they had opposed to their ministers or senior officials. This was done on the assumption that the senior officials and Ministers in developing countries seemed to have a different appreciation of matters from their Geneva based officials and they were more likely to agree with the big powers. Indeed, before the Cancun Ministerial, the protests and arguments of developing country negotiators in Geneva were routinely ignored and the Chairman of the General Council sent the draft Ministerial text to Cancun without taking many of their concerns fully into account.

37. This seems to be what is happening at WIPO. In the WTO, it was only when in Cancun the ministers and senior officials demonstrated that what their negotiators were saying in Geneva were the national concerns of these countries and that the negotiators were not going on frolics of their own, that the negotiations were sent back to Geneva. These same officials who had earlier been dismissed as irrelevant in the process were the ones who finally hammered out an agreement in July 2004.

38. In this context the senior officials and Permanent Representatives that will participate in the Assemblies should, in dealing with the SPLT proposal, consider it not just a one off issue but an issue that has systemic strategic and political implications for their interests in WIPO and more broadly. They should clearly demonstrate to other members that:

- The positions expressed by their delegates at the SCP meeting in May were not a bluff;
- Those positions and the interests being defended are of national importance

and command strong political backing;

- The Permanent Representatives and senior officials who will be participating at the Assemblies have the same understanding of the issues as their delegates and their delegates were not involved in frolics of their own at the May SCP meeting; and,
- Emphatically, that the Permanent Representatives and senior officials are not gullible.

II.2 Matters Concerning Genetic Resources and Traditional Knowledge: The CBD Request[29]

39. Matters concerning genetic resources and traditional knowledge will be addressed at the Assemblies in two different contexts. In the first instance, genetic resources and traditional knowledge issues will be discussed in the context of the progress report of the work being undertaken in the IGC.[30] Secondly, genetic resources and traditional knowledge matters will be discussed in the context of the request to WIPO by the CBD to:

> "[E]xamine, and where appropriate, address, taking into account the need to ensure that this work is supportive of and does not run counter to the objectives of the Convention on Biological Diversity, issues regarding the interrelation of access to genetic resources and disclosure requirements in intellectual property rights applications".[31]

This paper only deals with the issue in the later context.

40. The CBD request to WIPO followed the discussions at Seventh Conference of the Parties of the CBD (COP-7) which reaffirmed that the fair and equitable sharing of the benefits arising out of the utilization of genetic resources is one of the principal objectives of the Convention and mandated the relevant working groups to elaborate and negotiate an international regime on access to genetic resources and benefit-sharing. Despite considerable debate regarding the role of trade and other related concerns in the context of the CBD, as well as on the wisdom of having the CBD resort to other organizations for clarification of issues essential to its implementation, COP-7 invited the collaboration of a number of organizations, including WIPO.

41. The invitation of the CBD to WIPO and how the International Bureau has sought to deal with it, raises a number of concerns not only with regard to the need for the CBD to rely on other sources of information and technical analysis apart from

[29] For further discussion on the CBD request and some of the issues that arise see South Centre and CIEL, *supra* note 2. The analysis under this section is partly based on the analysis in the Quarterly Update.

[30] The progress report is contained in WIPO document WO/GA.31/5 dated 23 July 2004. Available at http://www.wipo.int/documents/en/document/govbody/index04.htm.

[31] See document WO/GA/31/8 dated 23 July 2004. Also available at http://www.wipo.int/documents/en/document/govbody/index04.htm. Also see document WIPO/GRTKF/IC/5/13 dated 15 March 2004. Available at http://www.wipo.int/documents/en/meetings/2004/igc/index_6.html.

WIPO on these issues, but also as to the effect of the request on developing country and civil society groups' efforts to move forward the discussion on the protection of genetic resources and traditional knowledge in a simultaneous and coherent manner in all the relevant fora. Although the question of how much the CBD should rely on technical analysis from WIPO on these matters *vis-avis* information and analysis from other international organizations such as the United Nations Conference on Trade and Development (UNCTAD) is important, this section, however, only deals with the second set of issues. As indicated in document WO/GA/31/8 when the request from the CBD was received in March, it was submitted to the IGC for consideration. In particular, the IGC was asked to consider the invitation and address the issues set out in the COP decision VII/19. At the IGC there was no consensus on how to proceed with the invitation.[32]

42. The majority of developing countries that participated in the discussion on the CBD request in the IGC were opposed to the IGC taking any decision at that time on how to respond to the invitation. This stance, which apparently perplexed some developed country delegations is not, however, difficult to understand.[33] A clear understanding of the dynamics at play and the reasons for developing countries insisting that the invitation be dealt with, first, by the General Assembly will be crucial in the discussions on the issue at the Assemblies.

