



Bellagio Dialogue on Intellectual Property and Sustainable Development: Revising the agenda in a new context

MEETING REPORT

**Bellagio, Italy
(24 to 28 October 2005)**

I. The background

1. In November 2002, a group of specialists, government experts and members of international and non-governmental organizations met in their personal capacity in the context of the Bellagio Series on Development and Intellectual Property Policy sponsored by the Rockefeller Foundation. A core outcome was a strategic document entitled “Towards Development-Oriented Intellectual Property Policy: Setting An Agenda for the Next Five Years”. The document set forth a series of priority issues and actions to advance the goal of integrating development objectives in the formulation and implementation of intellectual property (IP) policy. Participants in the meeting identified actions that could be carried out at different levels and by different actors, including priority areas in negotiations, policy analysis and research and agreed to initiate a process of follow-up and monitoring.

2. Since the first meeting in November 2002, three further dialogues were organized in Bellagio to continue exploring and advancing a development-oriented IP policy. In June 2005, a group of stakeholders met in Geneva to review what has transpired since Bellagio 2002 with the view of taking stock of progress on the original agenda, to evaluate changes in the policy landscape, and to update priority issues and areas of action. The group noted a number of challenges and opportunities, and identified a series of needs for research and analysis as well as cross-cutting actions.

3. Building on the previous encounters, in October 2005 the fifth Bellagio Dialogue was organized to:

- review work carried out on the intellectual property (IP) development-oriented agenda at the multilateral and domestic level;
- explore new directions and ways forward for a pro-development IP process;
- relate recent developments at the multilateral level to domestic IP agendas in key countries;
- explore new ways and means to advance the IP development agenda.

4. Due to the nature of the meeting as a review of past developments, the objective was not to set a new agenda and come up with agreed recommendations. Rather, the meeting aimed at assessing progress in the priority areas as identified in the Bellagio 2002 dialogue and discussing possible ways to move this agenda forward in the in light of recent developments.

5. For this purpose, the 2005 dialogue was organized in four inter-related sessions, covering the following themes:

- Introductory session on taking stock of the lessons of the last five years;
- Patent reform and harmonization at the international level;
- Copyright reform and harmonization at the international level;
- Complementary policy components of a positive agenda.

II. Taking stock of lessons of the last five years

6. Discussing the main IP-related developments at the multilateral, regional and domestic levels, participants confirmed that the four key themes that guided the 2002 Bellagio dialogue remain central:

- the future of IP in the multilateral trading system;
- the challenge of new treaty development and harmonization;
- promoting effective national policy formulation; and
- integrating IP policies in development strategies.

7. It was generally perceived that there was greater awareness in both developing and developed countries of the relevance and implications of IPRs, as illustrated, for example, in:

- the anxieties exposed by different circles with respect to the IP chapters in recent free trade agreements (FTAs); and
- the recent debates on a Development Agenda for WIPO.

8. In particular, the dialogue considered successes and failures in advancing an IP development agenda. Some noted the difficulty of establishing clear-cut cases of "success" or "failure", as illustrated by the recent discussions on the WIPO Development Agenda. On the one hand, there is a lack of concrete outcome. On the other hand, the fact that future negotiations on decisive issues such as the draft Substantive Patent Law Treaty (SPLT) will include an open forum discussion is rather encouraging. In this context, participants referred to substantive issues that were parts of the Bellagio 2002 priority areas for future action, such as:

- **Public health:** since the 2001 Doha Declaration on the TRIPS Agreement and Public Health, there has been increased activity to enhance access to medicines, such as the 2003 WTO Decision on the Implementation of Paragraph 6 of the Doha Declaration as well as an expansion of the discussion to other fora (e.g. the WHO's Commission on Intellectual Property Rights, Innovation and Public Health and several WHO resolutions in this area).
- **The institutional framework:** since 2002, the focus of IP discussions has shifted from WTO to WIPO (i.e. the Development Agenda), the regional and bilateral level (i.e. FTAs) and other fora (i.e. the recently adopted UNESCO Convention on the protection and promotion of the diversity of cultural expressions). Several participants expressed concern about the persisting unilateralism pursued by some countries, frustrating hopes that the adoption of the TRIPS Agreement would end such practices.
- **Non-violation complaints:** As opposed to the TRIPS Agreement, non-violation complaints are now a firm part of the FTAs framework. Some participants raised the concern that this could potentially result in a more general acceptance of non-violation complaints in the area of IPRs, including the TRIPS Agreement.
- **Genetic resources, traditional knowledge and folklore:** In this regard, a number of countries have shifted their attention away from WIPO's Intergovernmental

Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) to the WTO, making clear that some kind of agreement concerning disclosure of origin constitutes a prerequisite for the success of the Doha Development Round.

- **Copyright:** New challenges have emerged, in particular the proposed WIPO Broadcasting Treaty. Furthermore, new trends in database protection and further protection for audiovisuals were also discussed. In addition emphasis was put on the increased importance of open source and other alternative business models.
- **Technology transfer:** Some viewed current policies and instruments as insufficient to promote effective technology transfer to developing countries. In particular, efforts in the WTO Working Group on Trade and the Transfer of Technology (WGTTT) to agree on concrete recommendations for the WTO December 2005 Ministerial Meeting have not as yet been successful.

9. When reviewing the past patent controversy of the 1970s, some participants stressed a number of differences with respect to the situation of today. In particular, the following observations were made:

- With the rising importance of technological know-how for industry competitiveness, the perceived costs and benefits of the current globalized IP system are unprecedented, as illustrated by the sharp increase of revenue generated from IP licensing.
- The international IP system has become far more complex through a proliferation of fora, resulting in a multitude of entry points for IPRs (e.g. WIPO, WTO, WHO, UNESCO, FTAs and bilateral investment agreements).
- Today's discussions on the development implications of IPRs do not necessarily constitute a North-South divide. The increasing privatization of knowledge also raises serious concerns in industrialized countries, in particular among consumers and small and medium-sized enterprises (SMEs).
- As opposed to developing countries' efforts in the 1970s to change the patent provisions under the Paris Convention, the current focus of developing countries' activities is rather on the balanced implementation of existing rules and future norm setting.
- Other than in the past, current discussions see a wide involvement of civil society in both North and South. This might increase the ability to move the discussion forward.
- Today's IP policies may be characterized by the unprecedented expansion of IPRs to new frontiers and the lack of consideration and integration of users' and consumers' interests in the formulation of IP policy in general. In particular, the patent system has seen an extraordinary expansion since the 1970s, in particular in the USA, with the establishment of the Court of Appeals for the Federal Circuit and a major change in assessing the IPR-antitrust interface. Participants voiced different views on the driving forces behind such developments.

10. Several participants pointed out the need to contribute to a better understanding of the WIPO Development Agenda, its objectives and contents. The dialogue also noted the need for reconciliation with a view to establishing mutual trust. The role of NGOs both from the North and South was perceived as crucial.

11. With respect to possible future strategies, participants discussed a number of issues:

- There is a need for greater IP impact awareness and assessment. There is a need to develop a methodology to measure such impact.
- Developing countries should seek to oppose to ever-increasing IP standards (e.g. through regional alliances or improved inter-departmental coherence) and need to

focus more on implementation of existing standards (such as TRIPS). In this respect, there is still a lack of awareness and capacity in many developing countries.

- More attention should be paid to TRIPS-plus obligation under WTO accession treaties (e.g. Russia, Ukraine), which to a large extent are ignored by the public and even IP stakeholders.

III. Toward a positive agenda on patent reform and harmonization at the international level

International harmonization of patent law

12. Patent law harmonization is not a new process. Harmonization usually refers to efforts designed to reconcile different policies and legal systems in a particular field. Harmonization does not mean to achieve uniform standards but similar or minimum standards. In the patent law field harmonization has taken place since the XIX century and it has mainly been driven by industrialized countries, big corporations and associations of intellectual property agents.

13. There have been different levels of patent law harmonization since the adoption of the Paris Convention on Industrial Property in 1883. Efforts were deployed in WIPO during the 1980's with an attempt to adopt a treaty that would supplement the Paris Convention. This process ended with an unsuccessful diplomatic conference at The Hague due to certain important differences between the United States and European countries on basic aspects of patent law. While the diplomatic conference did not succeed, it provided a basis for the initiation of negotiations on intellectual property under the GATT and the final adoption of TRIPS.

