Intellectual Property Rights in the International Trading System: 10 Years after Marrakech

Seminar report

Stockholm, Sweden
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Introduction

This is a summary of the seminar on Intellectual Property Rights in the International Trading System: 10 Years after Marrakech, arranged jointly by the Swedish International Development Cooperation Agency (Sida) and the International Centre for Trade and Sustainable Development (ICTSD), 24 September 2004 in Stockholm.

The purpose of the seminar was to discuss matters related to intellectual property rights (IPRs) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) including recent developments in the area with particular emphasis on their implications for sustainable development. During the seminar four experts on IPR issues gave short presentations in which they addressed different relevant questions. Their presentations were followed by an open discussion among participants. The seminar was chaired by Mr. Ricardo Melendez-Ortiz, Executive Director, ICTSD.

Introduction and welcome

Christina Hartler, Head, Division for Market Development, Sida, introduced the seminar by asking why IPRs are important for trade and development. She stated that ideas and knowledge form an increasingly important part of trade. Since IPRs vary considerably across countries they also influence the pattern of trade, investments and technology transfers. For these reasons the TRIPS Agreement, which came into force in 1995, became one of the main pillars of the WTO. Further she claimed that IPRs in the international trading system is a complex issue, and it is also an issue on which many in the field have strong but different opinions. Technologically advanced countries may have an interest in strong protection in order to reward their investments. In contrast, countries with a low capacity to produce products with high technology content may prefer weak protection in order to promote widespread and inexpensive access. She finished her opening by stating that there are various arguments for and against the introduction of IPRs in the multilateral trading system as well as questions regarding the impact of the TRIPS Agreement. Lastly, she expressed her hope that some of these issues would be addressed and clarified during the seminar.

In his introduction, Chair Mr. Ricardo Melendez-Ortiz explained why ICTSD is interested in IPRs and how they work with them. Ten years after the agreement in Marrakech to introduce IPRs in the trading system, he claimed that countries basically argue on two fronts. One group of countries stresses the inadequacy of the provisions that were agreed upon in the TRIPS Agreement. Even if the purpose of the

TRIPS Agreement was to increase innovation and creativity, these countries claim that it has rather contributed to the contrary and is used to a great extent for other purposes such as maintaining market dominance. The second stream of arguments is specifically related to developing countries and concerns the inability of the system to live up to the expectations of, for instance, increasing FDIs to developing countries. These claims are stated against the background of public policy concerns, which are related to the use of knowledge to attain different policy agendas in various fields such as the environment and the social and economic area. Thus, IPRs are related to sustainable development and this is primarily one of the reasons why ICTSD has an interest in this field. During the last 5-6 years ICTSD has investigated the relationship between the international framework of IPRs and public policy agendas. Mr. Melendez-Ortiz further stated that some of the unfinished work from their inquiry would be presented at the conference. He also stressed that IPRs are highly dynamic and that there are developments in the field, almost on a daily basis, especially at the regional level. Finally, he mentioned that IPRs cover two disciplinary aspects; law and economics.

Historical background

With the motivation that it is relevant to understand the history of the TRIPS Agreement in order to comprehend the present debate on IP, the first presentation provided a historical perspective of the TRIPS Agreement. It was given by Mr. Pedro Roffe, Director of the UNCTAD/ICTSD project on IPR and development. Mr. Roffe started out by stating that the issue of IPR has been controversial from the very beginning, not only between nations but also within countries where technology leaders and technology followers have disagreed on the balance of an appropriate intellectual property protection. He then gave a brief overview of 120 years, which he named the internationalization of IPR systems. He distinguished between two phases, the shallow and the deep harmonization period of intellectual standards. The first corresponds to the major classical conventions; the *Paris Convention for the Protection of Industrial Property* (1883), basically on industrial property, and the *Bern Convention for the Protection of Literary and Artistic Works* (1886) on copyright protection. The Paris Convention, that came into being at the culmination of the industrial revolution, was a US initiative which was a result of an identified need to go beyond national frontiers and recognize inventions in third countries. The American proposal for an international convention on patents and industrial property in general found Europe in the middle of a controversy in which free traders and advocates of patents discussed the convenience of such a proposal. The historical compromise, the Paris Convention, was an international system that recognized each country's right to local exploitation of inventions. This concept later evolved into the idea of compulsory licensing, which was introduced in 1925. The main features of the Paris Convention were firstly that patents were independent, i.e. a patent on the same invention that was granted in a third country did not depend of the original one in the first country. Secondly, it was recognized that there could be abuses of the monopoly right and this could be corrected through local exploitation or compulsory licensing. Lastly, and most importantly, there was the bottom-up approach to harmonization, implying that a number of areas were left out of the Convention (basically subject matter concerning protection and the scope of rights granted to the patentee and their duration) because it was left to each country to decide on these matters.

