Intellectual Property Rights: Challenges for Development
ICTSD/UNAIDS

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Introduction

The International Centre for Trade and Sustainable Development (ICTSD), in collaboration with UNAIDS, co-organised a Policy Dialogue on *Intellectual Property Rights: Challenges for Development* as a parallel event at the UNCTAD XI conference on 17 June 2004. Over 80 participants – representing governments, non-governmental organisations (NGOs), academia, international organisations, AIDS victims and labour unions – attended the meeting.

This document seeks to summarise some of the key points raised during the dialogue and does no represent a consensus reached by the participants, speakers and participating organisations. The event comprised the following three sessions:

- TRIPS and Public Health: Finding Solutions;
- TRIPS-Plus and the Multilateral, Regional and Bilateral Context; and
- Technology Transfer and Innovation – IPRs and Investment.

Speakers included: Antonio Patriota (government of Brazil), Cristina D'Almeida (government of Brazil), Julian Fleet (UNAIDS), James Love (CP Tech), Jorge Bermudez (FIOCRUZ), Rashid Kaukab (South Centre), Sisule Musungu (South Centre), Amb. Federico Cuello (PUCMM and Member Chamber of Deputies), Amb. Assad Omer (government of Afghanistan), Carlos Primo Braga (World Bank), Pedro Roffe (ICTSD) and David Vivas-Eugui (ICTSD).

First Session: TRIPS and Public Health: Finding Solutions (co-organised by ICTSD and UNAIDS)

IP Flexibilities and health concerns

Three million people died of AIDS in 2004. Access to essential medicines remains a key obstacle for many of the poorest countries. For example, of the 38 million afflicted with HIV today, only 400,000 people have access to the cocktail of antiretroviral treatment that could tame the fatality of the HIV virus. In the face of such a global public health emergency, what role – positive and negative – can the intellectual property (IP) regime

[1] This report was written by Bernice Lee and David Vivas with the help of Vice Yu, Pedro Roffe and Anja Halle.

of the multilateral trading system have to bridge many of the research and treatment gaps?

Even though economic interests in IP are valid, participants stressed the need to balance IP interests against other social interests and functions. Protecting intellectual property rights (IPRs) may play a role in generating research for essential medicines – but the IP regime needs to be interpreted and conducted with consideration of human rights concerns. The government of Brazil, for example, has insisted on the need for IP policy to comply with social objectives. In this context, it is important that the TRIPS Agreement support the implementation of the April 2001 Resolution of the ECOSOC Human Rights Commission, which recognises that "*access to medicines in the context of pandemics like that of HIV/AIDs is a fundamental element for gradually attaining the complete fulfilment of the right of all to enjoy the highest standards of physical and mental health.*"

Brazil's public policy in relation to AIDS has shown that countries of the South are capable of controlling the epidemic provided that they are given access to resources, technology and essential materials. Most important of all, the provision of health services should be seen as part of a public health system rather than a simple commercial enterprise. Over the last few years, through a policy of universal access to antiretroviral drugs (AVRs), Brazil managed to cut mortality by 50 percent, avoid 600,000 new infections and avoid spending to the order of US$2 billion with reductions in hospital admissions, in the consumption of medicines against opportunistic infections and in the payment of welfare benefits. This is based on the concept of health as a citizenship right – embodying the principles of universality, equity, decentralisation and social control.

Another case that illustrates the role of the state in ensuring access to medicine is the US government's response to the perceived anthrax threat. Since the antibiotic medicine produced by the German company Bayer was not perceived to be at affordable prices or at the quantity required, the US government stepped in to ensure access to this medicine to meet that perceived threat by issuing a compulsory license. As in the case of Brazil, it demonstrated how governments could intervene in a constructive fashion when its citizens face enormous health threats, and that governments' vigilant reaction could treat health problems of different magnitudes.

