

**REGIONAL DIALOGUE ON INTELLECTUAL PROPERTY RIGHTS (IPRs),
INNOVATION AND SUSTAINABLE DEVELOPMENT IN EASTERN AND SOUTHERN
AFRICA**

29 June – 1 July 2004

Cape Town, South Africa

www.iprsonline.org.za

TUESDAY 29 JUNE 2004**Introduction and Dialogue Context****Pedro Roffe (ICTSD)****Dialogue Objectives**

- To provide a platform for a strategic discussion between relevant stakeholders (negotiators, capital-based policy-makers, academia, non-governmental organisations [NGOs] and the private sector) on relevant trends and thematic issues in the area of IPs and their implications for sustainable development.
- To develop elements of a 'regional agenda' for development-orientated IP policies and informal mechanisms to advance it in the coming years, through, among others, joint research and networking.

Dialogue Structure

- Resource persons to present views on the Dialogue agenda themes.
- Commentators to react to the presentations.
- Broader discussion including all Dialogue participants.
- Working groups to identify issues to be pursued and the main components of a research agenda developed around the four thematic areas identified for discussion at the Dialogue.

Background to IP

- IPRs part of global economic system.
- Since the adoption of TRIPS –
 - Changes introduced in regulating the system of IPRs
 - Pressure on developing countries to implement national TRIPS compliance, generating vigorous debate on what a specific country's IPR policy entails.
 - IP policy area has become one of most dynamic in international law today, with:
 - The tendency to widen the protection of subject matters in IP
 - The creation of new rights to accommodate technological changes and economic interest
 - The progressive harmonisation of IPRs.
- TRIPS-plus –
 - TRIPS is only one episode in the controversial history of IPRs.
 - This dialogue will aim to:
 - Analyse the features of TRIPS-plus as they relate to even more pressure being put on developing countries to adopt new standards
 - Pinpoint what is needed to facilitate the integration of developing countries into the global system.
- A development-orientated approach to IPRs –
 - IP policy does not exist purely to protect but also to promote creativity and innovation, facilitate dissemination and the transfer of technology, and the integration of developing countries into the global economy, but it must be properly formulated. However, recent trends in IPRs have limited and restricted the policy space.
 - The single-model approach to IP followed by industrialised countries does not fit all countries.
 - IP must contribute to the dissemination of technology.
 - TRIPS has introduced flexibilities in the IP policy space, of which countries must make full use. However, the process of harmonisation of IP is driven by advanced economies, which does not necessarily fit with developing countries.

TUESDAY 29 JUNE 2004**General Trends in the Field of Intellectual Property: Issues and Challenges for the Establishment of a Development-Orientated Framework***Resource person – Sisule Msungu (South Centre, Kenya)***Presentation**

Sisule's paper and presentation dealt with:

- **General trends in the field of IP**

- *Institutional and process-related trends*
 - The World Trade Organisation (WTO)
 - The United Nations (UN), its specialised and other agencies –
 - The World Intellectual Property Organisation (WIPO)
 - The Convention on Biological Diversity (CBD)
 - The Food and Agriculture Organisation (FAO)
 - The World Health Organisation (WHO)
 - The UN Conference on Trade and Development (Unctad)
 - The UN Human Rights Bodies and Committees

Institutionally, the adoption of the TRIPS Agreement under the auspices of the WTO meant that the World Intellectual Property Organisation (WIPO) ceased to have its 'exclusive competence' on intellectual property matters. The TRIPS Agreement also marked the beginning of a significant high profile debate on the costs and benefits of intellectual property for developing countries.

- Bilateral and regional trade agreements

The bilateral approach to IP negotiations – the most active forum with respect to IP standard setting today – has seen the requirement that the parties to the free trade agreement (FTA) ratify or accede to a host of, mainly, WIPO treaties.

- *Issue-specific trends*

- Intellectual property and public health

Adoption of the Doha Declaration on the TRIPS Agreement and Public Health in November 2001 and a number of follow-up decisions in the WTO. However, a progressive dissipation of energy and the international coalition between developing countries and civil society groups can be explained partly by the deadlock in agricultural and other negotiations in the Doha Work Programme, and a shift in focus to regional and bilateral FTAs.

- Intellectual property and genetic resources and traditional knowledge

Lack of progress on genetic resources and traditional knowledge issues in both WIPO and WTO and a 'sub-contracting approach' by the CBD.

- Patent law harmonisation

Should developing countries simply seek flexibilities based on the TRIPS flexibilities?