Subsequently, Mr. Roffe turned to the deep harmonization phase, i.e. the advent of the TRIPS Agreement which implied a radical change in the IP evolution. The background to this agreement was, on the one hand, the reformist movement in developing countries led by Latin America in the mid 1970s that challenged the foundation of the IP system, even questioning the idea of national treatment in the recognition of patents. On the other hand, the Reagan administration represented a major shift in the US IP policy. From a policy that traditionally favored competition before protection, it changed to the contrary through a number of important legal reforms, as well as through a major transformation ofits trade policy. Additionally, the technological leaders in the US convinced the government that IPR was a major issue

that needed to be brought to the international agenda. A coalition including industrialists from the US, Europe and Japan was formed to bring up the issue of incorporating IPRs in the international trading system. Although developing countries showed hesitation towards the TRIPS Agreement, the idea was taken up in the Uruguay Round negotiations and it was only at the conclusion of that Round that IP in full entered into the trading system. The overall objectives of the enhanced protection of the TRIPS Agreement were to contribute to innovation, creativity, and the transfer and dissemination of technology.

Mr. Roffe continued by presenting the most relevant features of the TRIPS Agreement. The Agreement borowed two basic principles from the trading system: national treatment and most favored nation treatment. The latter was a novelty. A second feature of the Agreement was that it only served as a minimum standard that countries could go beyond. Furthermore, in the area of patents and in comparison with the Paris Convention, the TRIPS Agreement introduced the principle of non-discrimination, i.e. a country could not discriminate as before between fields of technology to be protected. Also, it established a minimum duration of protection and defined the exclusive rights of the patentee and the requirements for the exercise of compulsory licenses. Another fundamental principle of the Agreement was article 39 (3), which is an incipient recognition of undisclosed information and data exclusivity. This was particularly sensitive to the pharmaceutical and agricultural sectors, where it is recognized that countries need to consider protection against unfair commercial use of information.

After presenting these two phases of shallow and deep harmonization, Mr. Roffe addressed the question of what has happened after the TRIPS Agreement. He stated that IP is a salient but dynamic area of international law. After the Agreement, new forums have been established (in the major league are WIPO and WTO) and new actors are intervening and building on the concept of minimum standardsa number of multilateral, regional and bilateral initiatives have been undertaken. In the aftermath of TRIPS, a new phenomenon has emerged – The TRIPS-plus process. Immediately after the agreement on TRIPS, two major conventions were adopted by the WIPO in 1996: the Copyright Treaty (WCT) and the Performers and Phonograms Treaty (WPPT) which entered into effect in 2002. There is also a new patent agenda under discussion in the same organization. In addition, a number of regional and bilateral free trade initiatives have been, and are being, negotiated with the aim of replicating the TRIPS approach, in terms that higher standards of intellectual property protection are negotiated in exchange for concessions to market access. Probably the most significant of these are the recent bilateral free trade agreements promoted by the US in Latin America. The main features of these recent agreements are that they build on the international IPR architecture and the concept of minimum standards. They reinforce protection in the pharmaceutical sector and extend copyright protection as well as the duration of protection. Moreover, they comprise higher enforcement requirements and appropriate systems for the settlement of disputes, including non-violation complaints.