The Role of International IP and Trade Regimes

Much of the discussion focused on whether or not and, if so, how IP and the international trade regimes can contribute to the affordability of essential medicines. For example, the United Nations General Assembly Special Session on HIV/AIDS specifically mentioned generic drugs and IP regimes. The issue of public health and IP was first placed on the agenda by Zimbabwe at the 1998 World Health Assembly. Since then, there has been success in advancing solutions at the international level – at, for

example, the World Bank, the World Health Organisation and the World Trade Organisation through the Doha Declaration. Civil society groups such as Oxfam and MSF have played a key role in raising awareness of the need to balance the IP system with social obligations. In the Doha Declaration, for example, governments reaffirmed the primacy of public health concerns. These agreements, declarations and other arrangements provide government authorities with considerable flexibilities to tackle public health problems. Article 31 of the TRIPS Agreement is one example of those important flexibilities – where compulsory licensing could be justified, among others, in cases of national emergency, circumstances of extreme urgency and for public non-commercial purposes. The transition period for least-developed countries (LDCs) to implement the patent chapter of the TRIPS Agreement was also extended to 2016, and provisions regarding incentives for technology transfer were improved.

However, there has been systematic failure in implementing these global achievements at the national level. Since 2000, some countries have used regional and bilateral agreements to limit the flexibilities granted by the Doha Declaration. This is possible because many countries seem to care little about compulsory licensing and flexibilities or have traded them off for market access concessions. As a result, it has been increasingly difficult for civil society groups to monitor the activities of their governments, and explain the risks of trading health. Various organisations also mentioned that if the existing flexibilities were not used effectively today, they might be lost shortly. That said, there are still opportunities to revisit these agreements, since most of them are yet to be ratified.

Procurement rules were identified as a possible tool to complement IP flexibilities. It was recalled that the major multilateral donors have explicitly recommend countries to use international (global fund) and national procurement frameworks for obtaining the lowest possible prices for quality medicines.

Some national authorities have availed themselves of the flexibilities provided in Doha Declaration. Malaysia and Mozambique, for example, have issued compulsory licenses on a number of HIV antiviral drugs. Canada is exploring legal reform to allow the export of generic drugs and Norway has recently approved legislation to implement the Decision of the 30th of August on paragraph 6. But the examples are limited, and no LDC has have been pursuing this track with the exception of Mozambique that have recently issue a compulsory license. Not a single (importing or exporting) developing country has notified to the WTO its intention to use the compulsory licensing waiver under the Paragraph 6 Decision of 30 of August 2003. Much work needs to be done in countries to mobilise further use. In addition, despite the room for manoeuvre, there are technological, infrastructural and other constraints than patents. It may be difficult to establish co-operation with the private sector for some governments.

Participants expressed particular concern over one future obstacle. India has been producing generics under the transitional period granted by Article 65.4 of the TRIPS Agreement. Other countries, such as China, have compulsory licences for heart drugs. However, as TRIPS becomes fully implemented, unless there continue to be major producers taking on the manufacturing of generic drugs, poor countries such as those Africa will not be able to benefit from TRIPS' flexibilities, as they lack manufacturing capacity. It is hoped that there will be discussions among countries of major manufacturing capacity to produce these drugs. This also points to the need for promoting innovation and the development of domestic industries.

Another problem is the politicisation of health issues in LDCs, even though UNAIDS regards the politicisation of the AIDS debate in Africa as an opportunity to galvanise a multisectoral response from the finance and other sectors across the board.

Finding Solutions for Public Health

The Doha Declaration has empowered countries to go ahead and step up their public health policies. The international community needs to try and sustain the kind of environment that had put these policies in place.

For many countries, the public health battle to treat HIV/AIDS, tuberculosis, malaria and other diseases is nothing short of a struggle for the survival of their people. In response to this global public health emergency, UNAIDS has launched the '3 by 5' initiative to extend treatment to three million people by 2005. Many obstacles continue to stand in the way – selecting the right drug, financing HIV care, more financing from donors and national budgets. Achieving this goal also requires not only human resources and infrastructure, but also affordable prices for medicines. Through civil society activism, for example, prices for triple antiviral treatment have come down significantly. The Clinton Foundation announced in late 2003 that it had negotiated with South African and Indian manufacturers antiretroviral prices of less than 50 cents a day under certain conditions. UNICEF, the World Bank and the Global Fund to Fight AIDS, Tuberculosis and Malaria have also contributed to bringing drugs closer to affordability.