- Copyright and related rights

- **Issues and challenges for IPRs and the establishment of a development-orientated framework**

- Developing countries and other proponents of a development-oriented framework face complex challenges in not only co-ordinating their strategies and positions across fora but also in addressing the various substantive issues that are under negotiation and/or discussion.
- Most developing countries have argued consistently over the 10 years of the existence of the TRIPS Agreement that international rules on intellectual property can only promote development if they facilitate the transfer and diffusion of technology and contain enough flexibility to allow these countries take into account their development objectives in designing their intellectual property regimes.
- Trends towards decreased activities at the WTO and an increase of activities at WIPO, in other UN agencies and at the bilateral level mean that developing countries will have to significantly improve their policy co-ordination on intellectual property matters, both in terms of national policy formulation and participation in negotiations in various fora.
- The changing nature of the alliances that had developed in the WTO between developing countries and civil society organisations and the change in the technical issues that need to be

addressed means that assumptions can not be made about the readiness and ability of developing countries to respond effectively to the emerging trends.

- The shift of these issues to the national and regional context means that the role of national and regional institutions including regional economic organisations, regional patent organisations and national courts and institutions such as the competition authorities need to be more seriously examined.
- The trend towards bilaterals and the shift of activities to other fora also means that the solidarity of developing countries on intellectual property issues will progressively be eroded.

To fully map the effects of the general trends in the field of IP and the appropriate responses to them, the following questions must be answered:

- To what extent can developing countries and other advocates of the development-oriented IP framework dedicate significant resources and attention to TRIPS issues in the context of the ongoing difficulties in the main areas of the Doha Work Programme – agriculture and non-agricultural market access issues?
- As the major IP players have shifted their focus to WIPO and bilateral activities, in part because of the effectiveness of developing countries at the WTO; should developing countries and their partners simply shift focus to WIPO and bilaterals or should they seek to develop a strategy to try and make gains in the WTO?
- How should developing countries and civil society groups effectively engage in the various WIPO negotiations? For example, what needs to be done to push WIPO towards providing development-friendly technical assistance and increasing the critical participation of developing countries and civil society groups in its processes?
- How should developing countries approach the new processes and developments, in particular, the entry into force of the ITPGRFA, the work of the CIPR, open access initiatives, enforcement and human rights?
- How should the significantly increased number of works and materials on IP and development as well as the number of experts on these issues be harnessed and channelled?
- What needs to be done with respect to bilateral trade agreements and their TRIPS-plus approach, considering that there are no signs that the speed with which these are being entered into is reducing and the fact that it is not necessarily true that the US is the main *demandeur* for all these bilaterals in the first place?
- With respect to TRIPS and public health, is there still value for expending political and other efforts at the WTO or should the processes move to the national and regional level? What needs to be done to maintain or at least manage the changing relationship between developing countries and civil society groups on TRIPS and public health as well as on other IP and development issues?
- Can anything realistically be done on IP and transfer of technology at the international level?

Discussion

Questions and observations from participants

- So far, limited response / clarity on standing from African countries as a whole to changes occurring in the WTO and WIPO in the field of IP –
 - Some African countries engaged in bilateral negotiations with the US – focus mainly on these deliberations at present.
 - Some participants felt the attitude of “We’ll wait for a crisis and then respond” has become common among African countries.
 - Is Africa too big an entity for one coherent response on these issues?
 - Issue of FTAs and existing regional trade blocs in Africa: most of FTAs mainly in the interest of the US? Is this a threat to regional African trade blocs? How to strengthen these existing blocs and enable them to wield more negotiating power?

Sisule’s response

- Paper did not specifically look at FTAs and what they mean for regional trade blocs in Africa. However, not convinced that US necessarily driving these FTAs – smaller countries are trying to enter into these agreements for various reasons:
 - Concessions, for example, in terms of access to agriculture –not easy to quantify the IP element versus the agriculture element. The challenge here is to quantify it and to realize that this is not truly a balanced issue.
 - Regional groupings (for example, Latin America) – because of bilateral agreements, countries change their positions on certain issues or simply keep quiet on concerns around them.

Observations from Pedro Roffe, ICTSD

- Similar questions were raised at the March Regional Dialogue held in Brazil in terms of concessions and FTAs, and their impact on societies. With concessions, countries are making major commitments from which it is difficult to stand back. In South America, this issue has been identified as needing further research work.