43. To ensure mutual supportiveness between international patent rules and the CBD objectives requires cross-cutting solutions. In this context, developing countries have consistently argued that the relationship between patent rules and genetic resources and traditional knowledge is a matter that should be addressed in a number of fora both within and outside WIPO. This argument was again clearly articulated at the IGC session.[34] Consistent with this argument, developing countries have sought to address this issue in a number of WIPO bodies, including the Working Group on the Reform of the PCT and in the SCP, as well as in the context of the TRIPS Agreement.

44. Discussions in these different fora have, however, not always advanced and much less been mutually supportive, but rather have been played against each other by several developed countries, causing a general lack of progress. The IGC process has particularly been used to detract from other important initiatives and to mock attempts by developing countries to address genetic resources and traditional knowledge matters as they relate to patent law in those committees that deal with patent law in WIPO.[35]

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[32] See the report of the Sixth Session of the IGC document WIPO/GRTKF/IC/6/14 dated 14 April 2004, para 183. Also available at http://www.wipo.int/documents/en/meetings/2004/igc/index_6.html. For the complete discussion on this issue in the IGC, see paras 142-186 of the report.

[33] See, e.g. the statement by Norway at the IGC. See the report, *ibid*, at para 150.

[34] See, e.g. the interventions of the delegations of Egypt on behalf of the African Group para 143; Brazil para 148; Venezuela para 149; and Senegal para 161 of the report of the session. *Supra* note 32.

[35] See, e.g. the interventions of the delegations of Canada para 147; Ireland on behalf of the European Community, its Members States and Acceding States para 151 and the United States para 157 of the report of the Sixth Session of the IGC. *Supra* note 32. It is also notable that, for example, discussions in the TRIPS Council on the relationship between the TRIPS Agreement and the CBD continue to be opposed by countries such as the U.S and Japan because of ongoing discussions in the IGC. In addition, a number of developed countries have rejected proposals tabled by Latin American countries in the SPLT negotiations claiming that matters relating to the disclosure and protection of genetic

45. Developing countries therefore correctly saw the attempt to deal with the invitation from the CBD as a matter exclusively for the IGC, as yet another way of circumventing the consideration of these issues in other equally important bodies in WIPO. Thus, the consideration of the CBD invitation by the General Assembly will be a fundamental opportunity for developing countries to once again reaffirm their conviction that the consideration of the issues of genetic resources and traditional knowledge can only be properly undertaken if it is done in all relevant fora and not only in the IGC. In particular, developing countries should ensure that the General Assembly, if it accepts to respond positively to the CBD invitation, mandates that the issues raised in the invitation be considered in all relevant WIPO bodies including, in particular, the SCP and the Working Group on the Reform of the PCT.

II.3 Copyright and Related Rights: The Question of a Possible Diplomatic Conference on the Protection of Broadcasting Organizations[36]

46. Another critical issue that will be considered by the Assemblies relates to the possibility of convening a diplomatic conference on the protection of broadcasting organizations. At the end of the Eleventh Session of the SCCR, the Committee, *inter alia*, recommended that:

> "[T]he WIPO General Assembly is recommended to consider, beginning at its September/October session in 2004, the possibility of convening, at an appropriate time, a diplomatic conference on the protection of broadcasting organizations".[37]

The language of this recommendation was arrived at after fairly intensive negotiations and should therefore be understood to represent a delicately balanced text.[38] It is hoped therefore that the Assemblies will adopt the recommendation as it is, without seeking to change its language and or attempting to pre-determine the dates of a possible conference before the assessment. envisaged in paragraph 3 of the recommendations is undertaken at the Twelfth Session of the SCCR.[39]

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resources and traditional knowledge belong in the IGC, with the United States flatly refusing to discuss the issues in the context of the SCP. Finally, while the Swiss proposal regarding the declaration of the source of genetic resources and traditional knowledge in patent applications in the Working Group for the Reform of the PCT was generally perceived as a step in the right direction, including by the European Union, several countries insisted the adequate forum for discussion of such issues was the IGC.

