



Strategic dialogue on coherence between multilateral, regional and bilateral processes on intellectual property and a pro-development agenda IPRs

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Summary of discussions

Introduction

1. The UNCTAD-ICTSD Project on Intellectual Property Rights (IPRs) and Sustainable Development launched in October 2002 a series of international dialogues in response to concerns that continuing trends in the formulation of international intellectual property policies may be detrimental to economic, technological, social, and cultural development as well as poverty eradication¹. Two of those dialogues were held in Bellagio² in 2002 and 2003 respectively, in order to promote strategic thinking on the intersection between intellectual Property (IP) and sustainable development at the international level.

2. In 2003, a new phase of the project has been initiated and renewed efforts are being displayed to address concerns over current trends in the formulation of IP policy at regional and national levels. Five regional dialogues have been designed to address those concerns as well as various national events. The first of these regional dialogues was held in parallel to the Ministerial Meeting of the Free Trade Area of the Americas in Miami in November 2003. This dialogue focused on the “*coherence in the multilateral, regional and bilateral processes on intellectual property and a pro development agenda on IPRs*”.

3. The objective of the Miami dialogue was to promote an open exchange of views on coherence in international, regional and bilateral processes and pro-competitive

¹ See <http://www.iprsonline.org/unctadictsd/description.htm>

² See <http://www.iprsonline.org/unctadictsd/bellagio/dialogue2002/bellagioprocess.htm> and http://www.iprsonline.org/unctadictsd/bellagio/dialogue2003/bell2_description.htm

approaches to IP. The discussion built upon the Bellagio Dialogues. The Miami dialogue involved experts³ from a variety of organizations including governments, IGOs, NGOs, academia, research institutions.

4. This dialogue consisted of two sessions. The first session introduced the latest developments in the IP field. During the discussions in this session emphasis was placed on intellectual property and health, the WIPO's patent agenda, biodiversity related issues and access to information. The second session analyzed problem of coherence and the international, regional and bilateral treaties. It also discussed pro-competitive approaches to IP.

Session 1: Recent International Developments⁴

5. During the initial remarks it was acknowledged by participants that IP has a bearing on innovation, research and development (R&D), foreign direct investment and transfer of technology. It was also recognized the need to keep and enhance a balanced IP regime, especially when various authoritative institutions including the UK Commission on IPRs and the Federal Trade Commission of the United States have expressed concerns over excessive regulation on IPRs.

6. Various new developments have taken place recently at the multilateral level. They related to TRIPS and public health, copyrights, patents and biodiversity issues.

TRIPS and Health

7. WTO Members recently adopted a Decision on Paragraph 6 of the Doha Declaration on TRIPS and Public Health to address the concerns of countries that lack of capacity to produce pharmaceuticals when issuing compulsory licensing. The Decision of 30 August 2003 constitutes a waiver under the WTO agreements and therefore subject to limited interpretation exercises. This Decision, even if it was considered only possible political solution achievable in the WTO before the Cancun Ministerial, will not be easy to implement in practice due to cumbersome procedures. Various participants considered that the Decision was a diplomatic compromise but not a practical solution due to the fact that the requirements for the use of the waiver were higher than those applied to the issuing of compulsory licensing under emergency situations or other circumstances of extreme urgency.

8. In the discussions various problems were pointed out in relation to the Decision including potential conflicting interpretations of the text, its limited coverage (no inclusion of vaccines and diagnostic kits), and the potential negative precedent of including an annex referring to the practices of specific international firms. Proposals were made to commence efforts to revise its content and find a more permanent, user-friendly solution before end of June 2004. These efforts should be accompanied with full use of existing flexibilities in the TRIPS Agreement, actions against unfair competition acts, friendly joint interpretation of the Decision together with the Doha Declaration on TRIPS and Public Health and the use of ordinary compulsory licensing

³ See list of participants at <http://www.iprsonline.org/unctadictsd/DialogueMiami/MiamiParticipants.htm>

⁴ See background paper by Correa, http://www.iprsonline.org/unctadictsd/bellagio/docs/Correa_Bellagio2.pdf

at the national level. The need to implement complementary measures linked to infrastructure, distribution channels and investment in the health sector were considered of importance. The Canadian experience in amending its national law to implement the Decision and regulating the production and pricing of generics were highlighted as possible examples of necessary actions that would need to be taken at the national level, both in developed and developing countries.

Copyrights and related rights

9. Regarding copyright two important events occurred in 2003. The first was the demand of various experts, academics, and scientists to the Director General of WIPO to hold an international conference on open source. The second event was the initiation of negotiations on a treaty dealing with broadcasting rights (including web casting) under WIPO. The discussions identified an important number of copyright treaties and their impacts on education policies.

10. Concerns were expressed over expansion of the scope of copyright, the reduction of the public domain, elimination of copyright exceptions and the availability of information for educational purposes. Concerns were also expressed over the protection of non-original databases, which would protect information and not “creation” in the traditional sense. Some participants mentioned that the creation or expansion of copyright was a “one way street”. Copyright are private rights, once vested on private holders they cannot be recovered without compensating the titleholders. This fact implies that policymakers should be careful when expanding existing rights without weighting the consequences for consumers and the public domain.

11. It was suggested that new initiatives on copyright should clearly differentiate between authors/creators from owners of copyright; oppose excessive levels of protection that would affect educational policies; give value to alternative non-exclusive models; and maintain open access to essential information.