Mr. Roffe further pointed out that in the area of pharmaceuticals there are fundamental changes compared to the TRIPS Agreement. Article 39(3) has been extended by reinforcing provisions on marketing approval and by extending the terms of protection in order to compensate for delays in the granting of a patent. He also claimed that, if the TRIPS Agreement recognizes non-discrimination, the new free trade agreements favor and give privileges to particular economic sectors. Mr. Roffe concluded by explaining that the TRIPS Agreement was considered by developing countries to be the culmination of this process of internationalization but that the TRIPS-plus process has created more controversies, especially in terms of reducing policy spaces and higher IP commitments. He also mentioned that this harmonization process has been driven to a large extent by more advanced countries. Furthermore, he raised three major implications of the TRIPS Agreement: firstly, a major change in international regulatory regimes; secondly, a greater awareness of the impact of IPR on economic and social development; and thirdly, the introduction of a previously non-existent national debate on the balance between private rights and public interest. As regards the Post-TRIPS initiatives they have implied widening of the scope of protected subject matter. In

this area the trend towards protection of IP-related investments deserves more attention, according to Mr. Roffe. There is also a process of deepening the harmonization and standardization of IPR features. Further, he stated that these new developments are challenging the flexibility of the TRIPS Agreement. Mr. Roffe ended his presentation by discussing new actors and new forums. He raised the question of the future role of the WTO, the WIPO as well as civil society in the TRIPS-plus era.

Implications for development

The second presentation on the economic implications for developing countries of the TRIPS Agreement was held by Prof. Keith E. Maskus, University of Colorado at Boulder. Prof. Maskus introduced his presentation by stating that he would give a trade economist's view of IPR and development based on research and practical experience. Thereafter he would address the question of developing countries' expectations of TRIPS. He explained that, in 1986, the original idea was to introduce an anti-counterfeiting and piracy code in order to put an end to the free-riding in what rich countries considered to be high technology goods. However, the TRIPS Agreement became much more comprehensive. There were then, and there remain today, many differences among developing countries in their ideas on an optimal global IP policy. Nevertheless, all developing countries were concerned about pharmaceutical and plant variety protection. Moreover, there were some positive expectations of central concessions to market access and additional flows of international technology transfers and research facilities from multinational companies. Also included in the positive expectations were a shift of global innovation towards the needs of poor countries, relief from IPR-related trade threats imposed in particular by the Reagan administration, and access to dispute resolutions. On the question of whether these expectations have been met or not, Prof. Maskus argued that it might be too early to tell, especially regarding technology transfer and innovation. In terms of the direct expectations, developing countries have expressed considerable dissatisfaction. Their main concerns are limited additional market access, the limited success of international technology transfer, and the fact that evidence shows that the world's international companies and public research institutes are targeting their innovations to a small extent to the needs of developing countries. Also, there are a number of growing concerns in the area of agriculture, pharmaceuticals, science and education, which were probably not well understood in 1995 but are better understood today. In addition to this, many developing countries have recognized the need for broader reforms in the economy in order to implement an effective IP system. According to Prof. Maskus, many low and middle-income developing countries have not yet seen much effective implementation of an IP regime, and in these cases the political economy is often difficult.

Thereafter, Prof. Maskus addressed the question whether TRIPS was a good idea, arguing that there are good reasons to have an international IP agreement because of policy externalities, i.e. a country setting up its own IP regime on an individual basis would fail to take account of the implications for the interests of other countries. Moreover, he claimed that IPRs are pillars of market support, meaning that good IP protection enhances technology transfers in workflows, licensing and investments. To these arguments Prof. Maskus added that the details of TRIPS leave considerable room for argument on how well or how equitably IPRs are globalized. He also stressed the importance for developing countries to pay attention to the policy space and flexibility left in the TRIPS Agreement. On the issue of whether TRIPS is a boost to development or not, Prof. Maskus illustrated two cases. The positive case is that IPRs support market deepening and product quality even at low development levels since the losers from, for instance, weak copyright protection are often local innovative companies. Additionally IPRs support greater flows of ITT, offer scope for improving the commercialization of publicly supported research, and can improve the scope for implementing critical new technologies. In the negative case, TRIPS can be an obstacle to development by imposing considerable demands on development budgets and expertise, by limiting policy space for learning and imitation (though not to the same extent as the TRIP-plus agenda), and by increasing the potential for anti-competitive activity. Moreover, empirical evidence shows that stronger IP

protection could reduce technology flows to LDCs. In the neutral case, Prof. Maskus explained, impacts may be slight in poor countries and he expressed the opinion that since many LDCs not yet have implemented an effective form of protection, it might be too early to be confident about the effects.