14. The incorporation of the TRIPS Agreement in the Uruguay Round package in 1994 established a relatively high set of minimum standards that harmonized certain aspects of patent law like for example the term of protection. Since the adoption of the TRIPS Agreement WIPO in 2000 adopted the Patent Law Treaty, which basically deals with procedural aspects of patent law.

15. In 2000, the WIPO Director-General launched a "Patent Agenda" that would look at the creation of mechanisms whereby inventors and industry would have access to national, regional and international patent protection systems that facilitated global acquisition and maintenance of patents. The patent agenda was composed of two main pillars: the Patent Cooperation Treaty (PCT) reform and the initiations of negotiations toward a Substantive Patent Law Treaty (SPLT) in the Standing Committee on the Law of Patents in WIPO.

The draft substantive patent law treaty: concerns and impressions

16. The current proposal for a draft SPLT was the consequence of a previous proposal put forward by various industry and patent agent associations that was later supported by the patent offices of the United States, the European Patent Convention and Japan (known as the Triad). While initially there was a wide variety of issues included in the proposal, the Triad has recently limited the content of the draft to four main issues: a) definition of prior art, b) novelty, c) grace period and d) inventive step.

17. Various concerns were expressed during the dialogue on further patent harmonization and more specifically on the content of the draft SPLT. These concerns include the following:

- Patent law is possibly one of the areas of international law where a considerable amount of harmonization has already taken place; therefore there is no immediate urgency for deeper harmonization.

- Positions regarding deeper patent harmonization in the United States and Europe are not monolithic. Various stakeholders including consumers, academia, NGOs and some enterprises do not see their particular interests reflected in national positions.
- Deeper harmonization under the SPLT will reduce flexibilities under Article 27 of the TRIPS Agreement by defining patentability criteria.
- While simplification of patentability criteria and cost reduction in patent filing could be addressed under the SPLT, other objectives such as higher patent quality and examination are not at the center of the debate. It is necessary to define clear policy objectives.
- The definition of novelty, inventive step or non-obviousness and industrial application or usefulness is one of the last big areas of patent law that still is in the hands of states to define domestically. It might be the last real policy space existing under patent law. Attention was paid in this respect to recent trends in FTAs of including a definition of certain patentability requirements.
- There has not been a serious debate on cost and benefits of the new harmonization process for developing countries or credible assessment exercises.
- Issues raised by the trilateral proposal for the SPLT do not include issues of interest for developing countries or the public interest.
- Developing countries are unable to influence the process at WIPO. An extension of implementation periods and technical assistance are insufficient means for addressing development and public interest concerns in the SPLT.
- Harmonization of the patentability criteria will not necessarily resolve problems such as lack of examination capacity, low quality of patents, overbroad claims, and abuses by certain titleholders.

18. An additional concern expressed related to the need to identify in what countries specific products were under patent protection or not. Generic industries in developing countries often have to spend considerable time and resources to find out whether a certain drug is actually under patent protection, what claims are entailed in the patent and its domestic expiry date. This not only translates into a waste of resources but also leads to a delay of the entry of generics into the market. Participants of the dialogue suggested that patent law harmonization discussions should address these kinds of concerns.

19. Comments on the trilateral proposal were diverse and rich. Main comments made included the following:

- **On the “first to invent” vs. “first to file” rule.** As it is well known, the first to file rule is the system used globally with the exception of the United States where the first to invent principle is applied. In the USA the first to invent rule was incorporated in national legislation to defend small inventors, researchers and universities that could not invest in filing a patent. It was mentioned that the first to invent principle can be useful to small and medium-sized business. Other views indicated that harmonizing according to the first to file principle would facilitate defining “priority” dates. The first to file issue was identified as a priority need for improved understanding between the United States and the EU.
- **Novelty and prior art:** Currently there are two different standards of novelty. As opposed to other countries, in the United States (and China) prior art existing only outside the national territory is not considered as destroying novelty unless it is available in written form. It was mentioned that a reform to accept universally non-written disclosed prior art could be positive for developing countries and traditional communities. Nevertheless such reform will find resistance from the United States.
- **Grace period:** The purpose of a grace period is to provide inventors with a certain period of time for filing a patent after the invention has been disclosed in a journal or public event. The duration of a grace period varies from country to country and it