Some key questions need to be asked to respond to global public health emergencies. What should be the appropriate compensation for patent owners? Besides patents, how else could new drug development be financed? There is a need to come up with a different way of thinking. For example, there is today a social movement to promote a Research and Development Treaty or an R&D Plus as an alternative to the IPRs and TRIPS-plus regimes. In the US, for example, despite the push of the executive branch to promote TRIPS-plus, there are many in Congress and elsewhere, who feel that the current system is not working as it has not provided affordable drugs for many US citizens.

A different way to respond to the public health crisis is to ask what proportion of GDP should go into supporting R&D for medicines. This kind of mindset would give different countries freedom to choose the kind of research that best suits its public policy agenda. Thailand, for example, might choose to finance research on SARS and the bird flu, harnessing its traditional knowledge in this area as an alternative paradigm. Other experts indicated that investment in the revival and use of traditional medical knowledge could also improve the current situation.

Lessons from Brazil

The Brazilian National Health System has been built over the last 15 years to include universal access to healthcare. Health is considered a citizenship right, and the state has a duty to provide a legal framework that guarantees that right, as well as the principles of universality, integrality, equity, decentralisation and social control. Recent Ministry of Health guidelines enforced by the new government since 2003 include:

- expansion of access to health services and actions, including pharmaceutical care, ensuring quality;
- intensification of endemic diseases control and strengthening of health surveillance actions;
- formulation and implementation of a human resources policy; and
- strengthening the democratic management of the system.

In order to scale up access to medicines, a very comprehensive framework has been established, including:

- the National Medicines Policy;
- a review of the Essential Medicines List every two years;
- decentralisation of basic pharmaceutical care;
- the establishment of the new Regulatory Agency ;
- the Generic Medicines Law;
- a comprehensive procurement system;
- the reform of IPR regulations, especially ensuring access to antiretrovirals within the national STD/AIDS programme; and
- an economic regulatory system for the pharmaceutical sector.

State manufacturing of generic ARVs ensures the sustainability of universal access to care for people living with HIV/AIDs. The National School of Public Health in Rio has been working closely with the WHO to collect data from Latin America and the Caribbean regarding the monitoring of the TRIPS Agreement and its implications on access to medicines. The school has examined the inclusion of the TRIPS Agreement safeguards or flexibilities in the different countries' national IPR legislation, looking in particular into whether or not recently updated national legislations allow compulsory

licensing, parallel imports, and the early working option (Bolar provision). At the same time, using Brazil as an example, the school examined the patent claims filed by country of origin, as well as the impact of patent protection on the Brazil's balance of trade, and concluded that countries were not taking full advantage of the TRIPS safeguards and could still improve their legislations in order to achieve better public health outcomes.

The presentation highlighted the increasing market share of generic medicines and the price negotiations conducted by the Ministry of Health with the three pharmaceutical companies responsible for 63 percent of the expenditures for ARVs under the universal access policy. The speaker also presented several recent regional and wider initiatives, which had contributed to broadening access to medicines in developing countries.

Finally, consideration was made regarding the May 2004 World Health Assembly's approval of a resolution on scaling up treatment and care within a co-ordinated and comprehensive response to HIV/AIDS, which specifically urged member states to encourage bilateral trade agreements that take into account the flexibilities contained in the TRIPS Agreement and recognised in the Doha Ministerial Declaration. Mentioning the United Nations High Commission on Human Rights, emphasis was laid on the fact that the right to health, as a human right, comprised access to health services, prevention, care and therapies, and thus included access to medicines.

