



encouraging collaboration amongst the development and human rights communities to ensure that trade promotes an equitable economy

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In-Depth Study Session on Intellectual Property and Human Rights

Report of a Study Session aimed at exploring how human rights rules and mechanisms can be used to support more equitable and development-oriented intellectual property regimes

Geneva, 23-24 September 2005¹

1. Background and Objectives

The Study Session on Intellectual Property and Human Rights was organized by 3D in order to identify and explore how a human rights framework can provide tools to support more equitable and development-oriented intellectual property (IP) regimes. The Study Session brought together forty-six participants from all over the world in order to discuss and share expertise on the economic, social and cultural development consequences of stringent IP rules and identify ways in which to best use human rights tools to ensure that IP rules and policies support development goals. Participants included human rights advocates, experts advocating for more equitable IP systems, policy-makers and negotiators from countries as diverse as Argentina, Algeria, Bangladesh, Brazil, Cameroon, the European Union, Peru, the Philippines, Uganda, the United States and Venezuela. The Study Session was timed to coincide with international IP and human rights events, notably the beginning of the 41st series of meetings of the World Intellectual Property Organization (WIPO) Assemblies and the 40th session of the Committee on the Rights of the Child.

¹ 3D would like to thank Oxfam Great Britain and the Service du protocole of the Republic and Canton of Geneva for providing financial support to the Study Session. We are also grateful to the AW.60 Trust, the Ford Foundation (Brazil) and the Friedrich Ebert Stiftung for enabling the participation of advocates from different parts of the world.

The main objective of the Study Session was to create conditions for future collaboration and coordination between human rights advocates and advocates of a more equitable and development-oriented international IP system. In order to achieve this goal, the Study Session aimed to provide human rights advocates with a clearer understanding of the key technical and political issues at stake in the current IP debates and negotiations. Likewise, it aimed to show advocates of a more equitable IP system how to use human rights rules and accountability mechanisms to achieve more development-oriented and human rights-consistent IP rules. Moreover, a further objective was to clarify the distinction between IP rights and human rights in order to avoid misappropriation of human rights language in IP debates. Furthermore, the Study Session was designed to identify strategies and key dates where IP and human rights issues could be raised in various international, regional and bilateral fora. Ideas for strategies, key dates and future work in this area put forward by the participants can be found in section 7.

2. Overview of Regimes

The Study Session began with an outline of the role, trends and current concerns raised by international IP regimes. Participants considered the changing nature of IP systems, from national systems aimed at promoting scientific innovation and creations of the mind, to international regimes aimed at protecting investment and economic assets. This trend is embodied by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) which made IP an inherent part of international trade agreements. Despite already being burdensome for many developing countries, the IP standards in the TRIPS Agreement are now being supplanted by even more stringent standards. These even stricter IP rules (termed TRIPS-plus rules) are being negotiated at the World Intellectual Property Organization (WIPO), in bilateral and regional trade agreements, investment agreements and are found in IP technical assistance provided to developing countries. These strict IP standards affect a country's capacity to implement other international obligations, including environmental standards and human rights obligations.

In response to these concerns, participants discussed how a human rights framework can provide tools to address

the imbalances in the current IP system and achieve a more development-orientated outcome. States have agreed to be bound by international human rights norms, including by signing and ratifying human rights treaties. Even if States are the main actors in international law, it is important to bear in mind the obligations of other actors, such as international organizations and multinational corporations. The main international human rights treaties of relevance to a rights-based approach to IP policy include the Convention on the Rights of the Child (CRC) – the most widely ratified human rights treaty with 192 parties; the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) with about 160 parties each; and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) with 180 parties.²

These treaties are particularly useful as they are monitored by independent human rights treaty bodies (treaty bodies). Treaty bodies such as the Committee on Economic Social and Cultural Rights (CESCR) or the Committee on the Elimination of All Forms of Discrimination against Women can be used to ensure that IP policies always take into account the needs of the most vulnerable and marginalized groups. Other useful human rights mechanisms include the special procedures of the United Nations Commission on Human Rights such as the Special Rapporteurs on the Right to Health, the Right to Food and the Right to Education. Moreover, it was noted that regional mechanisms such as the Inter-American Commission on Human Rights, the African Commission on Human and Peoples Rights, the European Court of Human Rights and the European Social Charter provided additional tools.