usually lasts from 6 to 18 months. Most developing countries have already incorporated this principle in their national legislation due to the fact that small inventors usually publish or publicly inform about their invention before going to the patent office. EU countries have been reluctant to accept this principle but some consider it will be the trade-off for the acceptance by the United States of the first to file principle.

- **Inventive step:** This requirement presupposes that the invention is not obvious to someone skilled in the art. For many this is a key aspect in case negotiations on the SPLT are initiated. Such criterion will define to what extent patents are granted to major inventions or minor developments. For some participants, defining inventive step on an international scale could be an opportunity to improve patent quality by incorporating a high threshold. Nevertheless, many were sceptical that this could be possible when the United States and in some cases EU countries apply low standards of inventive step like in the case of simple isolation of biological materials or minor developments. Some proposed that the best way to deal with minor innovations was not the patent system but utility models ("petty patents") or unfair competition law.

Possible approaches to a positive agenda for patent reform

20. During the debate four possible approaches were examined for a potential positive patent reform agenda:

- **The Friends of Development (FoD) proposal:** This proposal implies that first it is necessary to agree on rule making issues and adopt a common methodology for pre-rule making assessments. It considers that a future SPLT needs to also include public interest and other exceptions in patent law, the control of anticompetitive practices and mechanisms for technology transfer. While most participants considered that exceptions and anticompetitive practices are essential in the SPLT context, they viewed the WTO (i.e. the WGTTT) and UNCTAD as the most appropriate fora to deal with technology transfer issues.¹
- **A comprehensive positive patent agenda:** If negotiations on the SPLT are unavoidable the process could be used to improve patent quality examination and raise standards of patentability criteria. Issues to consider include: universal novelty; detailed prior art searches; high inventive step standard; technical effect as one indication for industrial applicability; full disclosure of origin; recognition of working requirements; introduction of a best mode requirement in patent applications to facilitate replication of the invention by third parties; public interest exceptions; and dissemination of information in patent abstracts.
- **A pro-competitive approach:** Some participants were very skeptical about the positive effects of international patent harmonization on innovation. It was mentioned that a bad patent in the hands of a strong economic actor can have very negative effects on competition in weaker economies. This approach considers that the best option for a positive agenda for patent reform is to follow some of the recommendations of the US Federal Trade Commission report of 2003.² High examination standards, removal of the presumption of patent validity and a reversal of the burden of proof in patent challenge proceedings will constitute main elements for reform, as well as the introduction or strengthening of pre-grant opposition procedures.
- **SPLT as a political opportunity:** Some participants viewed the SPLT as an opportunity to resolve some issues such as the facilitation of patent filing and a reduction of the cost of patent examination. Some of the issues could also address patent quality. This approach seeks to expand negotiations beyond the four issues contained in the trilateral proposal to also cover genetic resources and full disclosure requirements.

¹ For UNCTAD's current work on technology transfer, see at <<http://www.unctad.org/tot-ip>>.

² See at <<http://www.ftc.gov/opa/2003/10/cpreport.htm>>

Current process toward an SPLT

21. The process toward an SPLT in WIPO has been very controversial. The informal consultations of the WIPO Secretariat held in Casablanca in February 2005 were considered by most participants as inadequate and exclusionary. The results of WIPO's General Assembly in September 2005 have set a renewed procedure by which an open forum and one informal and formal meeting of the Standing Committee on the Law of Patents at WIPO will be held in 2006. Participants considered these meetings as an opportunity to make clearer the development concerns, issues of the WIPO Development Agenda linked to patent harmonization and potential alternatives to the current process of the SPLT.

22. In relation to the most suitable forum for potential negotiations on an SPLT, various participants indicated the limited capacity of developing countries to influence any outcome in the patent harmonization processes, regardless of where negotiations took place. Some observed that an outcome inside or outside WIPO would give little or no consideration to development concerns, making therefore the issue of forum irrelevant.