Second session: TRIPS-Plus and the Multilateral, Regional and Bilateral Context

Issues related to the new multilateral context were discussed during the dialogue's second session. Forum shifting between the WTO, WIPO, and regional and bilateral negotiations was highlighted as one of the challenges for developing countries. With multiple negotiations underway in a wide range of fora, developing coherent, effective and sustainable policies and negotiating strategies on IPR policy is becoming increasingly difficult, particularly for poor countries. Some developing countries, while acknowledging the TRIPS Agreement's weaknesses from a development perspective, are working to creatively take advantage of the flexibilities it can provide. Others are working to lower the mandated standards. At present, the evolving international IPR system continues to raise the floor of minimum standards for IPRs above and beyond the TRIPS Agreement. This TRIPS-plus environment – enabled by 'forum-shopping' – represents a significant narrowing of the policy options available to developing countries and a major challenge to policy-makers.

Negotiations at the World Intellectual Property Organisation (WIPO)

Forum shopping is not a new phenomenon. Coalitions of industry in advanced economies have been pressing for the inclusion of IP in the multilateral trading system because their exports, whether in goods or services, are increasingly knowledge-based in a globalised and progressively more competitive world. Industry lobbies moved from

WIPO (where negotiations on IP originally took place) to the GATT because they were frustrated with WIPO's many committees and its weaker enforcement mechanism. In the WTO they found a forum in which IPR protection could be linked to dispute settlement. During the last phase of the Tokyo Round, the US government unsuccessfully sought to introduce an agreement to fight counterfeiting and illegal trade. Gradually the attempt metamorphosed to another proposition at the beginning of the Uruguay Round. The eventual marriage of convenience between IPR law and trade law was supported by powerful lobbies. During the Uruguay Round, there was an explosion from *demandeurs* to move towards multilateral minimum standards for IPR protection.

Since the Doha Declaration, scant progress has been made at the WTO TRIPS Council except for some discussion on Paragraph 6, mainly due to the stalemate on agriculture and market access. Meanwhile, a number of new trends have emerged. For example, the dynamics of IP negotiations have changed, with the main negotiation fora shifting from the WTO to bilateral negotiations and to the World Intellectual Property Organisation (WIPO). Coalitions like those at the WTO, such as G-77, do not exist at the WIPO and in bilateral negotiations – posing serious problems for many developing countries.

In this context, it is important to understand the role that organisations like WIPO might play in this debate. WIPO was created in 1967 outside the UN system. In international organisational terms, WIPO has a status that is situated between the WTO and the UN.

Even though TRIPS was negotiated at the WTO, WIPO has found a niche in providing technical assistance to its members on TRIPS issues through a formal agreement with the WTO. This means that WIPO has continued to be the main technical assistance provider on TRIPS and many other IP agreements and the face of IP in most developing countries. This is not least because it has abundant resources compared to UNCTAD in offering such assistance.

Since Doha, WIPO has seemed determined to demonstrate that it can produce treaties faster and more efficiently. In the TRIPS context, WIPO took initiative on the patent agenda and moved towards the harmonisation of patent law. More harmonised law – and hence harmonised standards –will make it easier to obtain patents around the world, this logic assumes. A draft Substantive Patent Law Treaty (SPLT) is being currently negotiated at WIPO. This will affect and even reduce policy space in some areas, including substantive criteria for patentability (novelty, inventive step and industrial application) and fundamental definitions in patent law. This could have TRIPS-plus implications.

Second, the secretariats of international organisations are generally expected to be neutral. However, a number of speakers described the WIPO secretariat's critical role in setting the agenda. For example, WIPO's Secretary-General launched the WIPO patent

agenda on his own initiative rather than that of the member states. Another example was the draft Patent Law Treaty that preceded the negotiation of SPLT treaty, which was prepared by the secretariat. In addition, when Brazil and the Dominican Republic suggested the inclusion of an exception in the draft provision regarding environmental and health concerns, the WIPO secretariat issued a document suggesting that these countries were confused and that the proposal could not be presented in those negotiations.

