

TAKING STOCK OF RECENT DEVELOPMENTS

Introductory Session

Note by ICTSD

The introductory session of the Bellagio Dialogue is intended to review where we stand on a development-oriented intellectual property agenda. It should be the occasion for participants to familiarize themselves with the issues, discuss recent developments and critically analyze the progress made and the difficulties encountered. The subsequent sessions of the Dialogue will consider in greater detail the substantive issues and related questions. This note seeks to provide an overview of the Bellagio process with particular emphasis on recent developments. Its main purpose is to raise broad questions that might assist participants in meeting the goals of the exercise.

Background

The first Bellagio Dialogue was organized in October 2002. It started a process to formulate and give shape to the concept of a development-oriented intellectual property (IP) agenda.¹ The meeting took place in the aftermath of the publication in September 2002 of a report by the Commission on Intellectual Property Rights that presented a coherent case for integrating intellectual property rights and development.² Over the past three years, successive 'Bellagio Dialogues' have continued this collective effort of developing and promoting the idea of a development-oriented IP agenda.

The first encounter resulted in two types of outcomes: (1) the identification of a series of substantive “issues-areas for priority action” and (2) the foundation of the so-called “Fрати Initiative”, which seeks to promote, facilitate and review the advancement of progress in the various agendas identified by participants in the dialogues. This initiative takes the form of an open-ended network of concerned individuals, acting in a strictly personal capacity, and of organizations (NGOs and IGOs), policy and academic institutes, as well as campaigns and media organisations. It functions as an ad-hoc, independent, non-partisan structure firmly committed to the ultimate objective of ensuring that IP policy is utilized to achieve equitable and fair development objectives.

Since 2002, three follow-up dialogues have been organized, during which the agenda was further refined by focusing on selected issues such as public health, test data protection, access to knowledge, transfer of technology, regional and bilateral agreements and technical assistance. These annual meetings have provided intellectual leadership, a space for networking, monitoring and analysis of trends, collaboration, campaigning, collective action and targeted research.

¹ See first Bellagio Dialogue “Towards Development-Oriented IP Policy: Setting an Agenda for the next Five Years”, October 2002. See www.iprsonline.org

² See Report of the Commission available in <http://www.iprcommission.org>

The Bellagio process

One of the purposes of the first Bellagio Dialogue was to identify areas considered for priority action in pursuing a development agenda. The outcome resulted in the identification of the following priority issue areas:

- Promoting and protecting public health;
- Evaluating and addressing the institutional framework in which IP policy is developed and implemented including assessment of the WIPO process;
- Precluding the possibility of non-violation nullification or impairment actions in the TRIPS dispute settlement context;
- Assuring that competition rules are developed and applied to IP in a manner that promotes the interests of developing countries;
- Addressing aggressive unilateralism and the promotion of TRIPS-plus standards;
- Developing and implementing effective and concrete short and long term policies on the transfer of technology;
- Pursuing a development-oriented approach to traditional knowledge, issues surrounding genetic resources and the Article 27.3(b) review;
- Reviewing harmonization efforts in the fields of patent and copyright to evaluate concerns that developing country interests are not being adequately addressed;
- Establishing the best means for capacity building in developing countries.

In June 2005, a group of stakeholders met in Geneva to review what has transpired since the first meeting held in 2002. The group examined the progress made with respect to the original agenda; evaluated changes in the policy landscape, and updated the priority issues and areas of action. The discussion confirmed that the four key themes that guided the 2002 Bellagio discussion remained 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.

Reflecting on the priority areas identified in 2002, the group highlighted that all required sustained attention but noted progress in advancing public debate and policy reform in six of the areas listed above.³ However, progress has been slower and more effort is required with respect to unilateralism, the promotion of TRIPS-plus standards, and transfer of technology and competition policy. It also proposed, in light of changes in the broader policy landscape, seven additional priority areas:

³ The areas where some progress was noted were namely: the promotion and protection of public health; evaluating and addressing the institutional framework in which IP policy is developed and implemented including assessment of the WIPO process; precluding the possibility of non-violation nullification or impairment actions in the TRIPS dispute settlement context; pursuing a development-oriented approach to traditional knowledge, issues surrounding genetic resources, the Article 27.3 (b) review and disclosure of origin; reviewing harmonization efforts in the fields of patent and copyright to evaluate concerns that developing country interests are not being adequately addressed (e.g., Digital Agenda, patent harmonization, Broadcasting Treaty, copyright limitations and exceptions); establishing the best-means for capacity building in developing countries for ongoing negotiation but also to advance development-friendly approaches to implementation.

- elaborating the WIPO Development Agenda;
- consolidating new and alternative approaches for the stimulation of innovation, technology transfer, delivering global public goods, and ensuring access to knowledge;
- supporting pro-development approaches to IP-related issues under discussion in different parts of the UN system;
- discouraging TRIPS plus provisions in bilateral and regional investment agreements;
- developing strategies with respect to discussions on IP enforcement in WIPO and TRIPS, unilateral pressures for enforcement, and IP-related dispute settlement in WIPO and TRIPS;
- establishing options and best practices for managing the administration and enforcement of IP laws, and IP-related litigation; and
- reviewing possible extensions to the TRIPS deadlines for Least Developed Countries and the treatment of TRIPS-related issues in the WTO accessions process⁴.

Assessing the impact of the IP development agenda process

As suggested above, the purpose of the Fifth Bellagio Dialogue is to consider in a critical way what has transpired since 2002, look at the new trends and provide further orientations and guidance on how a development agenda could actually succeed and be invigorated. The Dialogue should contribute to the identification and analysis of what has been achieved, elaborate on successes and failures, and reconsider what could further stimulate a positive pro-development agenda in certain key areas of IP policies.