Participants suggested that human rights rules and mechanisms could be used to address the imbalances in IP policy in three main ways: first, by ensuring greater transparency and participation in IP decision-making processes; second, by monitoring the impact of IP rules on the realization of human rights, thereby allowing for greater accountability of relevant actors on IP issues; and third, by ensuring that wealthier countries do not have national policies or take measures in international organizations that would undermine the enjoyment of human rights in other countries. Participants also underlined the need to ensure non-discrimination, especially against women, children, minorities, rural communities and indigenous

² For details, see the text of the human rights treaties at: <http://www.ohchr.org/english/law/>

peoples, in all aspects of the discussions on IP and human rights.

The session also emphasized the need to ensure that IP “rights” are not confused with human rights in IP debates. A number of participants mentioned that they would prefer to refer to IP “privileges” instead of rights, as this word better reflects what they are. Participants emphasized that human rights are fundamental and inalienable rights, whilst IP rights can be bought, sold or revoked. Also, participants noted that the Committee on Economic, Social and Cultural Rights (CESCR) aims to clarify this distinction by drafting a General Comment interpreting the scope and content of the right to the protection of the moral and material interests resulting from an author’s scientific, literary or artistic production under article 15(1) (c) ICESCR. Participants emphasized that this human right must be considered in the context of the whole of article 15, notably the right to take part in cultural life (article 15 (1) (a)) and the right to enjoy the benefits of scientific progress and its applications (article 15 (1) (b)). Moreover, it was noted that even if IP rules could in certain limited circumstances protect the moral and material interests of authors, other systems of protection – such as minimum wages – may be better suited to ensure that the enjoyment of this human right does not harm the enjoyment of other human rights, such as the right to health, the right to food or the right to education.

3. Development

The objective of this session was to consider the content of a development-orientated approach to IP policy and identify how human rights rules and mechanisms could support such an approach.

Participants began by looking at the fact that developing countries have varied objectives and needs in relation to IP policy. Some aspire to higher standards of IP protection to promote their technological industries, whilst oth-

ers would benefit from more flexible IP standards to facilitate transfer of technology and allow them to respond to economic, social and cultural development concerns. Therefore, a development-oriented approach to IP should be defined by each country according to its own needs. However, the TRIPS Agreement changed this approach by requiring a minimum level of IP protection in all WTO Member States, even if some flexibility is permitted in the implementation of TRIPS rules. Least developed countries were granted until 1 January 2006 at the earliest to implement the TRIPS Agreement. Participants noted that it is important that LDCs make use of the option to further delay implementation of the TRIPS Agreement.³

In spite of the increasing trend towards harmonized IP standards, some developing countries, such as Brazil, are adopting development-oriented IP policies at the national level and advocating a new approach to IP at the international level. Moreover, a group of fourteen developing countries called the “Friends of Development”⁴ submitted a proposal on a Development Agenda for WIPO to the WIPO General Assemblies in 2004. The proposal was tabled in response to increasing concerns about the strict standards being advocated by WIPO, especially in its technical assistance and norm-setting activities. The objective of this proposal was to ensure that WIPO, as a UN agency, fully mainstreams development concerns in all aspects of its activities and undertake independent evaluations and development impact assessments of these activities. The proposal also suggests the drafting of an Access to Knowledge Treaty that aims to counter the adverse impact of strict IP rules on access to information, scientific knowledge and educational materials. The Friends of Development proposal and counter-proposals from other countries are still under discussion in WIPO.

The participants went on to consider the human rights obligations of States in the context of development and international economic policy. Particular emphasis was put on the obligation of international cooperation and assistance under article 2(1) ICESCR and article 4 CRC.⁵

³ A joint request to the TRIPS Council was made by Zambia on 13 October 2005 on behalf of LDC Members of the WTO, asking for an additional fifteen year delay as of 1st January 2006. See WTO Document, IP/C/W/457.