Another problem highlighted in the discussions was that WIPO historically had behaved like a business enterprise and had continued to provide services to 'non-governmental organisations' such as industry associations and patent lawyers' associations. Much of WIPO's revenue comes from services it provides to industry, and industry players have always made clear their interest in higher standards of IP protection. There is a clear conflict of interest here.

In order to ensure that WIPO's agenda addresses public policy interests, the organisation's mandate needs to be clarified; it should be clear that WIPO should follow the agenda set by the United Nations. In addition, the provision of technical assistance by WIPO clearly can be problematic, not least because WIPO seems to have specific interest in the promotion of the patent treaties. It is difficult to see how an organisation can provide technical assistance to governments when it already has a solution in mind. The WTO accepts the conflict of interest in advising developing countries, which is why an independent Advisory Centre on WTO Law was set up outside of the WTO to give legal advice on WTO law to developing countries.

If WIPO should not be the repository of technical assistance on IP issues, other options need to be explored, such as the UNCTAD/ICTSD Project on IPR and Sustainable Development. How technical assistance is done may also need to be reconfigured and divided among different institutions. The WHO already provides technical assistance on public health issues. Another option is to set up an independent arm of WIPO or set up a separate institution funded by WIPO or other UN agencies such as UNDP.

Regional Trade Agreements in the Americas

In addition to WIPO negotiations, IP negotiations – and the proliferation of TRIPS-plus provisions – are increasingly taking place at the regional level such as the FTAA. In many instances – CAFTA is one example – countries are rushed into agreements. Negotiators of these agreements are generally aware of the problems entailed with TRIPS-plus provisions, but decisions are often made based on political considerations rather than an objective assessment of social and economic impacts. In this context, it is clear that the TRIPS agreement and the Doha agenda are being weakened by these trends. Special and differential treatment in this area does not exist anymore – just a timetable for implementation. In order to ensure that flexibilities will not continue to be

eroded, civil society action is fundamental. Compulsory licensing procedures, for example, need to be initiated by civil society actors. Other concerns, such as food security, biodiversity and nutrition also need to be addressed. On a slightly more positive note, the FTAA negotiation seem to have helped re-engage developing countries in the multilateral negotiations on IP at the WTO.

The fundamental question is: why do developing countries sign onto agreements that may be detrimental to their interests?

Developing countries often agree to unfavourable IP provisions in exchange for market access for goods, agriculture and textiles. About 40 percent of countries in the Americas have chosen that track. Expectations of investment in Latin America is another factor, as is security, which the FTAA is perceived to reinforce.

Today, many new regional and bilateral trade agreements contain chapters related to IP. It is important to recall that the MFN clause in Article 4 of the TRIPS Agreement implies that any benefit given to a partner as part of a regional or bilateral deal must to be given without conditions to all other WTO Members. As an example, CAFTA countries will have to give the EU and Japan the same treatment as they do to the US in the field of IP without getting any concessions in other areas.

There are many problems associated with these developments at the regional and bilateral level. One major problem is that trade-offs in the FTAA are yet to be assessed. The cost of the new chapter of IPRs and the gains in other areas – in economic terms and otherwise – needs to be evaluated. Even though we accept that one size does not fit all, it remains difficult to underline the costs and benefits of IP chapters in regional and bilateral agreements. Countries should therefore be clear on what is in their best interest before engaging in theses processes.

An important lesson from Cancun is that notwithstanding the blocking power of developing countries, the level of ambition of developed countries seems to have remained unchanged. In the case of IP, the demand for increasing the level of protection has continued unabated. It has been very difficult for developing countries to scale down ambitious proposals in the IP field, making regional and bilateral agreements more like accession contracts than actual negotiations.

A number of systemic issues also need to be considered in current FTAA and bilateral negotiations:

- New trends imply a more restricted legal interpretation for IP and a reduction of flexibilities under the TRIPS Agreement.
- Once certain knowledge or know-how is given to private ownership through IP it cannot be reversed.