WIPO's Patent Agenda

12. Negotiations of a potential substantive patent law, PCT reform and marketing of the patent law treaty have continued under WIPO auspices. Nevertheless, they have been under heavy criticism and important differences continue to exist between big players, especially in the negotiations of the substantive patent law treaty. These negotiations will affect important spaces of national IP offices regarding the conditions for patentability as well as other important definitions in patent law (i.e. invention). Participants indicated that these negotiations show the tendency of privileging private rights in detriment of public rights or balances in the IP system. They reflect a tendency of limiting the exercise of flexibilities of countries in the TRIPS Agreement.

Biodiversity and traditional knowledge

13. In relation to biodiversity-related issues, discussions on the TRIPS Article 27.3(b) review continue without clear solutions. For example, in the WTO differences over the term “review” have not been resolved. The main issues that are still on the table are the patentability of life forms and the disclosure of the origin of biological resources.

14. Work under the Intergovernmental Governmental Committee of WIPO has brought interesting analysis and research. Participants identified important problems regarding the definition of the objectives of a possible *sui generis* system of protection for traditional knowledge. Models proposed by WIPO in previous occasions (i.e. Panama and Venezuela) have basically relied on the incorporation of exclusive rights for protecting traditional knowledge holders leaving aside other relevant issues such as moral and religious rights, human rights, the collective/individual nature of traditional knowledge, the definition of public domain in relation to traditional knowledge, customary law, etc. Many of the participants viewed their approach as restricted and may be ineffective to achieve the broader objectives of sustainable development. Some participants emphasized some of the positive features of the law of Panama on traditional knowledge including free register procedures, permanent rights, collaboration with indigenous and local authorities and use of contractual models for commercialisation purposes.

15. Some participants considered that several immediate actions to protect traditional knowledge could be undertaken by policymakers. These include improvement of the quality of patent and other IP examinations, appropriate use of databases for knowledge that is already in the public domain, technical assistance for the national consultations and traditional knowledge law drafting.

Session 2: Working Towards Coherence in IPRs Issues and new Pro-Competitive Approaches⁵

16. Participants persistently mentioned the issue of lack of coherence between international, regional and bilateral processes. Many expressed concerns over the ever-increasingly protection trend and the “one-fits-all” approach in existing IP negotiations. Reference was made to the recent failure of the WTO Cancun Ministerial conference and the emphasis given to regional and bilateral trade negotiations (i.e. the FTAA and bilateral negotiations with Central American countries). It was indicated that those processes started before the Cancun Ministerial meeting and will continue independently of the developments at the multilateral level. Many saw the recently approved trade agreement between the United States and Chile as the possible model to be applied in future negotiations and therefore called for a deep analysis of this treaty as to assess its content and implications. Various suggestions were made during the discussions to promote coherence. They include the following:

⁵ See background paper by Reichman,
http://www.iprsonline.org/unctadictsd/bellagio/docs/Reichmann_Bellagio2.pdf

- Creation of permanent cross information channels among governments and strengthening of coalitions;
- Work with parliaments;
- Creation of stakeholders networks;
- Cooperation with civil society in both the North and South;
- Assessment of impacts of future commitments and capacity building to understand implication for future negotiations;
- Use media and public opinion to promote a pro-development international IP agenda;
- Enhance transparency in negotiations;

17. Participants considered that one important challenge policymakers of developing countries face today is how to manage an increasingly globalised IP regime in a pro-competitive manner and how to adapt existing IP mechanisms as to promote local innovation as well as to address development needs. Various strategies have been identified by the literature and new ones are starting to arise whether in the literature or in practice to address these problems. Some of these strategies are defensive while others are offensive.

Defensive strategies:

18. These strategies would include:

- Creation of national consultative groups on IPs and intersecting policies (innovations, health, environment) as to achieve balanced and informed national positions;
- Establishment of a moratorium on new international IP negotiations for fixed period of time allowing developing countries to absorb already high IP standards;
- Learn and understand about the problems that developed countries are already facing as a consequence of over-regulated IP system.
- Consider means to reduce unilateral pressures.

Offensive strategies:

19. These strategies would include:

- Creation of new paradigms for protecting innovations and creations that would prevent free riding by third parties' innovations, creations and investments while preserving information in the public domain and access to essential information;
- Use actively self-help incentives. These incentives could include existing alternatives as utility models or petty patents, industrial design law, trade secrets, and trademarks and geographical indications. They could also include the use of a new generation of incentives, as is the case of hybrid exclusive rights, new *sui generis* systems in food and agriculture, compensatory liability regimes, preservation of scientific/technological data for follow-on research, low cost collective management of rights for small-scale innovators and creators, etc.
- Use and national implementation of competition laws and policies;

- Revalorisation of local innovation and design of new incentives to innovation (i.e Bayh-Dole act type of incentives).
- Negotiation of an international treaty on the preservation of scientific/technological data for follow-on research.

Final considerations

20. The presentations and discussions underlined the need to understand the importance of development dimension in the IP area and the implications for sustainable development. They also addressed the basic realities and challenges for promoting a pro-competitive and pro-development IP agenda. Participants agreed that there was a need for enhanced pro-development cooperation that would take into account differences in country level of development. The following final suggestions were made:

- Declaring a moratorium on IP negotiations at the multilateral, regional, bilateral level;
- Creating North/South coalitions for the defense of the public interest in international discussions and a the preservation of pro-development IP regimes;
- Promoting pro-competitive approaches and considering new forms of enhancing innovation and creativity in developing;
- Revalorizing local innovation;
- Analyzing legal consequences of unilateral measures under the multilateral framework;
- Giving more attention to new developments in the field of copyright and their implications in both developing and developed countries;
- Enhancing access to information and technological public goods;