[36] For further discussion on this issue see, South Centre and CIEL, *supra* note 2. The analysis under this section draws on some of the analysis in the Quarterly Update.

[37] See para 1 of Annex III to the draft report of the session, document SCCR/11/4 Prov. dated 23 June 2004. Available at http://www.wipo.int/documents/en/meetings/2004/sccr/index_11.htm.

[38] This formulation was arrived at after two earlier formulations were found to be unacceptable to a large number of delegations. See Annexes I and II of the draft report and the discussions in para 121-146. *Ibid*. Initially it had been proposed to recommend to the General Assembly to decide at the forthcoming Assemblies on convening a diplomatic conference (Annex I). This language was rejected because a number of delegations felt that there was no basis for the Assemblies to make a definitive decision on the holding of a diplomatic conference. The proposal that 'the General Assembly make provision at the forthcoming Assemblies for the possible convening of a diplomatic conference' (Annex II) was also rejected partly because it was not clear what 'making provision' meant.

[39] See, Annex III of the draft report, *supra* note 37. The Committee agreed that:

47. As several countries stated in the SCCR discussions, only through a comprehensive discussion can it be ensured that the SCCR process results in an international instrument that responds to their needs, the needs of copyright holders, consumers and the public in general. To pre-determine the timing of the diplomatic conference would circumscribe the possibility of such comprehensive discussions.

48. While a number of treaties, including the Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, the TRIPS Agreement and the WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonograms Treaty (WPPT), already require countries to provide protection for the broadcasting of a work, its transmission and public communication, the proposed treaty would grant broadcasting organizations significant new rights. For example, under the consolidated text of proposals and discussions prepared by the Secretariat, the current basis for discussions, broadcasting organizations would have the exclusive right to authorize the fixation and communication to the public of their broadcasts.[40]

49. Such rights would not only grant broadcasting organizations equal protection to that afforded to the creators of the material, but it would even enable them to gain control over works that cannot be copyrighted or are otherwise in the public domain.[41] In this regard, developing countries in past SCCR sessions have repeatedly questioned going beyond the classic protection of broadcasting to create rights aimed at protecting the investments of broadcasting organizations, as worthy as they may be, rather than any innovative activities or a role as an informational and educational

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> "[3] [A]t its Twelfth Session the discussions of the Standing Committee would be based on the revised consolidated text and the Committee would assess the progress of the work. In the light of those discussions and that assessment, the Committee would recommend the dates, and the necessary preparatory steps for a possible diplomatic conference including the possibility that the Chairman prepares a basic proposal for this conference".

[40] For the consolidated text, see WIPO document SCCR/11/3 dated 29 February 2004. Available at http://www.wipo.int/documents/en/meetings/2004/sccr/index_11.htm. For detailed discussion of some of the challenges that face developing countries with respect to intellectual property rights in the information age, see, Okediji, Ruth, (2004), "Development in the Information Age: Issues in the Regulation of Intellectual Property Rights, Computer Software and Electronic Commerce", *Issue Paper 9*, UNCTAD and ICTSD, Geneva. Also see, Story, Alan, (2004), "Intellectual Property and Computer Software: A Battle of Competing Use and Access Visions for the Countries of the South", *Issue Paper 10*, UNCTAD and ICTSD, Geneva.

[41] During the last session of the SCCR, several countries raised the need to distinguish between the protection of the signals used to carry the broadcast program and the content of the program. There are increasing calls for any new instrument relating to broadcasting should protect the signals only and that signal protection language, not copyright or neighbouring rights, would be the most appropriate to protect those signals. For a full treaty-language implementation of these fundamental concepts, please see the document presented by CPTech (Consumer Project on Technology), EDRi (European Digital Rights), FIPR (Foundation for Information Policy Research), IMMF (International Music Managers Forum), and PK (Public Knowledge) at the last session of the SCCR, entitled "A Treaty on the Protection of Broadcasts and Broadcasting Organizations," available at www.cptech.org/ip/wipo/ngo-broadcast-proposal-v2.3.pdf.

tool.[42] In addition, the proposed treaty contains alternatives that could create a similar system of ownership for wired communications over cable networks and for material transmitted over Internet computer networks, with no assessment of the effects of such a framework on new, evolving technologies, as well as no consideration of the challenges of a coexisting number of different proprietary rights. The broadcasting treaty would thus, unlike the WCT and WPPT, which made only "cautious changes" to the legal regulation of copyright on the internet in light of the constantly expanding possibilities of such novel technologies, radically modify its legal framework.[43]