Furthermore, Prof. Maskus emphasized the importance of inward technology flows for development in poor countries. He pointed to a number of studies showing that the ability to implement international technology into local means is central for technological change. There are major market-mediated forms of ITT such as FDI, but non-market forms such as international flows of students and the spillovers into backward linkages when multinationals license to local contractors are also important. In this context IPRs are crucial. He then went on to discuss the reasons for market and policy failures in the IP area. He asserted that since this area concerns technology there is always the classic asymmetric information problem, with the result that technology transfers may fail to happen. Also, he mentioned that market power matters in terms of markups on technology prices, and that there may be externalities and spillovers into domestic productivities that are important in terms of development. Lastly, he pointed to policy coordination difficulties. He then suggested that TRIPS-like protection can resolve some of these failures though evidence suggests that other problems can be worse in poor countries.

Thereafter, he presented the TRIPS provision on ITT (article 7, article 8(2) and article 66 (2)) and concluded that there are inherent difficulties in these tasks. According to Prof. Maskus, the way to improve the prospects for ITT is to not just sit and wait for TRIPS to happen, but rather for both the host and the source-country to make an effort . The host country should focus on general support policies for technology adoption and ITT. Also, it is important to take advantage of policy flexibility because there are market failures. Moreover, Prof. Maskus argued that low-income countries should have extensive exemptions from rigorous IP protection, especially when protection involves provision of public goods. Regarding what source-countries can do, he provided a list including improvement of market access, considerations on undertaking competition policy actions on behalf of developing countries, fiscal incentives for ITT, encouragement of differential pricing strategies especially in the pharmaceutical sector, public research programs in developing countries, and creation of better opportunities for temporary movements of technical workers and students. Finally, the question of what multilateral cooperation can do was addressed. Prof. Maskus said that he did not understand why article 66.2 was limited to LDCs and suggested that it should be extended on a graduated basis. He also proposed that WTO members should re-visit some of the rules on subsidies to expand policy space and that it should be made clear that TRIPS permits research exemption in patents and plant variety rights. Additionally, he said that information on effective interventions should be expanded. Lastly, he discussed other multilateral options and suggested that WIPO should dedicate a small fee on international patents and trademark applications for the purpose of funding administration systems on IP in developing countries. He also briefly mentioned other measures such as the controversial issue of establishing a multilateral agreement on access to basic science, considering additional measures for price differentiation in information products, as well as clarifying the international norms on the scope of fair use in digital works.

Regional and Bilateral Agreements

The first two presentations both brought up the issue of narrowing public policy space. This trend was further addressed by Mr. David Vivas, Program Manager, ICTSD, in the third presentation on regional and bilateral agreements. Mr. Vivas started off by stating that this trend of regional and bilateral agreements is affecting all trade issues including IP and is at present one of the most important phenomena in this area. Then, Mr. Vivas discussed why this trend is occurring. He approached the question from different perspectives and stated that developed countries are interested in IPR commitments in regional trade agreements basically because they want to protect investments in new technologies and consolidate market access for products with high technology content. In addition, the industries which profit from the

IP system are powerful both in terms of lobbying groups and in terms of high market concentration. Furthermore, Mr. Vivas mentioned the US policy on IPR as inflexible, with a focus on securing market access to US citizens, preferably through bilateral agreements. An even more interesting question is why developing countries are interested in bilateral agreements when there is an obvious imbalance in bargaining power. Mr. Vivas pointed out various reasons, most importantly the need for consolidation of unilateral tariff preferences and market access. Many developing countries are oligopolistic producers and they have limited access to markets since their products are classified as sensitive products in the multilateral trading system. Today there are more than 250 regional and bilateral treaties on trade with IP provisions.

As regards the question of how these regional and bilateral agreements interfere with the multilateral agreements, the link is normally the most favored nation clause. In the case of TRIPS however, it is different since the legal nature of article 4 (d) implies that whatever is agreed upon at the regional level after 1994 has to be given to all other trade partners without concessions back. Thus, the TRIPS Agreement have an important expansive effect over bilateral and regional agreements. Moreover, Mr. Vivas gave a general overview of bilateral treaties. Regarding negotiations he expressed his concern for developing countries which are negotiating TRIPS plus agreements at the regional level with full IP chapters in order to secure market access, even though they even have difficulties in implementing the TRIPS Agreement. Besides, many developing countries feel that they can "block" negotiations but are not able to bargain on IP issues. This lies partly in the fact that developing countries have made reasonable proposals according to trade theory, e.g. in Cancun, but with little change in practice, and therefore they feel frustrated with the multilateral system. Also Mr. Vivas mentioned that once a country took on IP at the international level, for instance by eliminating public policy space, it is difficult to go back. He also mentioned that the forum for negotiations has increasingly moved to WIPO.