Observations from commentator Fiona Bayiga, Senior Attorney, Ministry of Justice, Uganda

- The increasing shift of activity from the WTO to WIPO is negatively affecting Uganda. Little formal linkage between the Patents Office and IPR issues, as well as a lack of funding for the Ministry of Justice to attend WIPO meetings, although the attendance of WTO meetings by the Trade, Tourism & Industry Ministry is funded, impacts on the country's effectiveness in the IP arena.
- Criticism raised about WIPO technical assistance to developing countries: in terms of the implementation of IP legislation, a lack of personnel / infrastructure hampers process – government's priorities not very high on protecting IPRs. Technical assistance not only focused on the implementation and enforcement of legislation, but also on the instruments of enforcements, namely courts and magistrates. However, Uganda has a wide range of authorities dealing with different legislation – cannot be taken for granted that a specific authority has knowledge of / training on IPR issues.
- Disappointing lack of outcome from the developmental committee on genetic material and traditional knowledge. Stance of "when there is a crisis, we will react" should change.

Observations from commentator Zenobia Ismail, University of the Witwatersrand, South Africa

- Tougher IPR protection sidelines development.
- Fora shifting around IPR issues is concerning and detracts from the fundamental issues around IPs
- Attempted appropriation of traditional knowledge by developed countries is disturbing (for example, attempted patent registrations on 'rooibos') – protect through geographic indicator protection. The financial cost of challenging traditional knowledge claims is high for developing countries

Observations from commentator Likonelo Lebone, Ministry of Trade, Lesotho

- Concerns around developing countries' ability to participate in fora such as WIPO where capacity is concerned – all talks take place in Geneva; Lesotho, for example, only has very small mission there.
- In terms of the issue of bilateral negotiations and agreements – do our negotiators have sufficient capacity to state Africa's case in negotiations with the US on IPR issues?

Questions and observations from participants

- Concerns were raised over the quality and consistency of WIPO and other institutions' consultancy and technical assistance to developing countries around IP issues – do not have enough of an understanding of the pertinent issues in these countries around IPRs and often no relevance between the assistance and what developing countries are attempting to do in this regard. Why don't we use local experts? Work remains to be done around structural processes in terms of technical assistance – with a specific focus on how to assist developing countries to develop their own agendas and priorities around technical assistance and how these priorities should be addressed.
- Little respite foreseen for indigenous communities – any discussions on harmonization of IPRs must start from a point that IPRs cannot accommodate indigenous nuances.
- How best to have a consolidated approach and enable greater participation between developing countries are complex issues – not all countries have the same interests on specific issues.
- The increasingly low profile of the WTO on IP issues is a worrying development: to grow economically, developing countries need market access, but also the increasing competitiveness of enterprises – for which technology transfer is essential. The WTO plays a role in ensuring effective technology transfer; the lack of monitoring of whether sufficient technology transfer takes place is perplexing.
- WIPO determines ways in which developing countries should implement TRIPS laws, but provide no options to fit with the economic needs of those countries.
- Regional trade agreements and TRIPS-plus: As soon as developing countries built their capacity in the WTO and 'neglected' WIPO, the forum is taken back to WIPO – is the forum-shifting 'strategy' used against developing countries?
- Policy space and flexibilities available to developing countries in terms of IP to realise development are getting narrower – what options do developing countries have here?
- Balanced agreement is the nature of TRIPS – flexibilities versus minimum standard. I flexibilities (for example, the transfer of technology) is not allowed, should developing countries not question the validity of their obligations to minimum standards? Minimum standards cannot be raised if flexibilities are not given.

- Should have a better concept of what we mean by transfer of technology – conceptualisation and formulation of what developing countries are asking in terms of technology transfer must be improved. Forum shifting: how should do developing countries choose their Fora? Deliberate on how different institutions will assist with developing countries' various agendas and situate each of these Fora for a particular purpose, as developed countries do.

Health, Competition Policy and Intellectual Property: Using Competition Policy to Mitigate the Impact of Patent Protection

Resource person – Jonathan Berger (Law & Treatment Access Unit, WITS)

Presentation

Context

- Debate post *Doha Declaration*
- TRIPS provides significant flexibility to deal with “anti-competitive practices”

Purpose

- Role of competition policy in advancing public health
 - Particular focus on how and when competition policy can be used to increase access to essential medicines
- Based on assumption that developing countries can and should take measures to limit the potentially negative implications of IP protection

The TRIPS framework

- **Why focus on TRIPS?**
 - Imposes certain limits on use of competition policy
 - Provides some guidance on IP/competition policy interface
 - Only framework that legally binds Southern African countries for now

Relevance of developed country experience

- **General position**
 - “Competition policies ... generally take a favourable attitude to intellectual property rights”
 - BUT, important differences regarding specific issues
 - Scope of “essential facilities” doctrine
 - Forms of abuse of dominance prohibited
- **Relevance for developing countries**
 - Developed world approach informed by –
 - TRIPS+ IP protection
 - More tolerant to conduct that we may regard as abusive
 - No single approach to some key issues