- There will be a reduction of the public domain.
- There is a tendency to create new IP areas including, for example, *sui generis* protection for plant variety, and Internet domain names.
- Each lobby group attempts to get protection for what is of interest to it, whether or not there is an intellectual value added.
- There have been proposals for direct incorporation of nine more WIPO agreements in the FTAA, with no assessment of cost of implementation.
- Proposals have also been made to include in the FTAA a broadcast and a trademarks treaty even though neither has even been drafted.
- The expansion of the subject matter for patents (to plants and therapeutic methods and procedures, for example) might also affect health and environmental concerns.
- New enforcement rules would give rise to new implementation and administrative costs.

In addition, it seems that developed countries have been using divide and rule tactics to ensure their gains in IP negotiations. In the FTAA context, a building-block approach was used but it was later abandoned for the bilateral track. In response, Brazil proposed an 'FTAA-lite' approach under which some chapters (including IP) would be open for countries to join, but not binding to non-signing members.

The case of the Dominican Republic in TRIPS-plus world

Even though the Dominican Republic had made efforts in implementing pro competitive IP policies at the national level – including the preservation of TRIPS flexibilities, competition law and capacity building activities for functionaries, judges and attorneys – they have found resistance in the American Chamber of Commerce, who protested against the implementation of such pro-competitive legal framework.

During the CAFTA negotiations, the negotiating role of the Dominican Republic was very limited. Their negotiators only participated in a later stage of negotiations and had to adopt what was already agreed by other Central American countries. Many of the Dominican Republic's priorities in the negotiation – including public health, incorporating CBD and FAO principles, protecting traditional knowledge and expressions, regulation against anticompetitive practices and abuse of rights in the IP field as well as special and differential treatment – were not addressed and some cases such as public health were undermined. To illustrate their case, first, the new measures on regulated products (pharmaceutical and chemical) *de facto* expand patent life for five years and make it difficult for parties to use compulsory licenses. Second, issues will be the incorporation of non-violation complaints recourses. This legal recourse would allow countries parties to a particular treaty to bring their counterparts to dispute settlement even if there is not a violation of the treaty in case the complaining party believes that there is a nullification of impairment of expected trade concessions.

Is IPR delivering what it promised?

At the core of the discussions are issues related to the purpose or objective of IP rights. Many economists regard IPRs as a second best solution because they go beyond investment and innovation, and have impacts on the dissemination of knowledge. Despite such misgivings, a speaker suggested that broadly speaking economists remain in favour of IPRs as an engine for innovation. It was mentioned that the Soviet Union used a different approach to innovation through government subsidies rather than IPRs, but various experts maintained that IPRs seemed to have fared better.

What should be level of IPR protection? Some level of IPR protection is needed because it can be used to generate innovation and avoid free riding. From a social perspective, knowledge dissemination is valuable even if it may affect innovation and the impacts may be different across or within industries. On the other hand, IPRs, by increasing standards of protection, imply a rent transfer from the South to the North because most knowledge to be protected and capacity to innovate is from the North (making the South consumers of knowledge). 85 percent of global R&D is concentrated in OECD countries, and 10 OECD countries receive more than 90 percent of IPR payments. It was mentioned that IPRs were moving from protecting innovation to protecting investment and the interests of lobby groups.

Some may argue that the role of IPRs is to protect new technologies such as biotechnology and information technologies. If TRIPS is technology-neutral and is applied to all kinds of technology, this kind of rationale may not apply. Many participants view IP as an instrument for developed countries to enhance and to consolidate market access, and TRIPS-like agreements purely with as instruments to advance trade-oriented goals.

If TRIPS was the outcome of lobbying efforts from industries as well as compromises during the Uruguay Round, we need to ask if it really could provide answers for the South and be used to create real systems of innovation. Studies conducted by a number of commissions – such as the UK Independent Commission on Intellectual Property – have come to the conclusion that patents do not provide enough incentives to develop drugs for neglected diseases. The recent US Federal Trade Commission Report on IPRs and innovation policies arrived at similar conclusions on the current role of the patent system. The US National Academy of Science is also questioning how patents are approached because they are not promoting innovation.