Regarding more systematic issues, Mr. Vivas said that most of these regional/bilateral agreements contain highly restrictive legal interpretations, less exceptions and less flexibility. There is also tendency towards creation of new IP areas as well as more specialized forms of protection adapted to different industries. Additionally, these agreements comprise an increase in the number of years of copyright protection which implies further costs for implementation. The costs and benefits of regional and bilateral agreements were also discussed. Mr. Vivas emphasized that it is important to acknowledge that the expansion of IP, whether national or international, always reduces the public domain. In relation to this issue he stated that there is a need for incremental innovation and R&D policies in order for IP to create development. Also, he mentioned that there is a lack of synergies with CBD and ITPGR in the bilateral treaties. He stressed the importance of complementary competition policies in order to create sound markets. Subsequently, the expectations of developing countries were addressed. Firstly, it has been expected that the cost of a regional and bilateral agreement should not exceed its benefit. However, it remains unclear if this is the case since no systematic assessment has been made. In addition, it was expected that commitment should be close to the TRIPS levels and that protection of public health should be assured. Regarding the latter importing from countries outside the region exhausts rights, which undermines the possibility of importing cheaper generics. There was the expectation that there would be greater protection for authors and policy space for educational purposes. However, instead we have seen increased protection from producers and investors in the entertainment and software areas. It was also expected that CBD/FAO would be incorporated into the agreements but they are basically not covered.

Regarding the expectations of developing countries in respect of improved transfer of technology as well as technical cooperation, Mr. Vivas said that there are no provisions on technology transfers in the regional/bilateral agreements. Also technical cooperation remains limited in quantity. The last question addressed was what can be done to reverse this trend. Mr. Vivas argued that it is important that we understand that these new trends in regional and bilateral agreements are political and that it is a concern

of all countries, since contradicting agreements that exist in the multilateral system might cause its failure. Further, he stated that we need to establish broad international coordination and involvement, lobby internationally in the US and the EU, establish new partnerships between developing countries, give value to the force of public opinion, declare a moratorium on international IP negotiations, and promote coexistence of alternative models. Lastly he brought up the importance of promoting pro-competitive approaches on IP, creating a pro-development approach and promoting the reform for delivering current technical assistance. As regards litigation Mr. Vivas claimed that despite increased risks and bilateral pressure it is important to proceed in order to maintain flexibility for achieving public policy goals.

Geographical Indication

The last presentation addressed a more specific and very controversial aspect of the discussion, namely GI. It was presented by Dwijen Rangnekar of the University of Warwick. In his introduction, Mr. Rangnekar stated that GIs are one of the few areas in the TRIPS agreement where developing countries are demanding stronger protection. GIs are also linked to various other areas such as the issue of traditional knowledge and indigenous knowledge, which makes them interesting. The GIs provisions in the TRIPS agreements are found in articles: 22, 23 and 24. Article 22 gives the definition of GIs as *"indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristics of the good is essentially attributable to its geographical origin".* According to Rangnekar there are four key words (*indications, good, quality* and *geographical origin)* in this definition. As regards indications there must be some form of *indication* (phrase, word, iconic symbol etc.) that the good alludes to origin. The second word *good* implies that GIs identify goods rather than services. The third important criterion is *quality,* which means that the good must have a certain unique quality, reputation or characteristic. Lastly, there must be a special link between *the geographical origin* and the quality, reputation or special characteristic. In the final draft of the provisions of GIs in the TRIPS agreement, there are two levels of protection. Article 22 provides the general scope of protection of all GIs and stipulates that protection that misleads the public is considered deceptive or is an act of unfair competition and is prohibited. Article 23 builds on the basic scope of protection but is stronger in the sense that it contains a clear prohibition on the use of an indication even where the true origin is indicated or the use of indication is in translated form.[1] The consequence of article 23 is that it creates a broader space around the indications of wines and spirits in terms of market competition and that it creates stronger barriers to free-riding on protected indication. According to Mr. Rangnekar, the hierarchy of protection has caused continuous tensions between different members of the WTO. Furthermore, he said that the agreement regarding GIs has three provisions that are subject to further negotiations and have not yet been finalized (article 23 (4), article 24(1) and article 24 (2)).