⁴ The “Friends of Development” proposal is co-sponsored by Argentina, Bolivia, Brazil, Cuba, the Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania and Venezuela. See WIPO Document, *Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO*, WO/GA/31/11, 27 August 2004.

⁵ See article 2(1) ICESCR, as interpreted by CESCR General Comment No. 3(1990), *The nature of States parties obligations*, 14 December 1990 at <http://www.ohchr.org/english/bodies/cescr/comments.htm> and CRC General Comment No.5 (2003) *General measures of implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5, 27 November 2003 at <http://www.ohchr.org/english/bodies/crc/comments.htm>

It is widely accepted that under human rights States have three types of obligations; the obligation to *respect, protect and fulfil* rights, and these pertain also to international assistance and cooperation. In order to *respect* rights States have an obligation to ensure that their policies do not harm the enjoyment of human rights in other countries. In order to *protect* rights, States must ensure that they take measures to regulate third parties, including multinational corporations, so that they do not harm the enjoyment of human rights in other countries. Whilst the specific scope of the international obligation to cooperate in fulfilling human rights is being advanced, human rights-consistent IP policy would be furthered, in the first instance, through rigorous adherence by developed countries to the obligations to *respect* the exercise of human rights abroad, through the policies and agreements they pursue, and to *protect* human rights from being undermined by third parties who benefit disproportionately from the current IP regime.

Another useful human rights norm is the right to development, enshrined in the Declaration on the Right to Development. Although this Declaration is not a binding instrument, it provides an increasingly valuable normative framework in light of its requirement for an international environment conducive to the realization of human rights. This right also includes the right of people to participate in and control the direction of their development and to participate fully and equally in the benefits of development. The right to development, in conjunction with other participatory human rights, is particularly relevant in supporting claims for public participation in IP decision-making processes at the national, regional and international level. The Task Force on the Right to Development, which brings together human rights experts and representatives from international financial and trade institutions, has made recommendations on the need for human rights impacts assessments of trade rules through the WTO Trade Policy Review Mechanism. The Task Force will meet in November 2005.

In view of the current state of IP regimes participants discussed the need for human rights mechanisms, such as the treaty bodies or the Special Rapporteurs, to openly advocate for greater coherence between IP and development policies in a way that is human rights-consistent. Participants were cautious about the best way to approach raising human rights concerns in international organizations that are specialized in trade and IP issues, such as

the WTO and WIPO. It was stressed that there was a risk that if human rights concerns were raised in a trade-related IP case in the WTO Dispute Settlement Body (DSB) that they could be re-interpreted in a harmful way. Participants also expressed concerns about the misuse of development cooperation and assistance by rich countries to impose their policy positions, such as TRIPS-plus rules, on poorer countries. In response to these concerns, participants emphasized the need to advocate that States undertake human rights impact assessments of IP rules before they are negotiated and adopted.

4. Knowledge and Education

The purpose of this session was to consider how IP rules, especially copyright, affect access to knowledge and the right to education, and suggest how human rights rules and mechanisms could be used to counter any adverse impacts.

Participants began by considering the scope and content of copyright. Copyright is a bundle of rights which includes the right to produce, copy, adapt, distribute, publicly perform and display a work. Moreover, copyright also includes a number of moral rights which include the right to be known as the author of a work or the right not to have a work altered. Since the adoption of the TRIPS Agreement WTO Member States are required to provide a term of protection to copyright of life plus fifty years after the death of the author. By providing exclusive rights, copyright raises the cost of materials, thereby restricting access to knowledge and information. This is particularly problematic in developing countries where copyright raises the cost of text books and learning materials, with dramatic consequences on the affordability of education. States can use flexibilities such as compulsory licenses, which are licenses without the consent of the IP owner, to reduce the cost of educational materials. Only thirteen countries have ever used compulsory licenses under the Berne Convention on copyrights to reproduce and translate works.