IV. Toward a positive agenda on copyright reform and harmonization at the international level

International harmonization of copyright law

23. In the field of copyright there have been harmonization processes since the adoption of the Berne Convention in 1886. The Berne Convention granted almost universal rights for copyright works, including automatic protection with no formalities and national treatment. In general terms, countries have been at ease when implementing Berne obligations due to its lax language. In the 1950's certain levels of protection were given to derivative works including rights of phonograms producers and performers. The TRIPS Agreement expanded not only remedies but the scope of substantive copyright protection. It effectively included basic neighbouring rights, and expanded the list of protected works to software and original databases. It also harmonizes the use of the three-step test for exceptions to copyright to all rights covered by the Berne and Rome Conventions as well as new rights (under Berne, this test only applied to exceptions to the reproduction right).

24. After the TRIPS Agreement, two new copyright treaties were adopted at WIPO in 1996. These two treaties, the WCT and WPPT, were designed to protect copyright works and derivatives in the digital environment where copies at almost zero cost could be made. Two main new features were introduced in copyright law as consequence of these treaties: the right to make available a work on the Internet and protection against anti-circumvention measures, arguably even in cases where those are undertaken for legitimate private/fair use purposes. These new rights have been very controversial due to difficulties about their interpretation and in setting the limits between unauthorized activities and private/fair use in the digital environment. Problems on how technological protection measures (TPMs) limit creativity and follow-on innovation have also been identified in both national and international public debates. These and other new features of copyright including narrow interpretations of exceptions and private/fair use have been exported through a new series of regional and bilateral free trade agreements where the impact of new copyright standards has been overlooked or ignored.

25. Lately a new generation of rights, which tend not to be considered by many as copyright, have made their appearance. They are rights over audiovisuals (including web casting), broadcasting signals, and non-original databases (none of these rights are covered under TRIPS). All these new rights are being pushed internationally, whereas in the United States and in Europe, their implementation has been very controversial and litigious. Even some developed

countries still have not ratified the WIPO 1996 copyright treaties due to differences in their internal constituencies as is the case of Canada and various European countries.

26. One issue that seems to be high on the agenda of developed countries in the near future is piracy and enforcement. While the piracy issue has been there for more than three decades, the way it is being pursued recently has shown to be very aggressive and not appropriately balanced. In this context the actual role of private holders in defending their interests needs to be restated so as to avoid unnecessary costs for tax payers.

New actors and new business models

27. In the public interest and copyrights debate there are important differences between the pre- and post-TRIPS scenario. Today, there is a new set of actors becoming increasingly active and exercising their rights when faced with over-protection of intellectual property rights. These actors include consumers, new generations of creators, academia and civil society. Also these actors are using copyright to explore and expand the use of new business models based on cooperation, collaboration and incremental creativity. They tend to include open source, FLOSS and creative commons licenses. These new models are proving to be successful in practice and very appealing to small innovators and creators that cannot afford paying access to property models.

New trends and concerns in copyright law

28. New trends in copyright law have raised a number of important concerns among consumers, academia, civil society, the open source communities and certain business. Concerns identified at the dialogue include the following:

- Lack of experience in developing countries about the effects of the creation of new rights;
- Overexpansion of titleholders' rights;
- Misrepresentation of authors (mostly big corporations are the beneficiaries of new trends in copyright). Issues concerning natural person authors such as moral rights, compensation for individual and collective creators, workers' rights over collaborative creations, and clarity and balance between authors and producers are not being addressed;
- Difficulties and narrow interpretations when defining private/fair use;
- Difficulties in implementing flexibilities and exceptions in the field of copyright;
- Overstatement of “piracy” and use of misleading figures on its extent.