Thereafter, Mr. Rangnekar highlighted the two key debates in GIs: Multilateral registering and GI extension, i.e. to remove the problem of the hierarchy between article 22 and article 23. As regards multilateral registering, the background to this issue is a historical search, largely conducted by the EU, for comprehensive and multilateral protection for certain GIs, mainly wines and spirits. This existed in various forms in the mandate for further negotiations within the TRIPS Agreement. Initially the Agreement solely specified wines. Spirits were included at the end of the Singapore Ministral. The inclusion of spirits was then clarified during the Doha Mandate, which also provided a final deadline for

1 To illustrate this Mr. Rangnekar gave the example of a product called California Scotch Whiskey. By placing the term California in front of Scotch the public is not mislead since the product's true origin is indicated and therefore it will not violate article 22. However, the brand name violates article 23 since Scotch is a well known spirits.

the completion of the multilateral register, which, it was decided, would be by the end of the 5th Ministral. The discussion of multilateral registering touches upon the fundamentals of the GIs provision and questions such as what article 22 means. Also, the purpose and meaning of a multilateral registration system are part of the debate. Regarding the purpose of the system the obligation says that the system should facilitate protection though it is unclear if it would imply an increase in the level of protection. The second important debate in the area concerns GI extension. Mr. Rangnekar briefly mentioned that there are three broad categories of points that have been debated in the negotiations. The first is the balance after the Uruguay round. Secondly, the hierarchy between article 22 and article 23, and finally the potential costs in terms of administration, consumer confusion and trade disruption in case of a GI-extension. Furthermore, Mr. Rangnekar referred to one of the UNCTAD/ICTSD papers for more information on the subject. In the last part of his presentation, Mr. Rangnekar compared GIs to club goods, where the mode of production defines the club. Thus, anyone who agrees to the rules belongs to the club, but others are excluded. This becomes interesting for developing countries because club members automatically differentiate their products from other products. Equally, it implies a difficulty since all members of the club need to cooperate in order to decide on the rules of the club and promote the club's brand. Mr. Rangnekar called this tension cooperative competition and said that it implies an organizational challenge, since cultural value that has acquired commercial value is being recollectivised through GIs protection. Mr. Rangnekar concluded by stating that he thinks that the GIs area is one area of potential benefit in the TRIPS agreement for developing countries.

General discussion

After the four presentations the Chair offered the floor to anybody who had comments or questions. Ivan Hjertman, Läkemedelsindustriföreningen, commented that since many developing countries have not yet implemented the TRIPS Agreement it is premature to draw any conclusions about its consequences. Further, he pointed to the difference between China and India in terms IP development. The second comment from the floor came from Ms. Ankin Ljungman, Diakonia, who asked if the TRIPS Agreement is promoting IPR for development or if there is a need for greater reforms in order for TRIPS to actually boost development? Thereafter Ms. Agnes Courades Allebeck, National Board of Trade, made two comments. In the first she pointed out the fact that most of the negotiations in the WTO and in the TRIPS council are dealt with in the Doha Declaration. Therefore, she said, there is a lot of activity in the area and we should not be too impatient for results. In her second comment she stressed that it is important to distinguish between the EU and the US policy regarding bilateral and regional agreements, where the EU, in contrast to the US, focuses on enforcement of TRIPS in developing countries rather than on negotiating TRIPS-plus agreements. Lastly, she commented upon Prof. Maskus' statement that poor countries have difficulties in benefiting from the TRIPS Agreement and asked him if the same applies to a poor country with high technological capacity, such as China. Further, Karlis Goppers, a former Sida consultant, commented upon Mr. Vivas' declaration that introduction of IPRs would lead to reductions in the public policy domain. He suggested that the introduction of IPRs, given that the economy is managed in a favorable way, would rather promote growth, investment and also enhance the public domain.