Participants outlined how the right to education under article 13 ICESCR and article 29 CRC, could be used to pressurize governments to use these flexibilities. The right to education has been interpreted by the Committee on Economic, Social and Cultural Rights (CESCR) in two General Comments.⁶ According to CESCR General

⁶ For details, see CESCR General Comment No. 11 (1999), *Plans of Action for Primary Education*, E/C.12/1999/4, 10 May 1999 and CESCR General Comment No. 13 (1999), *The right to education*, E/C.12/1999/10, 8 December 1999.

Comment No.13 (1999) the right to receive an education, including the right to universal and free primary education, has three dimensions of obligations: to *respect, protect and fulfil*. The right to education includes the right to *availability* of functioning educational institutions and programmes, *accessibility* of educational institutions and programmes for all without discrimination, *acceptability* in the form and substance of education and *adaptability* of education to the needs of changing societies and communities. Of particular relevance to the issue of copyright are *accessibility* and *adaptability*. States need to ensure *economic accessibility* of education without discrimination. If the poor cannot access education because copyright makes learning materials too expensive, this discriminates against vulnerable groups. Moreover, if copyright rules prevent materials from being adapted to the linguistic and cultural needs of communities; this could be a violation of the right to education.

Participants discussed the need to mobilize public awareness about the risks raised by copyright and new technological protection mechanisms on the right to access information and the enjoyment of the right to education in developing countries. Also, increased action is needed from the treaty bodies, especially the Committee on the Rights of the Child, on the right to education generally, and specifically the impact of IP rules on access to education. In addition, there is a need to clarify whether free universal primary education also includes free access to educational materials. Moreover, participants emphasized the fact that copyright restrictions on photocopying imposed by bilateral and regional trade agreements, especially Free Trade Agreements (FTAs), had vast implications for access to information and access to secondary and higher education in developing countries.

Participants spoke about the need to learn from the experience of the access to medicines campaigns on how to best use human rights rules and mechanisms, such as the Special Rapporteur on the right to education, to encourage States to use compulsory licenses for educational materials. Participants also questioned whether the United Nations Economic, Social and Cultural Organization (UNESCO) Convention against Discrimination in Education could play a role in ensuring that copyright rules do not discriminate against vulnerable groups, especially women and minorities. Participants also flagged the need to follow copyright rules being negotiated in different fora, including bilateral and regional trade agreements

and the WIPO Broadcasting Treaty. Finally human rights advocates were encouraged by the participants to provide input in discussions on a draft Access to Knowledge Treaty, which is part of the WIPO Development Agenda proposal put forward by the Friends of Development.⁷

5. Food

The objective of this session was to identify how IP rules affect access to seeds and the realization of the right to adequate food, in order to develop a human rights approach to analyzing these impacts.

Participants began by looking at how IP rules affect access to seeds for farmers and breeders. The TRIPS Agreement grants patent owners at least twenty years of exclusive rights to make, use, offer for sale, sell or import. Although the TRIPS Agreement allows for the exclusion of patents on plants and animals, WTO Members cannot exclude the patenting of microbiological or non-biological processes. This means that patent rules are mainly used to protect genetically modified (GMO) seeds. The TRIPS Agreement also requires that all members of the WTO provide for the protection of plant varieties either by patents or by an effective alternative system (termed “*sui generis*” system). The protection of plant varieties can also have an impact on access to seeds by limiting the ability to breed, save and re-use seeds.

Many countries have opted for the protection of plant varieties under the International Convention for the Protection of New Varieties of Plants (UPOV), and its subsequent revisions – 1978 and 1991 – instead of developing their own systems. The UPOV 91 system creates a monopoly over the production, marketing and sale of seeds and restricts the ability of farmers to breed, save and exchange seeds. Participants were concerned by the fact that developing countries are being pressurized in bilateral and regional trade agreements to adhere to the UPOV 91 system without fully understanding the impact on the livelihoods of small farmers, food security and food sovereignty. Finally, participants noted that IP rules are not the only barriers to access to seeds. Other barriers include: private contracts limiting the re-use of seeds, approved national seed lists and the use of hybrid seeds that cannot be saved.