Possible elements for a positive agenda for copyright reform

29. During the debate various elements were proposed for a positive agenda for copyright reform. These elements include the following:

- Introduce an international/national public interest rule in copyright law interpretation;
- Restate users' rights and make them explicit;
- Use the domestic judiciary for obtaining more flexible interpretations of copyright law;
- Avoid the creation of unnecessary copyright (non-creative / non-original works); Some issues could be addressed through other regulatory framework (i.e. telecom and broadcasting laws);
- Make explicit use of existing copyright exceptions and limitations at the national level and set a list of minimum exceptions;
- Differentiate individual from collaborative works. Specific protection for collaborative works might be necessary;

- Negotiate a new protocol to Berne and other treaties that could include exceptions, limitations, private/fair use and fair dealing, elaboration of antitrust principles, and protection from TPMs;
- Formulate a counter pro-development proposal on the copyright provisions contained in FTAs;
- Promote greater awareness on collaborative models and other new business models (open source, creative commons licenses). Existing copyright models tend to benefit more producers and distributors than authors and creators;
- Explore options on how to refine and move forward the Access to Knowledge Treaty proposal;
- Develop accurate methodologies for measuring piracy and its impact (the World Bank and UNCTAD could be suitable organizations);
- Strengthen local stakeholders including consumers and rights-based groups;
- Recommend that international organization including UNESCO, UNCTAD and WIPO need to give more attention to the creation of an adequate environment for open source and collaborative models;
- Encourage new business models such as the Google and Yahoo book search projects, and the BBC project on the use of the public domain or public broadcasts.

V. Complementary policy components of a positive agenda

30. While the three previous sessions focused on the impact of recent trends in patents and copyright, participants under this agenda item discussed the contribution of complementary policies to the promotion of innovation and international technology transfer, particularly to developing countries. The discussion focused on three main issues:

- The need for complementary policies to promote innovation and international technology transfer;
- Policies directly related to IP systems (e.g. compulsory licensing);
- Competition law and policy.

Technology transfer and innovation capacity

31. Participants agreed that the establishment of IP law and policy alone is not sufficient for the promotion of innovation in developing countries and technology transfer. IPRs are only one element of an overall inclusive industrial and development policy, and other factors such as a country's market size, growth potential and overall political stability can be considered more decisive than IP protection. The adoption of high levels of IPR standards does not automatically lead to innovation and technology transfer, as illustrated by various countries' experiences such as the case of Korea. In this context, several participants emphasized the importance to adjust the level of IP protection to a country's level of technological development and pointed out potential adjustment costs of moving to a higher level of protection (such as higher prices, crowding out of domestic companies, and IP abuse by rights holders). It was nevertheless stressed that higher prices, in particular in the area of pharmaceuticals, are not exclusively related to exclusive rights but also to other factors such as a country's poor infrastructure or an inefficient overall drugs management system.

32. As regards possible future action in this respect, some participants stressed the importance of further clarifying the relationship between IP protection on the one hand and formal and informal means for technology transfer on the other hand. In particular, it was felt that further research was needed as regards the effective operationalization of the technology transfer clauses under Articles 7 and 66.2 of the TRIPS Agreement. In this context, some proposed

exploring the use of actual incentives and mechanisms to promote both formal and informal ways of technology transfer in both host and home countries.

33. Participants discussed in some detail how IPR-related policies may be used to promote the international transfer of technology. Special attention was paid to the potential of compulsory licensing in this regard (in particular as a means for the licensee to receive and absorb the patented technology). The Brazilian experience reveals a rather mixed picture, as the country's public health policy, which relies to a large extent on the threat of issuing compulsory licenses, has resulted in the increased importation of foreign anti-retroviral drugs (ARVs), but not in the development of local production capacities for the formulation of active pharmaceutical ingredients (APIs). India, on the other hand, by abolishing product patent protection between 1970 and 2005, did not need to rely on compulsory licenses, but instead provided an enabling environment for its domestic pharmaceutical industry to slowly build local production capacities, including APIs, through imitation and reverse engineering of foreign pharmaceutical products. With regard to the particular case of compulsory licensing for export to countries lacking sufficient pharmaceutical production capacities, many participants agreed that the WTO General Council Decision of 30 August 2003 if facilitated could be a sound legal basis for such exports. However, concern was also expressed about the complex and lengthy mechanism stipulated in the Decision, as well as the requirement to issue compulsory licenses on a case-by-case basis, which prevents suppliers from stockpiling and taking advantage of economies of scale. This was perceived by some as constituting an obstacle to the effective use of compulsory licensing, thereby also limiting its potential as a tool for the promotion of technology transfer.