II.4 The Reform of the Patent Cooperation Treaty

50. The process of reforming the PCT which started in 2000 has already led to significant changes with regard to the international search and examination procedures under the system. The main changes to the Regulations were adopted at the PCT Assembly in September/October 2002 and 2003 and came into effect on 1 January 2004. These changes, among others, relate to: the enhanced search and preliminary examination (EISPE) system which introduces significant convergence between Chapter I and II procedures as well as an international preliminary report on patentability (IPRP) for every application; concept and operation of designation system; and, signature requirements, indications concerning applicants and powers of attorney.[44] A number of additional changes to the Regulations will be discussed at the 2004 Assemblies.[45]

51. Although these changes as well as the 2002 and 2003 changes are aimed at streamlining procedures, the PCT Reform process raises a number of issues which should be borne in mind during the discussion of the proposed changes to the Regulations and the general review of progress in the Working Group on the Reform of the PCT. In approving the continuation of the reform process, developing countries should consider seeking to orient the reform process to address broader societal interests as well and not just the interests of patent applicants and patent offices.

52. In this regard, there are two main issues that should be considered. First, is the issue of the future reform of the PCT including options for the future development of the international search and examination. As already noted, although the changes to the PCT so far have related to streamlining procedures, some of the proponents of the reform process see this as just a first step in a process that should lead ultimately to

[42] See, e.g., the interventions of India and Brazil at the Tenth Session of the SCCR. The report is document SCCR/10/5 and is available at www.wipo.int/documents/en/meetings/2003/sccr/doc/sccr_10_5.doc.

[43] See, Cornish, William and David Llewelyn, (2003), *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, Sweet & Maxwell, London, p. 368.

[44] For detailed explanations regarding the new system see, WIPO "Changes to the PCT Regulations which came into Effect on 1 January 2004". Available at http://www.wipo.int/pct/en/texts/ppt/2004changes.ppt.

[45] See the Memorandum by the International Bureau document PCT/A/33/1 dated 28 June 2004 which contains a progress report on the reform of the PCT and, in particular, reports on the discussions in the Fifth and Sixth Sessions of the Working Group. See also document PCT/A/33/2 dated 23 June 2004. Both documents are available at http://www.wipo.int/documents/en/document/govbody/wo_pct/index_33.htm.

the grant of substantive rights for PCT applications.[46] This would be a major undertaking with serious implications for developing countries and the public interest in general.[47] Already, there have been attempts to move the PCT reform to this second level even before seeing the effectiveness of the new changes and waiting for the entry into force of the Patent Law Treaty (PLT). In particular, the International Bureau both at the Fourth and Fifth Sessions of the Working Group made proposals with far-reaching implications for future work in the Working Group.[48] At the Fifth Session there was considerable opposition to discussing these proposals and no agreement was reached on how to proceed.[49]

53. Following these discussions, the Working Group agreed that the Director General should undertake consultations on the matter prior to the Sixth Session. The Director General does not seem to have carried out any consultations and the issue was not canvassed at the Sixth Session. In view of the fact that this issue had been raised as a proposal of the International Bureau, the Director General's decision not to pursue consultations suggests that the International Bureau has abandoned this idea, at least, for the moment. That said, however, developing countries should be vigilant and should ensure that the approval of the proposals by the International Bureau in document PCT/A/33/1 is not seen as authorizing the Working Group to undertake reform on the lines that had clearly been opposed in the earlier sessions.

54. The second issue relates to the question of genetic resources and traditional knowledge in the context of the PCT. Matters relating to bio-piracy and misappropriation constitute a crucial offensive interest for developing countries in international intellectual property standard-setting. The current discussions on achieving effective protection for genetic resources and traditional knowledge in the PCT system were, however, set off by a proposal by Switzerland regarding the declaration of the source of genetic resources and traditional knowledge in patent applications at the Fourth Session of the Working Group.[50] Since then, the discussions on genetic resources and traditional knowledge have been some of the most intense. At the Sixth Session, Switzerland presented additional comments on its proposal, clarifying some key concepts and building on some of the remarks and support received during the previous sessions.