Regulatory mechanisms to promote public health

- Exercise of IPRs cannot in and of itself provide basis for using competition policy
 - Freedom to determine grounds for issuing CL not a reason for broad definition of “anti-competitive”
 - When no abuse or problematic conduct, invoke government-use and standard IP instruments
 - Competition policy inappropriate vehicle where conduct not problematic (or potentially problematic)
- Use competition policy only to –
 - Increase access where unfairly or unjustifiably limited
 - Maintain access where already exists
- Three main competition policy instruments
 - Abuse of market dominance
 - Excessive pricing
 - Predatory pricing
 - Refusal to license
 - Regulation of licensing
 - Merger control
- Focus on abuse of dominance and licensing

- Merger jurisprudence generally well-established
- As mergers difficult to undo, generally regulate upfront

Limitations of using competition policy in the developing world

- Against
 - Insufficient expertise or capacity
 - Rather invest resources in patent system until required to have a competition law framework
- For
 - Regulatory flexibility under TRIPS requires state or specific third party action – may not be forthcoming
 - “Singapore issues” around the corner – Doha Development Round and/or regional/bilateral FTAs
- Compromise?
 - No prior approval
 - Enforced by third parties in ordinary civil courts

The South African experience

- SA’s new competition law framework in force for less than five years
- Takes advantage of the regulatory flexibility permitted under TRIPS
- But: still relatively undeveloped; little in the way of jurisprudence to give real meaning and content to its relevant provisions.
- However, already been used to advance public health –
 - Recent challenge to the pricing practices of pharmaceutical giants: GlaxoSmithKline, Boehringer Ingelheim

Concluding remarks

- Competition policy can play an important role in advancing public health
 - Increase access to essential medicines
 - Increase options for action by consumers
- Learn from developed country experiences
 - Issues not clear cut
 - Context is everything
- Stimulating creative thought and debate
 - Placing new ideas on the table
 - Playing our own game, creating our own rules

Discussion

Observations from commentator Francis Mangene, consultant, Uganda

- Significance and effectiveness of civil society activism in terms of the South African experience detailed here important to note.
- Competition Law model described here and the appropriate provisions to reflect societies’ needs provides considerable learning experiences for Uganda and other African countries which do not have developed Competition legislation.

Observations from commentator Heinz Klug, University of Wisconsin (South Africa)

- Recognise the importance of this paper and the power of civil society to engage on the vital issue of access to medicine. Civil society can push and widen boundaries.
- What power does the government have in terms of Doha, etc? Look at price-setting, especially in terms of the extreme urgency of anti-retroviral (ARV) roll-out in South Africa – failure of government to adequately use flexibility, thus return to Competition Law as an alternative remedy.
- In terms of Competition Law, legal resources are key – capacity problem in South Africa.
- Also, only a settlement agreement, not legal precedent in the case described.
- The US and the EU will not refrain from applying pressure in this area. Coercion in the form of trade preferences and development aid; diplomatic intervention used in domestic issues.

Observations from commentator Nora Olembo, Kenya Industrial Property Institute, Kenya

- In Kenya, certain TRIPS issues and the question of access to medicines have also surfaced – realised the country’s laws are inadequate to address such issues, but it is a complex task to change legislation – not a case of inserting a clause here and there.

- Implementation of legislation: often find that laws which on the surface seem very inclusive are found to be insufficient when put to the test.
- Legal systems often not user-friendly – waiting a long period for a licence is very problematic in terms of emergencies such as HIV/Aids. Even South Africa, where the legislation is in place, is experiencing difficulties around the production of medicines.
- Leaving decision-making powers / authority in the hands of a single person (relevant Minister) is problematic – no progress made on issues.
- Africa has to a large extent neglected its research & development and capacity-building – without which, even if laws are in place, they cannot be implemented efficiently. In this case, technical assistance to enable implementation is of little use.

Observations from commentator Silver Ojakol, Ministry of Tourism, Trade and Industry, Uganda

Regional concern: although individual developing countries could develop their own competition law systems, the cross-border element of multi-national corporations also necessitates a regional arrangement.

Questions and observations from participants

- Often limited legal capacity and financial resources inhibit developing countries to challenge / engage the private sector.
- The issue of free traders versus those for patents: if IP is approached as an exception to the competition model of free trade, is this a strategy that can work?
- In developing countries' bilateral negotiations with developed countries, political will and national systems for comprehensive policy play a large part in the successful conclusion of agreements –so at national level we should establish an inter-institutional co-ordination framework to ensure the negotiating team includes experts from all relevant areas.
- Not taking advantage of flexibilities post-Doha related to bilateral/regional FTAs, technical assistance?