Prof. Maskus started to respond to the question put by Ms. Ljungman. He stated that he would not argue for scaling TRIPS back, except in the area of public health, since it provides space for countries to meet what the sellers of technology need as a minimum to protect their assets and, at the same time, it preserves policies for domestic needs. Moreover, he pointed out the fact that the "one size fit all" implicit in TRIPS is inappropriate for different levels of development and advocated differentiation in IP protection. In this context, he said, the TRIPS plus-agenda becomes problematic.

As regards the question on China, Prof. Maskus explained that China had an IP system long before TRIPS, which has enabled it to move technology out of public research and into private and state-owned enterprises. Today the Chinese IPR policy is probably too aggressive but they can get away with it because there is an enormous market which attracts foreign investments. Lastly, Prof. Maskus mentioned the extreme inequalities in terms of growth rates across parts of the country and commented that complementary policies are needed to solve this issue.

Mr. Roffe agreed with Prof. Maskus in the sense that he thought that, in retrospect, TRIPS is a decent agreement. He said that, compared to what is going on today at the bilateral level, TRIPS is flexible and developing countries could live with it. He also made an announcement on a research book on TRIPS from a historical perspective that will be published on ICTSD's website.[2]

In his response to the floor, Mr. Vivas commented that the increase in patent filing in China is related to the increased level of development. Regarding bilateral agreements, Mr. Vivas agreed that the EU approach is softer than that of the US. Concerning the question from Mr. Goppers on the public domain, Mr. Davis clarified that the public domain is a legal term defined as knowledge, information and data available for any user at zero cost. He then explained that, each time the IP system is expanded, this domain is reduced because things that were previously openly accessible to everyone are now subject to appropriation. This in turn may imply that less information is exchanged, which affects innovation and competition. His last point was that one has to interpret his declaration within the context of bilateral TRIPS plus agreements.

Mr. Rangnekar made one comment on India and China, in which he pointed out that domestic players in the pharmaceutical industry have increased their capacity to innovate, which has resulted in an increase in medicine prices compared to other developing countries. He further pointed out that the full implementation of the TRIPS provision will lead to further differentiation and he expressed his concern over an expected increase of price of medicines.

The last comment from the floor came from Carl-Gustaf Thorström, SLU, who announced a study on freedom to operate, innovate and use 20 biological materials. Thereafter he asked Prof. Maskus to elaborate on his idea of establishing a multilateral agreement on access to basic science by defining basic science.

Prof. Maskus responded that he will soon publish a paper on this matter. Furthermore, he explained that the essential idea is to make public research institutes demand that research funded by them is made publicly available and not locked up in the patent system. If universities and researchers need to make money from their research they can differentiate prices and let developing countries pay less than developed countries. Prof. Maskus then compared the global IP regime to the anti-dumping regime of 15-20 years ago and stated that it is highly governed by commercial interests. Finally he claimed that the international IP regime will probably go through the same transformation process as the anti-dumping regime in the years to come.

Closing of the seminar

The Chair, Mr. Ricardo Melendez-Ortiz rounded up by expressing his gratitude and he stressed the need to carry on the dialogue on this complex subject. Additionally, he recommended participants to visit the ICTSD portal on IPR and development. He suggested that participants should read the book "Trading in

[2] www.iprsonline.org/unctad.ictsd/description.htm

knowledge" which collects some of the thinking on development in developing countries. Lastly he announced that he is currently looking for material for a second book on the same theme that will be published early next year.

In her closing of the seminar Mrs. Hartler expressed her deepest appreciation to the participants for sharing their knowledge. She further stated that she would gladly continue the dialogue in order to enhance the understanding of TRIPS, trade and development.

Literature

Bellmann, Christophe, Dutfield, Grahan and Meléndez-Ortiz, Ricardo (2003), *"Trading in Knowledge"*, (London: Earthscan).

Acronyms

CBD	Convention on Biological Diversity
FAO	Food and Agriculture Organization of the United Nations
FDI	Foreign Direct Investments
GI	Geographical Indication
ICTSD	International Centre for Trade and Sustainable Development
IP	Intellectual property
IPR	Intellectual property right
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
ITT	International Technology Transfers
LDC	Least Developed Countries
TRIPS	Trade-Related Aspects of Intellectual Property Rights
R&D	Research and Development
Sida	Swedish International Development Cooperation Agency
UNCTAD	United Nations Conference on Trade and Development
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performers and Phonograms Treaty
WTO	World Trade Organization