55. There is no doubt that issues related to prior informed consent for access to genetic resources and traditional knowledge and issues related to benefit sharing are critical issues for developing countries. There is also no doubt that the PCT system has a role to play in any effective scheme for these purposes. As already noted,

[46] See e.g. Correa and Musungu, *supra* note 5, p.10.
[47] For a discussion of the possible risks that could come with a substantial 'user centric' reform to the PCT see, Correa and Musungu, *supra* note 5.
[48] See documents PCT/R/WG/4/7 titled "Options for the Future Development of the International Search and Examination" dated 21 March 2003 (Available at http://www.wipo.int/pct/en/meetings/reform_wg/reform_wg4.htm) and PCT/R/WG/5/9 titled "Options for the Future Development of the International Search and Examination: Making Greater Use of International Search Reports" dated 19 September 2003 (Available at http://www.wipo.int/pct/en/meetings/reform_wg/reform_wg5.htm).
[49] See para 19 of document PCT/A/33/1, supra note 43.
[50] See document PCT/R/WG/4/13 dated 5 May 2003. Available at http://www.wipo.int/pct/en/meetings/reform_wg/reform_wg4.htm.

however, a number of major developed countries including the U.S and the Member States of the European Union (EU) have opposed any discussion of these issues in the Working Group. These countries have, in particular, sought to use the IGC process to divert efforts to address genetic resources and traditional knowledge matters as they relate to patent law in the SCP and the Working Group.

56. In this context, developing countries should, both in the discussions at the PCT Assembly on the future reform of the PCT and at General Assembly on the request of the CBD, reiterate the importance of addressing matters relating to genetic resources and traditional knowledge in all relevant fora in WIPO. With respect to the future reform of the PCT, they should emphasise that any work on the further reform of the PCT system should fully address these issues. They should also argue that considering the progress that has been made on the other matters in the reform, genetic resources and traditional knowledge issues should be prioritised in the next two sessions of the Working Group with a view to finding workable solutions to the problems of bio-piracy and misappropriation.

II.5 The WIPO Policy Advisory Commission

57. The discussion on the report of the Fourth Session of the WIPO Policy Advisory Commission (PAC) at the Assemblies should, apart from providing an opportunity to discuss the role of the PAC, also be an opportunity for the Assemblies to discuss broader development issues.[51] In this context, a number of issues could be raised and considered in the discussion. The first issue is the role of the PAC and how it influences the direction of the International Bureau on various issues. The second issue which arises from the report is the mandate of the WIPO. The third and final issue, is the level of debate and focus of the PAC. We address each of these issues in turn.

II.5.1 The Role of the PAC in the Work of WIPO[52]

58. In the memorandum of the Director General to the Assemblies, the mandate of the PAC is stated as being to "provide objective and informed external advice to the Director General, particularly with respect to policy-making, medium-term planning, processes and the needs of the market sector".[53] The Director General then goes on to point out that 'the PAC is strictly advisory and consultative and –shall never replace or diminish the role of Member States in the initiation and monitoring the programme of the organization'. It is important that the Director General makes it clear that the role of the PAC is strictly advisory. However, the important point is not about the PAC replacing or diminishing the role of Members, but it is probably more about the influence that the PAC exercises on the International Bureau.

[51] The report of the PAC is contained in document WO/GA/31/1 dated 28 June 2004 as Annex I. The document is available http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/index_31.html.
[52] For further discussion on the Role of the PAC and possible problems see, Musungu and Dutfield, *supra* note 5.
[53] See, paragraph 2 of document WO/GA/31/1, *supra* note 51.

59. Although the Members States maintain the overall oversight on the programmes of WIPO, the International Bureau plays a significant role in determining the vision of the organisation and the shape and nature of the final outcomes of treaty and other negotiations and discussions. Consequently, although the PAC is only advisory, it does not mean that it is not influential. Indeed, the Director General noted at the opening of the session that the PAC "through its… influence, had already become a fundamental part of the fabric of the international intellectual property community"[54]. He also referred to the PAC as authoritative. Consequently, because of the influence that the PAC wields in the thinking of the International Bureau, it is important that the Director General ensures that all important points of view, including civil society views are represented on the PAC. It is particularly important that the persons that make up the PAC represent also experts on development and public interest in intellectual property policy. Although the new PAC is definitely an improvement from the previous PAC, a fact that is reflected in the variety of views expressed on various issues, the Director General should be urged to continuously review the representation on the PAC to ensure a balance of points of view and expertise.