Berger's response

- An important issue is a country's capacity to make use of competition policy – demand on regulatory capacity is high and deters from other possibilities that perhaps have a greater reach.
- The case where government decided to provide drugs for the public sector and the drug companies were the only party not to come to the table (refusing to licence; keeping prices unreasonable high) – shows to very particular competition circumstances in SA, which are not necessarily a helpful experience for other countries.
- Should our competition law take a favourable position on IP? I see IP as a barrier in the way it is practiced at the moment. But TRIPS and IP are here to stay – find ways to work in and around system.

WEDNESDAY 30 JUNE 2004

Agrobiodiversity and Intellectual Property Rights: Selected Issues under the FAO International Treaty on Plant Genetic Resources for Food and Agriculture

Resource Person – Robert Lettington (ICIPE, UK)

Presentation

Selected issues

- Definitions and scope
 - - rarely considered
 - - actual and potential impacts
- Farmers' Rights: positive and negative rights
 - - actual and potential impacts
 - - two discrete concepts with varying effects
- Material transfer agreements
 - - object of varying perceptions
 - - potentially fundamental issue
- Genetic Uniformity

- if creating strong rights in particular resource, concentrate on this: opinion is that IP creates genetic uniformity

Conclusions

- National implementation likely to have a major impact on developments under the ITPGR
- Whether countries focus on the functioning of the Multilateral System under the ITPGR or on the politics of intellectual property rights may prove decisive

Discussion

Questions and observations from participants

- For the countries that have already acceded to the Convention for the Protection of New Varieties of Plants '78 (UPOV 78), what are the advantages and disadvantages of joining UPOV 91? In Kenya, this is a difficult debate: opinion is that if move away from UPOV 78, farmers would lose out on their capacity to modification.
- Clarity was sought on the definition of Farmers' Rights – why considered as a form of IPR?

Lettington response:

- UPOV 91 versus UPOV 78 for African states: in essence these are a series of revisions of the same treaty, so different members can be members of different texts – 78 and 91 (more rigid system than 78) texts are open at the same time. Under 91, apart from if the country has signed a bilateral agreement, there is no requirement to join UPOV, even if the country uses UPOV text for its own legislation. But countries should formulate their own positions/approaches, otherwise the negotiating position becomes very difficult. For example, on plant variety protection rights, if the EU says a country should join UPOV 91, it must be able to state that it has its own system in place, and detail the reasons behind its implementation.
- Material transfer agreement (MTA) dispute: in terms of dispute resolution how compliance will be measured – in my opinion, MTAs should be largely meaningless – country members should set rules: “you can only do xyz with plants in my country”.
- Farmers' Rights as IP: look on positive rights as a form of IP, not all Farmers' Rights. Viability and function of these rights: in WIPO and TRIPS, the focus is on positive rights. Although there are more important aspects in negative rights, most countries do not explore these. Also, very few countries have experience with Farmers' Rights in legislation.
- New trend: traditional knowledge and Farmers' Rights becoming more and more part of bilateral agreements – on request by developing countries, which use these issues as valuable bargaining chips.

Observations from commentator James Otieno-Odek, University of Nairobi, Kenya

- Treaty vague in terms of bio-piracy
- Kenyan experience: existing IPRs – seed and plant varieties – different organisations dealing with these issues – better co-ordination is needed.
- Capacity constraints: limited facilities for research – inhibit developing countries' ability to implement and make use of flexibilities.

Observations from commentator Lovemore Simwanda, Zambia National Farmers' Union, Zambia

- Zambia actively engaged in key discussions around biodiversity on international level to promote exchange and use.
- Currently there is a demand for IP on Zambia's genetic material – support to develop IP regime – necessary for research and innovation.
- In terms of new policy framework being designed: Zambia should be careful not to adopt IPR system that hampers conservation, local communities' benefit-sharing.
- Should distinguish between traditional agro-biodiversity and modern biotechnology – legal responses to these issues different.

Observations from commentator Tom Suchanandan, Department of Science and Technology, South Africa

- Need for clear safety clause in FAO Treaty for conservation, sustainable use.
- Must establish clearing house, monitoring system, promote education and awareness around these issues.
- On the issue of sovereignty: does ownership reside with national government or with the farmers/community?

Observations from commentator Andrew Mushita, Community Technology & Development Trust, Zimbabwe

- Important issues are the patenting of life forms and GMOs.
- Uniformity of *sui generis* legislation or rather multiple responses that reflect specific economic circumstances?
- Challenges: limited capacity to enforce or implement national legislation; enforcement systems and mechanisms to make it practical; will the benefits reach the communities and how is this to be ensured?
- Technology transfer: South not only a recipient – also providing a vast amount of knowledge – technology transfer is a two-way process.