While few now question the need for IP protection, the importance of patent protection and the need for long protection periods should not be overstated. Developed countries need to balance their interest in protecting investment in R&D against the need to

provide essential medicine for the poor. Since all UN member states agreed to deliver the Millennium Development Goals (MDG) in 2000, developed countries should ensure coherence among their policies on trade, IP and aid to ensure delivering on what was agreed. International agreements also must balance the need for investment/innovation with the need for access to essential drugs. The UK Independent Commission recommended a two-speed or multi-speed approach to patent protection.

Most participants agreed that IPRs were only a means, not an end in themselves, and would not provide solutions to all problems. In the ten years since the increase in patent protection – with TRIPS – only four 'developing' countries have significantly increased their number of patents. These are Taiwan, Hong Kong, Korea and Singapore. Since most innovation continues to come from the North, IP commitments entail enormous expenses for the users of these technologies, especially in developing countries. Researchers have also found the system limiting in promoting follow-up innovation due to excessive cross-licensing. There also seems to be no relation between price and the quality of the invention.

This was not always the case. While in the past there were stronger links between innovation and patents, patents are increasingly used to segregate the market; they are no longer linked to innovation and creativity. Agreements that are being negotiated today – including TRIPS-plus provisions – are more linked to investment than to innovation and patents are increasingly seen as instruments to secure investment.

We need to move away from the debates on patents to an evidence-based approach that questions what patents do. There has also been too much emphasis on patents; the debate needs to move to include copyrights. Broadcasting rights and *sui generis* databases are about protecting the market and investment (i.e. a simple signal or telephone lists) rather than about stimulating creation. This type of protection places under serious threat issues such as distance learning, access to information and essential learning tools, such as those for handicapped people.

Participants stressed the need to promote competition in the form of a public interest agenda – a World Coalition for the Public Interest – in order to make the discussion more balanced. As described earlier, in the early 90s up to the TRIPS agreement, the pendulum went towards stronger IPR protection. But since 1994, the pendulum has started to swing back a little. Challenges such as AIDS have brought other forces coming to fore to match the pressure from IPR lobbyists. The debate on IPRs has also expanded beyond trade and patent lawyers to other sectors. But forum shopping still exists, which is why there is now pressure for TRIPS-plus through other fora such as bilateral and regional negotiations, WIPO, etc. There is no basis in theory to say that countries all need a high standard of IPR protection or that astrong IPR regime automatically brings about development.

Third session: Technology Transfer and Innovation – IPRs and Investment

Can IPR systems be useful for economic development?

Innovation and knowledge creation is now becoming much more fundamental for the economic development process. Typically, as countries evolve, the pressure to protect areas that can be covered by IPR protection also grows. Technology transfer and flexible IPR laws played an important great role in the development process of the US, Japan, Switzerland, Taiwan and Korea.

Some basic issues surrounding technology transfer

- What is technology transfer? The term refers to the transfer of systematic knowledge on how to produce goods or render a service, as opposed to the transfer of the good or service itself.
- What are the terms and conditions of transfers of technology? Normally attached to contracts of transfers or sales of goods, they may include non-disclosure obligations or guarantees, de-linking of knowledge rights from the product.
- Study of technology at the sectoral level – i.e. the role of technology in various sectors or industry (food, energy, environment protection).
- Technology capacity-building, covering innovation as well as supply-side capacity development, which can develop new technologies for exchange purposes in a trading system.

How is this question treated in international system?

In the context of UNCTAD, technology is considered as a factor that must be integrated into trade and investment, i.e. a tool that would allow developing countries to be better integrated into the trading system. This also includes looking at the extent to which IPRs promote or hinder transfer of technology.