60. Finally, the discussion on the PAC may also be the time to raise questions about the Industry Advisory Commission (IAC) and its possible influence on the International Bureau. The IAC also created in 1998, although advisory like the PAC also raises concerns about the influence on the International Bureau. The IAC was apparently established for the purposes of ensuring that the "voice of the market sector is heard and that the organization is responsive to its [market sector] needs"[55]. The Director General stated at its creation that it was designed to ensure that there is "a direct input of industry into the policy-making process in WIPO"[56].In the context of the development concerns that have been raised in and outside WIPO and considering that industry experts and players are also represented in the PAC it is questionable whether it is necessary to have an additional separate industry-only group.

II.5.2 The Mandate of WIPO

61. A number of statements that are reported from the fourth session of the PAC raise the question of the mandate of WIPO in the context of the debate on the benefits and costs of intellectual property and the role of WIPO in this debate. For example, the Director General in paragraph 4 thanks the members of the PAC 'for their commitment to the promotion, protection and development of the international intellectual property system' while the Chairman of the session in paragraph 5, notes that "intellectual property, so relevant for prosperity, needed to be protected in order to prosper itself". Although not necessarily problematic in themselves, these

[54] See, para 4 of the report of the session, *supra* note 51.
[55] See Report of the first meeting. WIPO Document WO/GA/24/6 Annex 1. Available at http://www.wipo.int/eng/document/govbody/wo_gb_ga/doc/ga24_6a1.doc.
[56] See press release on the first meeting of the IAC http://www.wipo.int/edocs/prdocs/en/1999/wipo_pr_1999_154.html

statements raise questions about the understanding of the PAC of the mandate of WIPO.

62. As a specialised agency of the United Nations, WIPO has the responsibility for taking 'appropriate action… to promote intellectual activity and for facilitating transfer of technology… in order to accelerate economic social and cultural development'.[57] In this regard, the mandate of WIPO should be understood to include the responsibility to address all matters relating to intellectual creativity, a concept that goes beyond and might in some cases require that intellectual property is not promoted as such. In essence therefore, in addressing, for example, issues relating to the digital divide, WIPO should be able to legitimately within its mandate, address issues relating to free and open source software and other non-proprietary collaborative models of innovation.

II.5.3 The Level of Debate and Focus of the Fourth Session of the PAC

63. As already noted, there was a marked improvement in the level of debate and the range of perspectives on the table at the fourth session of the PAC as compared to the earlier sessions. This appears to be, in part, as a result of the perspectives of some of the new members but also probably because of the increasing acceptance that development issues that developing countries have raised both in WIPO and at the WTO as well as in other fora, are legitimate issues that need to be addressed. Although some statements as those cited above raise some concerns, there were a number of progressive approaches to issues that should be encouraged and the members of the PAC who raised them lauded.

64. For example, in the discussion on managing cultural assets, some members of the PAC pointed out that 'while there may be benefits from intellectual property, there is nonetheless another side to the coin'. These members pointed out the potential impacts of high prices resulting from strong protection systems and the economic effects of copyright on software in addition to correctly noting that piracy should not be confused with "intensive fair use".[58] In the discussion on the intellectual property policies and the Japanese economy, some members pointed out that lessons from Japan 'did not necessarily transfer precisely to the situations of developing countries' and questioned whether spending time and effort in achieving strong and comprehensive protection in developing countries would be equally effective in terms of encouraging economic growth.[59]

65. Finally, with respect to the focus of the discussions of the PAC, although the topics addressed were relevant and important, the suggestion by some PAC members that future PAC sessions should consider topical issues, such as intellectual property and public health with particular regard to pharmaceuticals is a timely one.[60] This is a

[57] See WIPO, *Agreement between the United Nations and the World Intellectual Property Organization*, WIPO Publication No. 111, WIPO, Geneva, 1975, article 1.
[58] See, para 16 of the report, *supra* note 51.
[59] See, para 28 of the report, *supra* note 51.
[60] See, para 34 of the report, *supra* note 51.

suggestion that the Director General should be encouraged to follow through. The PAC could, for example, also be asked to discuss the report of the IPR Commission which raised a number of important policy and related issues directed at WIPO. A discussion by the PAC on these matters should help the Director General and the International Bureau, to fully take into account the recommendations of that report and other recent similar reports and commentary in future WIPO activities and programmes.