As noted in the review exercise of June 2005, during the last five years there has been important developments and exchange of ideas, as well as unparalleled action taken by relevant stakeholders on IP and development. One should bear in mind, however, that similar attempts were made in the past, namely by developing countries, to revise the existing IP architecture. In the 1970s developing countries raised important questions on the operation of the international IP system and on ways to facilitate the transfer of technology to developing countries. The initiatives of those days did not prosper and in many respects brought about a window of opportunity for numerous key actors and organisations to set in motion an argument for a system of ‘trade-related’ intellectual property rights. The end result was the consolidation of a new IP architecture symbolized by the TRIPS Agreement. Thus, the process of revision and reshaping the international IP system is not entirely new, but has been fluid for some time.

IP policymaking is complex and not necessarily transparent. This is so at the national level and more conspicuous at the international level. The process is often characterized as “regulatory capture” whereby strong lobbies of powerful industries prevail in determining the new trends and the continuous expansion of IP in terms of coverage, subject matters and duration of rights. The most striking trend of recent decades has been the continuous strengthening of enforcement measures to duly protect intellectual property holders. In this process weak countries have been traditionally at the receiving

⁴ The final report of the meeting is included in this folder.

end, being mere recipients of norms and standards developed in more advanced countries, exported into the international regulatory system and then translated into domestic rules. The TRIPS Agreement is a good example of this phenomenon.

However, the broader picture should not be over-simplified. Countries differ among each other, also among developing countries. In fact there are also forces within developing countries that push for strengthening of the IP system, and in some cases for the expansion of IP. Indeed, not all developing countries face similar challenges and the onus for the expansion of IPRs is not exclusively with developed countries or forces within those countries. Similarly, positions differ also within developed countries, where different industry groups, institutions of learning, government arms, and experts question the efficiency of the current model.

Initially, controversies surrounding IP focused on the perceived difficulties for developing countries when implementing the TRIPS Agreement. In the meantime concerns have now expanded towards addressing the potential overall effects caused by the trend of increased expansion of IP standards. Policymakers, academia, civil society and part of the business community both in developing countries and in developed countries have expressed concerns by the intensification of the process of harmonization including in the recent generation of free trade agreements (FTAs). Issues of compatibilities between IP and development, in general, have repeatedly arisen in different fora, namely WTO, WIPO, WHO, UNESCO, UNCTAD, UN Human Rights Commission, the CBD and FAO.

Looking back at these developments, one of the most recent important manifestations of defiance to the emerging trends has been the initiative by a group of developing countries to introduce in WIPO a development agenda that should permeate all activities of the organization. This initiative, if well understood, is not limited to WIPO and the multilateral process but also to concerns with national, and recent FTA processes.

Taking stock of progress and shortcomings

What has actually happened in the last five years in terms of rebalancing IP policies and inserting a development angle into the IP discussions?

Conceptually, there appears to be a better understanding of the pervasive role of IP in people's life. The debate on the relationship between IP and health has been the most notorious case. But, has the progress made by the Doha Declaration on Health meant real improvement to access to medicines? Has the new generation of free trade agreements facilitated or restricted the flexibilities of the TRIPS Agreement?

Concisely, the WIPO Development Agenda is intended to reassess the way norm setting is taking place and the manner this takes into account the local conditions of individual countries.

The process towards recognizing the need to insert a development component into the IP debate has made some progress particularly through new developments in WIPO. But, is this enough to succeed in reshaping trends in this area? Is this time for

complacency? What needs to be done? What actually can be done? These are some of the issues we need to address in our three-day meeting. To facilitate these deliberations, participants might wish to address some of the following over-arching issues:

- Is the IP development oriented agenda at all achievable? What is different compared to similar attempts of the past? Is the concept well understood by policymakers, by the media? What has failed? What is missing? What has been achieved?
- Public opinion in the North appears to accept the argument that IP infringement (counterfeiting, piracy) has reached high levels particularly in developing countries and that the expansion of IP, with strong enforcement mechanisms is the appropriate response. Is this the correct perception? Is this due only to good public relations campaigns or do they reflect legitimate concerns and well argued cases by affected industries?
- The IP world appears divided between maximalists that demand continuous expansion of IP regimes, and minimalists that try to preserve the public domain and limit this expansion. The first group tends to dominate IP policy making, nationally and internationally. The second is viewed as ideologically minded. Are there ways of bridging gaps between maximalists and minimalists?
- Coalitions of civil society groups particularly in the North have succeeded in raising awareness on the excessive expansion of IP protection particularly on health. This contributed to a major debate at the multilateral level on the relationship between TRIPS and health. Has this been enough to produce actual results in developing countries? How do we explain the TRIPS-Plus process in bilateral trade agreements to such broader groups of society?
- Developing countries are in general well equipped to negotiate at the multilateral level. African countries, for example, have played an active role in the Council for TRIPS in raising issues of particular concern to them. However, there is an obvious disjunction between multilateral processes and domestic ones. Are there ways to improve coherence between these different levels of interventions?
- The expansion trends in IP are not only of concern to developing countries. They might affect SMEs and technology followers, consumers and competitors in general. Is there room to build coalitions between these groups in the North and South? Based on what common objective?
- The WIPO Development Agenda has been one expression of progress in terms of inserting the development concerns in IP policy making. Is this enough to move the process forward? Are all developing countries committed to this process? If not why? Is WIPO the right forum to tackle these issues? The EU and the USA are key players in IP trends. How can these countries or groups in those countries be better involved in order to enter into constructive dialogue on IP issues?
- Free trade agreements are building blocks of the new IP international order. Is this an irreversible process? How will these processes influence multilateralism? Is there an immediate future to multilateralism in IP?
- Could we achieve concise, precise and well-structured objectives for a development agenda that could be universally understood and achieved? Within what time frame?