Observations from commentator Patricia Kameri-Mbote, international Environment Law Centre, Kenya

- Interrogate IPRs in realm of agro-biodiversity – what are the benefits? Can IPRs improve our agro-biodiversity? Has any economic analysis been done in this regard? And on the role of IPs in economic development?
- Emphasis on individual rights: is agro-biodiversity principally managed by individual entities – is there scope for communities, is the emphasis on individual rights?
- Challenges: to harmonise seed preservation; analyse how IPRs on agro-biodiversity impact on food security as function of both access and availability; improve upon the very constrained capacity of national governments.

Questions and observations from participants

- Traditional knowledge issues: definition – communal nature and cross-generational linkages – not so different from modern IP-type issues (research laboratory versus traditional knowledge in healer). But money and technology bias create fundamental differences: in IP, access defined much more by economic power. Nature of IPR regimes also exclude traditional knowledge as not new and not modern.
- Question of relationship of FAO to other treaties: where and when do you fight issues of concern?
- MTA subject to revision in November 2004: challenge for developing countries to have capacity available, their position(s) clear and ready.
- Use of existing models could be very helpful – do not have to be applied strictly as they have been set up elsewhere in developing countries; approximate laws in terms of economic analyses.

IP, Innovation and Commercialisation of R&D*Resource Person – Rosemary Wolson (UCT)***Presentation**

Options to assist developing countries in positioning themselves to reap the benefits of a stronger IP regime, with special reference to the role of IP management in research organisations.

Context

- TRIPS here to stay
 - Reduced flexibility in implementing IPRs
- Need to acquire, absorb & diffuse technology
 - IPRs as enabler or obstacle?
- Role of research organisations in promoting development
 - Especially indigenous innovation
 - Situated within broader policy framework
 - Tailored to needs & environment
- Not proposing a solution
 - But a step towards one?

Institutional Technology Transfer

- Relationship between academic/public sector research & private sector
- Technology Transfer Office (TTO) as facilitator
 - Research contracts (including collaboration agreements)
- Publication

- Freedom-to-operate
- IP
 - Licensing
 - Policy/regulatory affairs
- Research & innovation value chain

Options for Developing Country Institutions

- Bearing in mind severe pressure on resources
- Distinguish appropriate roles
 - ‘Pre-licensing’ TTO
 - Licensing TTO
- Broad definition of TTO
 - ‘Minimal’ functions, for example, reduce risks
 - Active facilitation of collaboration
 - ‘Regulatory affairs’ – compliance
 - Licensing
- Tailor according to needs

Options for Licensing Practices

- Strategic patenting
- Licensing preferred over assignment
- Non-exclusive versus exclusive licensing
 - Exclusivity where licensee can practice
 - Appropriate fields of use, territories, duration
 - Minimum performance/diligence provisions
- Open source as a model
- Market segmentation
 - Including differential pricing
 - Developing versus developed country markets
 - Public versus private sector
- Requirement to deliver in developing countries
 - Compulsory sub-licensing – including know-how
- ‘Humanitarian use’ clauses
- Preference for local firms
- Donation of technologies unlikely to yield profits or serving public interest

Supportive Policies

- Motivation for government intervention
 - Main benefits captured outside institution in broader economy
- Training & capacity-building
 - Learning by doing, context-specific
- Funding for patent filing, prosecution & marketing
- Centralised TTO
 - National or regional
 - Limitations
 - Potential benefits

Complementary Policies

- Rooted in a well-functioning national system of innovation
- Co-ordination of efforts of different government departments, agencies & stakeholders
 - Avoid duplication
 - Avoid conflicts
 - Seek synergies

R&D Support

- Increased public spending on R&D
 - Incentives for promoting private R&D investment
 - Tax relief
 - Matched funding

- Public-Private Partnerships (PPPs)
- Environment conducive to attracting:
 - FDI
 - Technology transfer (international)
 - Meaningful research collaboration
- Support for local firms and research institutions to exploit their IP

IP-Related Mechanisms to Explore

- Taking advantage of TRIPS flexibilities where available
- Must be appropriate to national context
 - *Sui generis* rights for protection & exploitation of IKS
 - Utility models/‘petty patents’
 - Geographical indications
 - ABS for protection of biodiversity
 - Competition law

Bilateral

- Balancing undertakings for stronger IP protection with measures to ensure that users of system can ultimately benefit
 - Medium- to long-term objective
 - Capacity-building
 - Technology transfer (including know-how)
 - Provision of research infrastructure
 - ‘Genuine’ collaborations

Multilateral

- Alignment of countries with similar interests to lobby
- Co-ordinating role of multilateral institutions
 - Clearing-house facilities
 - Administration of multilateral funds
 - Facilitation of tech transfer of technologies of particular public interest
- Multilateral agreement on access to basic science and technology?