At the WTO this is a new phenomenon; transfer of technology issues became part of international trade rule-making in the Uruguay Round agreements, i.e. the GATS, and the agreements on agriculture, SPS, TBT and TRIPS. TRIPS Articles 7, 8 and 66.2 are related to technology transfer in recognition of the issue's importance to the development process. But the problem with most technology transfer provisions is that they are mostly non-binding 'best endeavour' clauses and (except Art. 66.2). The Working Group on Technology Transfer established after the Doha Ministerial Conference may possibly come up with some recommendations for legally binding provisions in the WTO's agreements, especially TRIPS. It has already identified technology as a tool that developing countries should pursue more actively, with a focus on two areas (i) how to operationalise the process of technology transfer in WTO?; and

(ii) the need to discuss other areas of technology transfer – e.g. tariffs and technology transfer, and expanding trading system's role in promoting technology transfer.

What are costs and benefits of having strong IPR regimse vis-à-vis foreign direct investment (FDI) flows?

In his study on FDI, Mansfield he concluded that a strong IPR regime may be a necessary but not an essential condition. IPRs are just one piece of puzzle that FDI investors take into account. Furthermore, the impact can be different depending of the type of investment involved – e.g. R&D investment as opposed to green field production investment.

A survey by Primo Braga shows that while the impact of IPRs is generally positive, other factors also figure prominently. It also shows that the impact of IPRs is different depending on the level of development, both with regard to its impact on innovation and investment and in terms of implementation of IPRs and the training of people for such implementation. Quantification of IPRs' impact on development is not easy.

What is the role of IPRs in attracting foreign investment and promoting technology transfer?

Broadly speaking, intellectual property protection is often a relevant factor in attracting FDI, but is only one among many. FDI can play a role in the transfer of technology – depending on the type of technology. IPRs might be more relevant for higher types of technology that developing countries need. Poor countries need a combination of factors – the right skills to take advantage of tech transfer, sound institutions, appropriate policies (including IPR policy) and competition policy. International co-operation can play a role in facilitating these processes.

TRIPS is an agreement on IPR enforcement, rather than property rights over knowledge or the promotion of technological innovation or tech transfer. Art. 66.2 is a commitment by developed countries to try to establish incentives to promote technology transfer to LDCs, though LDCs have complained that this has not been made effective.

To really understand how to promote technology transfer, mechanisms for technology transfer need to be understood. Some important channels are FDI and licensing. But these are only the visible parts of the iceberg. Indirect forms of technology transfer (such as the movement of natural persons, reverse engineering, copying, etc., that were practiced by US in the past) also play a great role. Compulsory licensing can also be very important means to facilitate technology transfer.

Most technology transfer today takes place with context of transnational corporations (TNCs) through intra-firm transfers. Patent information can be an important factor, and international co-operation can be useful in this regard. However, the transfer of such

information is essentially a private transaction. All these mechanisms need to be explored further.

There is no conclusive evidence that IPRs promoting technology transfer. In Korea, for example, IPRs were not relevant in terms of policies at the country's early stage of industrialisation; they became important only when Korea had reached a certain level of development. The same could be said about Switzerland, where IPR protection was tightened in the 1970s as Swiss pharmaceutical companies became competitive internationally.

In terms of attracting investment, surveys conducted for TNCs suggest that macroeconomic conditions and government regulations are more important than strong IPR protection regimes.

What level of IPR is adequate for developing countries?

Countries protect IPR in different degrees. The question is why some countries have better access to knowledge than others. Many African countries have good IPR laws and FDI regimes, but still there is no flow of technology transfer and low FDI inflows.

One must also bear in mind new developments in technology, such as the Internet. The Internet, however, has developed under extremely liberal IPR conditions. But there are also other trends going the other way; witness the music industry seeking tighter IPR protection and regulation of Internet to protect its IPRs, as well as new initiatives re IPR treaties. Clearly, the level of protection can change according to the nature of the activity and to the level of development of the sectors.

Are IPRs the right incentives for R&D?

Some participants suggested that it was naïve to look at the link between patent systems and FDI, because it is quite clear that IPRs and patent systems are about protecting monopolies of TNCs, which typically spend 20 percent on R&D and 40 percent on trademarks. This means that most of the costs are not related to R&D but to marketing.