⁷ For further information on the proposed Access to Knowledge Treaty see: www.cptech.org/a2k

Participants then discussed the normative content of the right to adequate food and how it could be used to ensure that farmers retain the ability to produce their own seeds and re-use them. The right to adequate food is an inherent part of the right to an adequate standard of living according to article 11 ICESCR. The content of the right to adequate food has been interpreted by CESCR in General Comment No. 12 (1999).⁸ States are obliged to implement the right to adequate food in a non-discriminatory way and must ensure *adequacy* and *sustainability* of food availability and access in order to achieve long-term food security. This involves ensuring that food meets dietary needs, is free from adverse substances, is *acceptable* culturally and for consumers, is *available* and *accessible*. Participants recognized that more work needed to be done on the link between IP, access to seeds and the right to adequate food.

Despite the need for a clearer human rights framework for this issue, participants suggested that the normative content of the right to adequate food of particular relevance to access to seeds is *availability* and *economic accessibility* of food. The restrictions on access to seeds imposed by UPOV 91 could undermine the right to adequate food of farmers by limiting availability of possibilities to grow food directly and limiting access to affordable seeds in order to grow food and feed oneself. Participants also considered State obligations to take measures to *respect, protect and fulfil* the right to adequate food and its link with IP and seeds. They considered that the State obligation to ensure that measures do not harm access to food could include patents on seeds and plant variety protection mechanisms. Also, the States' obligation to protect the right to adequate food by ensuring that private enterprises or individuals do not deprive people of access to food, could include protecting farmers from the adverse effect of the monopoly effects of patents on seeds. Finally, the State obligation to take measures to provide the right to adequate food could include taking measure to guarantee the price of seeds and access to seed varieties.

Of concern was the impact of patents on seeds and plant variety protection mechanisms on traditional knowledge relating to genetic resources. Participants considered a proposal put forward by the Bolivarian Republic of Venezuela which suggests that indigenous peoples could have their collective rights relating to traditional knowledge protected as part of the wider IP system. Many of the

participants expressed concern that the IP system of protection was not suited to the protection of traditional knowledge and that it risked leading to the privatization of genetic resources. Further discussion is needed in consultation with indigenous peoples to devise an adequate international protection mechanism. Discussions are currently under way within the auspices of the WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore (IGC), and the United Nations Working Group on Indigenous Populations (WGIP) on these matters.

Participants considered the possible human rights mechanisms that could be used to raise issues regarding IP, access to seeds and the right to adequate food. These include the treaty bodies, the Special Rapporteur on the Right to Food and possibly the FAO Voluntary Guidelines on the Right to Food. A number of participants working to ensure a more equitable IP system expressed concern about the FAO Voluntary Guidelines. They referred to a clause which is extremely problematic as it makes the FAO Voluntary Guidelines and their interpretation of the right to adequate food subservient to international trade agreements, including IP agreements. Participants agreed that this clause in the FAO Voluntary Guidelines underlines the need for greater cooperation between human rights advocates and advocates working to ensure a more equitable and development-oriented approach to IP policy. Participants encouraged each other to collaborate in advocating against the adverse impacts of IP protection and plant variety protection on access to seeds and the realization of the right to adequate food.

6. Health

The objective of this session was to share experiences of using human rights rules and mechanisms to ensure that IP rules, especially patent rules, do not adversely affect access to affordable medicines and the enjoyment of the right to health.

Participants stressed that IP, access to medicines and the right to health is the issue where most work has been done on the intersection between IP and human rights at the national, regional and international level. This is linked to the fact that international concern about the adverse effect of patent rules on the cost of medicines resulted in an unprecedented political commitment: the

⁸ See CESCR, General Comment No. 12 (1999), *The right to adequate food*, E/C.12/1999/5, 12 May 1999

Doha Declaration on TRIPS and Public Health 2001 (Doha Declaration). The Doha Declaration reaffirms a countries' ability to use the flexibilities permitted by the TRIPS Agreement to reduce the cost of medicines, including compulsory licenses for the manufacture of generic medicines or parallel importations of patented medicines that are sold more cheaply in other countries. Although the Doha Declaration does not refer to the right to health, many NGOs that advocated for such a declaration framed their arguments using right to health language as access to affordable medicines is an integral part of the right to health.