Policies directly related to IP systems: the case of compulsory licensing

34. Some participants therefore recommended amending the TRIPS Agreement with a view to enabling the issuance of compulsory licenses on a broader scale, rather than case by case. Furthermore, it was emphasized that compulsory licensing will be most effective for indigenous acquisition of technology where the licensed technology is received by a public entity or open to competition and then disseminated through public-private partnerships. In addition, many participants agreed that compulsory licenses, in order to create domestic capacities, need to be accompanied by broader public support policies, including financial support to promote local technological expertise through training. Moreover, considering many developing countries' lack of experience in issuing compulsory licenses, some participants recommended the development of international guidelines in this respect. This could potentially take place in the form of a guidebook of how to issue a compulsory license. In this context, there were divergent views on whether issuing a compulsory license actually constitutes a challenge for some countries, especially LDCs.

Competition policy

35. As regards the use of complementary policies, emphasis was put on appropriate competition laws and policies for the control of both the abuse of a dominant position by IP holders and the use of restrictive practices in vertical licensing agreements. Participants agreed that the TRIPS Agreement in Articles 8.2 (IPR abuse in general) and 40 (addressing the particular case of restrictive practices in licensing agreements) leaves Members large discretion to promote pro-competitive use of IP and in particular the use of licensing terms conducive to the transfer and dissemination of technology. The real problem lies in the lack of experienced competition authorities in many developing countries. In addition, some participants cautioned against overly-broad use of competition law, taking into account the wish in some developing countries to create domestic champions to better address the international competitive environment.

36. The participants discussed several suggestions for future action in the area of competition law and policy. This included, *inter alia*,

- the adoption in developing countries of a regional framework on competition policy and related authorities, rather than a multilateral approach;
- assuring autonomy of competition authorities from the government;
- providing the competition authorities with appropriate human and financial resources (a regional approach is more promising in this respect than national efforts);
- assuring the competition authorities' integration in the development of national/regional IP laws and policies;
- developing guidelines and model provisions in the area of IP-related competition rules and case law;
- familiarizing competition authorities with the particularities of IP law;
- authorizing *ex officio* and consumer group-driven competition proceedings, rather than only through initiatives by other competitors;
- finally, in the particular context of the pharmaceutical sector, participants discussed the possibility of regulating both drugs prices and advertising to promote the marketing of domestic generic products rather than expensive patent-protected products.

VI. Exploring options and modalities to move this process forward

37. The last session of the dialogue was dedicated to the strategic question of moving forward the IP development agenda. The discussion focused on two major issues:

- the overall objective of promoting the development agenda;
- ways and means of promoting such an agenda in the South and the North.

38. Moving the development agenda forward requires clarity about the final objective of such exercise. Participants identified two options in this regard:

- *reform* of the IP system. This approach is based on the general acceptance of the IP system as an incentive for innovation and economic development. In order to actually achieve this, however, there is no "one-size-fits-all" solution; rather, the system needs to be made more flexible to accommodate different levels of technological development and divergent economic interests.
- development of a *new system*. This approach is fundamentally different from the first one: it is based on the view that the IP system in its current, proprietary form is an obstacle to innovation in both developing and developed countries. Providing flexibilities under the current system will, according to this view, not promote the required push for innovation, but rather endorse the system's identified dysfunctions. Therefore, this approach would seek to develop alternatives to the proprietary IP system. Such alternatives could be built on collaborative business models, where IPRs as such would not be abolished but used to promote collaborative approaches to innovation (as illustrated by the use of copyright through the open source movement and creative commons licensing). Adopting this approach would represent a new paradigm in IP policy making.

The group expressed divergent views on this fundamental issue, with some participants showing sympathy for the idea of developing a new paradigm for innovation systems, and others cautioning against any major change of the system, emphasizing the general appropriateness of exclusive proprietary models for the promotion of innovation.