II.6 Matters Concerning the Advisory Committee on Enforcement

66. Another issue that will come up for consideration and review by the Assemblies is the work of the ACE. The Second Session of the ACE which addressed, among others, the role of the judiciary in enforcement was held from 28 to 30 June 2004.[61] When the ACE was established at the Assemblies in September/October 2002, its mandate was agreed to be limited to technical assistance and coordination and it was specifically agreed that the mandate would not include norm-setting. At the First Session of the ACE, a number of members noted that the issue of enforcement should be seen in a broader context of societal interests and right holders obligations and not just from the context of right holders interest and infringement.[62] This is an important consideration that merits being re-emphasised whenever the Assemblies discuss the issue of enforcement. This is particularly so because there are those who continue to urge that the ACE be bestowed with a norm-setting mandate.[63]

67. In emphasising that the mandate of the ACE excludes norm-setting, developing countries should also be clear that norm-setting goes beyond treaty making or setting binding standards but extends to cover a wider range of activities including the extent to which activities related to "best practices" create normative systems. In this context, care should be taken to ensure that activities related to national experiences etc. do not result in the creation of a value system that would directly or indirectly put pressure on countries to adopt certain measures as opposed to others or that could result into 'soft law'. A best practices approach or similar approaches are also likely to legitimatise TRIPS-plus enforcement standards that are being developed through bilateral trade agreements.

68. Finally, although tackling infringement of intellectual property is a legitimate interest, it is just one part of enforcement. The concept of enforcement as seen within

[61] A summary of the discussions is contained in the Summary by the Chair, document WIPO/ACE/2/13 dated 30 June 2004. Available, together with other documents for the session at http://www.wipo.int/documents/en/meetings/2004/ace/index_2.htm. The South Centre and CIEL prepared a short background note to help developing countries to participate in this session. See, South Centre and CIEL, (2004), "The Role of the Judiciary in the Enforcement of Intellectual Property: A Commentary on Selected WIPO Studies in the Context of Development Concerns", mimeo. The discussion here is partly based on that document.

[62] See paragraph 7 of the Conclusions by the Chair for the First Session of the ACE. WIPO document WIPO/ACE/1/7 Rev dated 13 June 2003. Available at http://www.wipo.int/documents/en/meetings/2003/ace/index_1.htm.

[63] See, e.g. para 18 of the report of the fourth session of the PAC, *supra* note 51, where some PAC members asked whether the ACE's mandate 'could usefully be extended beyond discussion and consideration of best practices'.

the intellectual property circles and as projected, for example, in most of the studies that were discussed at the Second Session of the ACE, is not holistic as it concentrates on enforcing the private rights of the right holders to the exclusion of enforcing their obligations to society including preventing the abuse of intellectual property rights and the rights of third parties as well as the rights of the general public. In this regard, while right holders interests are important, there are other equally important interests which do not appear to be informing the definition of enforcement in the intellectual property community. It will therefore be critical that the International Bureau be asked to explain how it has taken into account the other aspects of enforcement in its technical assistance and training activities.

III. CONCLUSIONS AND SUMMARY OF STRATEGIC ISSUES TO CONSIDER

69. The fortieth Series of Meetings of the Assemblies of Member States of WIPO will address important matters currently under negotiation/discussion in various WIPO committees and bodies. In particular, the Assemblies will be asked to debate and or provide direction on issues crucial to developing countries interests and objectives in WIPO. Although in general, developing countries and civil society organizations have in the last couple of years become increasingly involved and influential in a number of WIPO committees and working groups, their effective participation at the WIPO Assemblies remains a challenge due to their representation at the Assemblies as well as the variety of issues covered. The scenario that emerges is therefore a complex one and one which indicates that developing countries are likely to face significant challenges at the forthcoming Assemblies.

70. This background paper has sought to provide some ideas that could assist developing countries in thinking through the various issues on the agenda of the 2004 WIPO Assemblies. Some broad substantive as well as strategic and political considerations that these countries need to take into account as they prepare for and participate in the Assemblies have been outlined. These considerations relate to, among others, matters relating to the SPLT, the IGC, the protection of broadcasting organizations, PCT reform, the PAC and the ACE.