The Doha Declaration left one issue unresolved: how can countries that cannot manufacture their own generic medicines make effective use of compulsory licensing? The WTO General Council Decision of 30th August 2003 (General Council Decision) provides a compromise solution to this issue in the form of a temporary waiver that allows countries to export a majority of medicines under compulsory license to a country that cannot manufacture the medicines itself. So far, no country has used this mechanism to import generic medicines. WTO Members are negotiating how to best incorporate the General Council Decision into a permanent amendment to the TRIPS Agreement. Participants underlined that this issue could be controversial at the WTO Hong Kong Ministerial in December 2005.

Participants stressed that the flexibilities and mechanisms achieved in the multilateral context are being undermined by more restrictive TRIPS-plus rules in bilateral and regional trade agreements. Of particular concern are limitations on compulsory licenses, parallel imports and the inclusion of new rules on data exclusivity that will effectively undermine access to generic medicines in developing countries. Participants flagged a number of Free Trade Agreements (FTAs) where these TRIPS-plus rules are currently being negotiated such as the US – Andean

FTA,⁹ the US – Southern African Customs Union (SACU) FTA,¹⁰ the US – Thailand FTA, and the European Free Trade Association (EFTA) FTA negotiations with Thailand.¹¹ These negotiations are used as benchmarks for even higher standards in future FTAs.

Participants considered the right to health according to article 12 ICESCR and article 24 CRC.¹² The content of the right to health has been interpreted by CESCR in General Comment No. 14 (2000) and includes the right to *availability, accessibility, cultural acceptability* and *quality* health products. Of particular relevance is the right to access affordable medicines, including the provision of essential medicines. The State must take immediate steps to *respect, protect and fulfil* these obligations. The obligation to *respect* means that States should refrain from impeding the enjoyment of the right to health. The obligation to *protect* requires States to adopt measures that will prevent third parties – including the pharmaceutical industry – from threatening the enjoyment of the right to health. Finally, the obligation to *fulfil* requires the State to implement national policies and legislative measures that ensures the realization of the right to health.

Human rights rules and mechanisms that have been used to fight against the proliferation of TRIPS-plus rules include the treaty bodies and the Special Rapporteur on the right to health. Treaty bodies, such as the Committee on the Rights of the Child (CRC), started looking at this issue of IP, access to medicines and the enjoyment of human rights especially as a result of submissions from NGOs.¹³ In 2004 and 2005, the CRC monitored this issue in relation to Ecuador, El Salvador, Botswana, the Philippines and Nicaragua. For example, the CRC following the consideration of the report of El Salvador made the following recommendations on the implementation of the US- Central American FTA (CAFTA): “The Committee recommends the State party to systematically consider the best interests of the child when negotiating

⁹ The Andean countries involved include Colombia, Ecuador and Peru.

¹⁰ SACU includes Botswana, Lesotho, Namibia, South Africa and Swaziland.

¹¹ EFTA includes Iceland, Liechtenstein, Norway and Switzerland.

¹² See CESCR General Comment No. 14 (2000), *The right to the highest attainable standard of health*, E/C.12/2000/4, 11 August 2000, CRC General Comment No. 3 (2003), *HIV/AIDS and the rights of the child*, CRC/GC/2003/3CRC, 17 March 2003, and CRC General Comment No.4 (2003), *Adolescent health and development in the context of the Convention on the Rights of the Child*, CRC/GC/2003/4, 1 July 2003.