Discussion

Observations from commentator Getachew Mengistie, Intellectual Property Office, Ethiopia

- Patent system designed and developed not by developing countries – inaccessible and unaffordable for local inventors.
- Local inventors not in a position to reach commercialisation stage – limited in terms of fees, country policies, education.
- Do we make policy-makers aware of these problems?
- Also concerns around capacity: public officials snapped up by the private sector. Suggestion to set up semi-autonomous body to determine TTO office budgets, etc., without the normal bureaucracy.

Questions and observations from participants

- IP offices in Africa mainly exist to administer patents from the North. Does this justify the finances and resources spent on such offices? What is the comparative advantage for African countries in this? What should be the mandate and function of IP offices to ensure they add value?
- Innovation requires resources – human, financial, infrastructural – research organisations in the region severely constrained where all these are concerned.

WEDNESDAY 30 JUNE 2004**Main Concerns Emerging from the Dialogue****Heinz Klug**

The following points attempt to pull together and link ideas which emerged during the first two days of discussion. There is no significance to the order of the points and it is important to note that there are various cross-cutting issues, such as the problem of capacity and the difficulties of technical co-operation which are raised in a number of different contexts reflected in this summary.

Cross-cutting issues

- Capacity
- Technical Assistance

Bilateral negotiations, the question of forum shifting and domestic failures

Concern was expressed about the impact of bilateral negotiations and the tendency of developed countries to shift forums from multilateral institutions to bilateral agreements and between different multilateral institutions such as the TRIPS Council and the World Intellectual Property Organisation (WIPO) – particularly in relation to the impact these developments might have on the public health provisions of the Doha Declaration and subsequent Paragraph 6 agreement. Concern was also expressed over the failure of domestic (national) governments and negotiators to achieve goals more suitable to the needs of the region.

Technical assistance and capacity

Concern was expressed over the lack of capacity among many of the participants and institutions from the region and the consequences this has for the relationship between intellectual property and development. In this context there was concern expressed about the need to obtain appropriate technical assistance. Here there was some concern that the technical assistance offered by some multilateral institutions, such as WIPO, is not appropriate to the needs of countries in the region but rather tilted to favour increasing IP protection before any other considerations.

Harmonisation and minimum standards

Concern was expressed about the impact of minimum standards, particularly in the context of broader harmonization efforts. It was suggested that audits or studies be conducted to examine the effects of the insistence on minimum standards on various aspects of concern including: their anti-competitive effects; the overprotection of IPRs in the context of development needs; the interaction with trading blocs; and in relation to incompatible treaty obligations in other areas, such as the fields of human rights, health etc.

Transfer of technology and compulsory licensing

Here there was concern for the need to develop a deeper understanding of what exactly commitments to transfer technology or to engage in compulsory licensing entail. It was felt that there is great scope for defining both of these concepts and commitments. Definitional development of both commitments to transfer technology, as are included in the TRIPS agreement and on the exact scope and nature of compulsory licensing would be of great value to the region.

Implementation and differential treatment

It was felt that countries are not fully using the space provided by the process of implementation to address their particular needs or adopt their own positions on issues of national conditions and flexibilities but are rather relying on standardized interpretations provided through technical cooperation which emphasizes IP protection over local needs and capacities. The group advocated for differentiated treatment in relation to local needs and capacities.

Enforcement

Concern was expressed over the costs of placing enforcement before other needs such as facilitating access. This was particularly so in trying to achieve the correct balance between proprietary rights on the one hand and facilitating access to public goods on the other. Of special concern here is the relationship between public and private forms of enforcement and the ways in which public authorities are required to

expend limited resources to provide for the enforcement of private rights in IP while little consideration is given to the needs to provide access to IP for development needs.

Interpretation of international agreements

Concern was expressed about the relationship between international agreements and their interpretation, especially in the relationship between the more general commitments, such as the commitment to transfer technology and the specific rights and obligations defined by the treaty. This is especially the case in trying to balance private rights and public needs, e.g. human rights.

Overreaching

Concern was expressed that the tendency of IP holders (developed nations and trans-national corporations) to overreach in their claims for intellectual property protection threatens to undermine the whole system of international IP protection. This was raised in relation to the question of a future TRIPS review and the possible need to place a ceiling on private claims so as to balance private rights and public needs. Reference was made in particular to questions of open access as well as the need for a better balance within the international IP and trading system.