39. Turning to the second issue, participants discussed concrete strategies of promoting a development agenda. Views exchanged could be clustered under the following themes:

- Improvement of communication of IP concerns to the public;
- Promotion of alliances of like-minded stakeholders;
- Better accommodation of development concerns in national and international policy making;

- Economic analysis in support of development-oriented IP policy making.

40. Under the first of these themes, the group focused on ways of promoting the development concerns as articulated, particularly in the WIPO Friends of Development Agenda, among IP stakeholders mainly in the North. The overall objective is to exert influence on developed country decision makers as the main drivers of the current IP harmonization efforts at the multilateral, regional and bilateral levels. In this context, participants discussed the following issues and actions:

- For the Friends of Development and like-minded stakeholders, there is a need to be clearer and more specific about their objectives. The public (including the media) in the North is unaware of what is meant by general terms such as "Development Agenda" and "TRIPS flexibilities". The message needs to be delivered in more concrete terms, such as, e.g., recommending high standards of inventive step in patent law as potentially promoting innovation.
- For public opinion in the North, development implications of IPRs are not an issue of immediate concern. Participants raised the idea that one way of increasing awareness on development concerns in developed countries would be to better express the linkages between the concerns relevant to both developed and developing countries. While this will not cover all concerns felt in developing countries it could allow for some common interests. The 'joint packaging' of those could substantially raise their leverage and political profile and thus the attention they receive by policy makers in the North.
- To raise awareness on IP issues, greater advantage should be taken of the momentum created by large development frameworks and movements. Examples of this could include linking specific IP-related concerns to individual Millennium Development Goals and Targets. This would not only raise the visibility of what are often perceived as rather technical IP concerns, and create alliances among organisations that are working on similar objectives, but also be used as an instrument of holding policy-makers accountable for engaging more actively in the respective issues.
- There should be greater lobbying efforts for developing country concerns at developed country governments and relevant agencies. The group expressed divergent views on whether such lobbying should be primarily targeted at the executive (such as USTR and the EC Commission) or the legislative (such as the US Congress, the European Parliament and EU Member State parliaments), or both.

41. As to the possible promotion of alliances between like-minded stakeholders, discussions revealed divergent views on the importance of the North-South divide. While some participants considered the promotion of a development agenda as being mainly driven by developing country interests, others stressed the commonalities between IP stakeholders in both developed and developing countries, highlighting as examples the interests of Northern consumers and small and medium-sized enterprises (SMEs). It was felt that involvement of developed country consumer associations would be important, but the extent to which this should be pursued was not clear.

42. A number of participants identified the judiciary in both developing and developed countries as important potential allies, using court cases to publicize IP abuses and collectivize development-driven actions. Others cautioned against the high costs involved in litigation and the limited value of the civil law system for the creation of precedent.

43. Another major point of discussion related to a better accommodation of development concerns in national and international policy making. In particular, some proposed to:

- Bolster national policy making processes in developing countries by greater inter-agency coordination and involvement of non-governmental experts and academia;

- Democratize, monitor and strengthen IP policy making in developed countries by ensuring more diverse and representative domestic consultative processes, supporting domestic IP policy reforms and forging coalitions of like-minded groups;
- Promote cross-regional coalitions and alliances at the multilateral level, such as between developing countries on the one hand, and Northern public interest groups or certain sectors of industry, on the other;
- Lead the substantive debate of development agenda proposals to further elaborate and clarify some key issues, such as, for instance, the proposed Access to Knowledge Treaty, ways to protect the public domain and IPR exceptions and limitations.

44. In this context, there was much discussion of the future role of WIPO as a multilateral expert norm setting body, and the need for WIPO to respond to the genuine needs of developing countries. Some participants believed that WIPO needed to engage more independent legal and economic expertise in order achieve credibility in policy development and the provision of advice to developing countries.

45. Finally, participants agreed on the urgent need to support the debate on development-oriented IP policy making by sound statistical data on the economic impact of the expansion of IP protection – either to TRIPS-plus or IP harmonization processes. While some related activities have already taken place in the case of the Andean countries, these are still isolated initiatives. To promote increased use of such studies, it is of critical importance to develop a methodology for conducting economic impact assessments.