¹³ See the country briefings of 3D -> Trade – Human Rights – Equitable Economy on IP, access to medicines and human rights in Botswana, Denmark, Ecuador, El Salvador, Italy, and the Republic of the Philippines and Uganda at: <http://www.3dthree.org/en/page.php?IDpage=23&IDcat=5>

trade-related intellectual property rights and implementing them into national law. In particular, the State party should conduct an assessment of the impact of international intellectual property rights agreements on the accessibility of affordable generic medicines, with a view to ensuring children's enjoyment of the highest attainable standard of health."¹⁴ The participants stressed that such recommendations are only useful tools if civil society groups disseminate and use them in their advocacy work.

Participants flagged that the treaty bodies have made cross-references to each others recommendations. For example, CESCR recommended that Ecuador "conduct an assessment of the effect of international trade rules on the right to health for all and to make extensive use of the flexibility clauses permitted in the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (the TRIPS Agreement) in order to ensure access to generic medicine."¹⁵ The CRC followed up on these recommendations in its consideration of Ecuador and recommended that "the State party ensure that Free Trade Agreements do not negatively affect the rights of children, inter alia, in terms of access to affordable medicines, including generic ones. In this regard, the Committee reiterates the recommendations made by the CESCR."¹⁶ These recommendations were used by a coalition of civil society organization and human rights advocates in Ecuador to lobby their government on the impact of TRIPS-plus rules on access to affordable medicines.

Participants also spoke about the successful interventions of the Special Rapporteur on the Right to Health on this issue in the context of his mission to Peru. During his mission to Peru in June 2004 he raised a number of concerns about the effect of TRIPS plus rules in the US-Andean FTA negotiations (which includes Colombia, Ecuador and Peru). His press releases and recommendations in his report to the Commission on Human Rights were widely disseminated in Peru. They were used by civil society groups and also by the Ministry of Health.

In particular, they encouraged the Ministry of Health to undertake an impact assessment of proposed IP rules on the cost of medicines and the enjoyment of the right to health in Peru. Furthermore, the recommendations encouraged the Peruvian IP Office to also undertake an economic impact assessment of proposed IP rules on generic medicines in Peru. Participants also flagged the fact that a coalition of NGOs from Thailand and EFTA countries have sent two requests to the Special Rapporteur on the Right to Health to make urgent action interventions in the US – Thailand FTA and the EFTA – Thailand FTA negotiations in order to ensure that no TRIPS-plus rules are included.¹⁷

Furthermore, participants looked at how national health advocates have used human rights arguments to support their campaigns to ensure that IP rules do not undermine access to affordable medicines. Participants considered the case of Uganda, which benefits from a delay to implement the TRIPS Agreement until 1 January 2006 and an additional delay on the implementation of TRIPS patent rules until 1 January 2016 due to its status as a least developed country (LDC). Although Uganda was already TRIPS-compliant prior to the adoption of the TRIPS Agreement, the government obtained technical assistance to reform its IP laws in order to comply with the 2006 deadline. The technical assistance was provided by USAID which drafted a draft Patent Bill that includes TRIPS-plus rules. The Coalition for Health Promotion and Social Development (HEPS), Uganda, responded to these proposed rules by participating in the Law Reform Commission task force on the Patent Bill, providing independent advice on how to best implement the flexibilities in the TRIPS Agreement to ensure access to affordable medicines and the realization of the right to health, and designing a sensitization programme for the general public. HEPS encouraged Parliament to consider the importance of using a human rights benchmark in designing patent laws and succeeded in delaying the adoption of the draft Patent Bill. They are now working to ensure that Uganda use the TRIPS waiver to suspend patents on medicines until at least 2016.

¹⁴ CRC, El Salvador, *El Salvador; Concluding Observations*, CRC/C/15/Add.232, 30 June 2004.

¹⁵ CESCR, *Ecuador; Concluding Observations*, E/C.12/1/Add.100, 7 June 2004.

¹⁶ CRC, *Ecuador; Concluding Observations*, CRC/C/15/Add.262, 13 September 2005.