IPRs and developing countries

Concern was raised over the use of the IPR system by developing countries, particularly in relation to:

- Cost: where the system is too expensive and difficult to access for inventors in developing countries;
- *Sui generis* systems: the need for complimentary systems and rules
- Management of IP: particularly the cost of rules and enforcement; need for defensive publishing and the need to assert research exemptions.

THURSDAY 1 JULY 2004

Development-Orientated IP Agenda: Working Group Report-Back

Purpose of Working Groups

- To identify a number of areas of strategic concern where further research is needed, as well as the actions to be followed up to establish continuous interaction and discussion amongst Dialogue participants.

Working Group on IP, Health and Competition Policy

Action areas

- Institutional models and legal frameworks
- Implementation of *Doha Declaration* and decision on Paragraph 6
- Capacity in region to implement
- Developing a pro-development competition policy agenda

Institutional models and legal frameworks

Action point

- To develop institutional model(s) and/or regulatory framework(s) to meet developing country needs

Research areas

- Assessment of actual and potential institutional capacity in AU, COMESA, SADC, SACU, etc.
- Snapshot of existing models for cross-border and domestic competition policy – EU, US, etc.
- Survey of existing laws, legal frameworks and competition policy processes through an access lens
- Lessons to be learnt from existing laws and structures in key countries – Kenya, SA, Egypt, etc.
- Role of IP offices
 - Relationship between IP and competition policy
 - Extending scope of competition policy to cover IP issues

Implementation of Doha Declaration and decision on Paragraph 6

Action point

- Ensure that developing countries implement public health safeguards and flexibilities

Research areas

- Assess current state of play – who's implementing what, where and how
- Why limited implementation?
 - Lack of capacity? Political will?
 - Focus on key countries, such as major pharmaceutical manufacturing countries and importers
- Relationship between failure to implement and other processes/priorities
 - Regional/bilateral FTAs
 - AGOA
- Differentiating pharmaceutical and/or other health products from other technologies
 - Express public health provisions
 - Single industrial property bill vs. separate bills

Capacity in region to implement

Action point

- Need to strengthen capacity in all areas relevant to competition policy

Research areas

- Identify extent of capacity and need for strengthening
 - Civil courts and/or competition authorities
 - Legislators and other policy makers
 - Technical staff (implementers)
 - Civil society

Developing a pro-development competition policy agenda

Action point

- Getting the basics right
 - Establishing a set of principles, rules and competition policy instruments that advance developing country interests
 - Shape international competition policy processes from a pro-development perspective

Research areas

- Case studies and experiences of other developing countries, especially outside of Africa
- Using competition policy to address a broader set of issues outside of patent law

Working Group on Agrobiodiversity and IPRs

Strategic issues

- Defining and achieving protection of traditional knowledge (TK) in the conservation and sustainable use of biological diversity
- Review of Article 27.3.b informed by research on key elements of an acceptable *sui generis* system
- Establishment of an African IPR and agrobiodiversity working group
 - Keep discussion on issues alive and assist in developing positions at international for a
 - Send representatives of working group to international for a such as SBSTTA
- Promotion of discussion within Africa on key negotiating positions in international agreements
 - Development of common positions in inclusive group
 - Comprising countries that have ratified and those intending to ratify prior to negotiations on provisions of international agreements such as the International Treaty
 - Target people going to meetings from the government side and technical people.

Research issues

- Implications of the interface between genetic use restriction technologies (GURTS) and intellectual property rights on conservation and sustainable use of agrobiodiversity
- Key elements of a *sui generis* regime (Article 27.3.b)

- Research on what should comprise a *sui generis* system, taking into account:
 - Existing frameworks
 - Needs of countries and stakeholders
 - Costs and benefits
- Audit/interrogation of role of IPR on agrobiodiversity and the consequential impacts on food security and livelihoods
 - Potential impacts of Free Trade Agreements' IPR provisions (TRIPS+ conditionalities) on agrobiodiversity, livelihoods and food security

Conclusion

Cross-cutting issues of:

- Capacity building
 - Technical issues
 - Enforcement and administration
 - Negotiating techniques
 - Establishment of a working group
- Technical assistance
 - For research
 - Meetings of negotiators
 - Maintenance of dialogue between countries

Support of the working group

Working Group on *IP Tools, Innovation and Commercialisation*

Areas of Concern

- Role of IP in strengthening National Systems of Innovation
- Development of an innovative private sector
- Expanded role for national patent/IP offices

Areas for Further Research

- Analysis of development-friendly licensing practices
- Case studies on partnerships and their effectiveness
- Private/public sector
- North/south
- South/south
- Audit of IP assistance organisations