III.1 Summary of Strategic Issues and Considerations

71. The following is a summary of some of the main considerations that have been addressed in this paper.

III.1.1 The Draft substantive Patent Law Treaty

72. Taking into account that the proposal by the U.S, Japan and the EPO was a subject of intense discussions at the last SCP and that no consensus was reached on the issue because of various concerns raised by developing countries and some other delegations, developing countries should consider:

- Whether the proposal meets the requirements of Rule 5(4) and Rule 24 of the General Rules of Procedure;
- Whether the Assemblies have a basis for deciding (a) the future work plan of the SCP, an issue that has really not been discussed by the SCP, and (b) the priority items for the SCP to consider in the context of the SPLT. What such a decision would mean for the flexibility of the SCP in discussing issues and giving guidance on patent law matters should also be considered;
- What the strategic and political implications are for accepting to deal with this issue at the Assemblies or as a one off issue.

III.1.2 Matters Concerning Genetic Resources and Traditional Knowledge: The CBD Request

73. The invitation of the CBD to WIPO and how that invitation has sought to be dealt with, raises a number of concerns. Thus, the consideration of the CBD invitation by the General Assembly will be a fundamental opportunity for developing countries to:

- Once again reaffirm their conviction that the consideration of the issues of genetic resources and traditional knowledge can only be properly undertaken if it is done in all relevant fora and not only in the IGC; and,

- Ensure that the General Assembly mandates that the issues raised in the request from the CBD be considered in all relevant WIPO bodies including, in particular, the SCP and the Working Group on the Reform of the PCT.

III.1.3 Copyright and Related Rights: The Question of a Possible Diplomatic Conference on the Protection of Broadcasting Organizations

74. At the Eleventh Session of the SCCR, the Committee, *inter alia*, recommended that the General Assembly, starting at the September/October 2004 session consider "the possibility of convening, at an appropriate time, a diplomatic conference on the protection of broadcasting organizations". Considering that this language was arrived at after fairly intensive negotiations, developing countries should seek to ensure that:

- The Assemblies adopt the recommendation as it is, without seeking to change its language and or attempting to pre-determine the dates of a possible conference before the assessment. envisaged in paragraph 3 of the recommendations is undertaken at the Twelfth Session of the SCCR.

III.1.4 The Reform of the Patent Cooperation Treaty

75. There are two main issues that should be considered in the context of the PCT reform discussions at the Assemblies; the future of the reform of the PCT including

options for the future development of the international search and examination, and the question of genetic resources and traditional knowledge. In this regard:

- Although the Director General's decision not to pursue consultations of options for the future reform of the PCT suggests that the International Bureau has abandoned this idea, at least, for the moment, developing countries should be vigilant and should ensure that the approval of the proposals by the International Bureau in document PCT/A/33/1 is not seen as authorizing the Working Group to undertake reform on the lines that had clearly been opposed in the earlier sessions; and,
- Developing countries should, both in the discussions at the PCT Assembly on the future reform of the PCT and at General Assembly on the request of the CBD, reiterate the importance of addressing matters relating to genetic resources and traditional knowledge in all relevant fora in WIPO. With respect to the future reform of the PCT, they should emphasise that any work on the further reform of the PCT system should fully address these issues.

III.1.5 The WIPO Policy Advisory Commission

76. The discussion on the report of the Fourth Session of the PAC at the Assemblies will provide an important opportunity for developing countries to raise and discuss not only issues related to the role of the PAC more generally, but also for the Assemblies to discuss broader development issues. In this context, a number of issues could be raised and considered in the discussion, including:

- The role of the PAC in the work of the International Bureau and the factors that need to be taken into account in selecting the PAC experts. As a corollary, the role of the IAC could also be raised as a broad issue;
- The mandate of WIPO generally and whether that is limited to what is indicated in the WIPO Convention or is according to what is indicated in the Agreement between WIPO and the United Nations making WIPO a specialised agency of the latter; and,
- The focus of future PAC meetings and importance of addressing public interest issues and issues raised in reports such as the IPR Commission report.

III.1.6 Matters Concerning the Advisory Committee on Enforcement

77. Finally, in discussing matters relating to the ACE, developing countries should emphasise that:

- The mandate of the ACE excludes norm-setting including a wider range of activities that may result in the creation of normative systems; and,
- Although tackling infringement of intellectual property is a legitimate interest and the right holder's interests are important it is just one part of enforcement. There are other equally important interests which should inform the definition of enforcement in the intellectual property community. In this context, the

International Bureau could be asked to explain how it has taken into account the other aspects of enforcement in its technical assistance and training activities.

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