¹⁷ See la Déclaration de Berne, *Request for an urgent appeal to stop EFTA Member States (Switzerland, Norway, Iceland and Liechtenstein), from imposing TRIPS-plus rules in free trade agreements (FTAs) with Thailand*, 20 June 2005 at http://www.evb.ch/index.cfm?page_id=3647&archive=none

7. Ways Forward and Common Strategies

At the end of the Study Session the participants suggested a number of proposals to move these issues forward and identify common strategies to ensure that IP policies are development-oriented and human rights-consistent. These included:

Capacity-Building, Coordination and Awareness-Raising Activities:

- **Undertake capacity building** of human rights advocates on how to approach IP policy in a development-oriented manner and of advocates working on IP issues on how to use the human rights rules and mechanisms.
- **Stimulate coalitions and greater coordination** between human rights advocates and advocates working for a more equitable IP system. Particular emphasis was put on the need for greater coordination between these groups on access to seeds in order to develop a common strategy on IP, access to seeds and the right to adequate food.
- **Ensure that human rights advocates participate in debates in different fora where IP rules are on the agenda:** WIPO Development Agenda discussions, WTO Ministerial Conferences, WHO, UNESCO, FAO, Convention on Biological Diversity (CBD), World Summit on the Information Society (WSIS) and bilateral and regional FTA negotiations.
- **Ensure advocates of an equitable and development-oriented IP system participate in human rights fora where IP rules are raised:** Commission on Human Rights, treaty bodies, United Nations Working Group on Indigenous Populations (WGIP).
- **Inform IP policy-makers about human rights norms,** including negotiators in the WTO, WIPO and those negotiating bilateral and regional trade agreements. Encourage them to take into account their States' human rights obligations when negotiating IP rules in order to achieve a development-oriented and human rights-consistent outcome.

- **Raise awareness of national parliaments** about the adverse effects of IP policies of their countries on the enjoyment of human rights.
- **Raise public awareness** about the impact of IP rules on human rights by working with the media.

Procedural Strategies:

- **Use existing international human rights rules and mechanisms** to raise concerns about the impact of IP rules on the enjoyment of human rights. Encourage use of the treaty body monitoring process and the Special Rapporteur country monitoring and urgent action/ letters of allegation processes to raise concerns about violations of human rights due to IP rules. Encourage human rights impact assessments of IP rules.
- **Use domestic legislation and regional human rights mechanisms** to test cases on the impact of IP rules on the realization of human rights, with particular emphasis on the right to education and the right to adequate food.
- **Advocate for a resolution** from the UN General Assembly regarding the primacy of international human rights law over international trade agreements and IP agreements.

Additional Research and Analysis:

- **Undertake further research** on the effects of copyright rules on access to educational materials and the realization of the right to education. Similar analysis is needed on the impact of patent rules and plant variety protection mechanisms on access to seeds and the realization of the right to adequate food. Moreover, more work is needed on how to best use human rights arguments to counter the adverse impact of IP rules on access to educational materials and access to seeds.
- **Clarify the distinction between IP rights and human rights** in order to stop misappropriation of human rights in IP debates, including in WIPO. It is necessary that the CESCR General Comment on the right to the protection of moral and material

interests of authors under article 15 (1) (c) ICESCR fully clarify this difference when it considers the draft text at its session in November 2005.

- **Compile test cases** to develop a human rights framework to IP issues, including cases on access to education, access to seeds and access to medicines.

Participants identified a number of key fora and events where IP and human rights concerns could be raised; this included the WIPO General Assemblies from 26 September-10 October 2005, the UN Committee on Economic, Social and Cultural Rights 35th Session from 7-25 November 2005, the World Summit on the Information Society (WSIS) from 16-18 November 2005 and the WTO Ministerial Conference in Hong Kong from 13-18 December 2005.



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 → Human Rights
 → Equitable Economy

3D → Trade - Human Rights - Equitable Economy promotes collaboration amongst trade, development and human rights professionals, to ensure that trade rules are developed and applied in ways that promote an equitable economy.

Our Objectives are:

- To promote collaborative efforts between people working to promote an equitable economy,
- To strengthen the capacity of human rights advocates to raise their concerns with trade decision-makers,
- To encourage the use of human rights mechanisms and rules in support of efforts to promote an equitable economy, and
- To ensure accountability of all economic actors.