

***UNCTAD / ICTSD / BA Regional Arab Dialogue “Intellectual Property Rights (IPRs), Innovation and Sustainable Development” 26 – 28 June, Alexandria, Egypt***



8/10/05

**Regional Arab Dialogue on Intellectual Property Rights (IPRs), Innovation and Sustainable Development<sup>1</sup>**

**Alexandria, Egypt**

**26 – 28 June 2005**

The International Centre for Trade and Sustainable Development (ICTSD), the Bibliotheca Alexandrina and the United Nations Conference on Trade and Development (UNCTAD) organised a Regional Arab Dialogue on Intellectual Property Rights (IPRs), Innovation and Sustainable Development<sup>1</sup>. The dialogue brought together distinguished experts and practitioners, including academics, civil society organizations, trade negotiators and capital-based policy-makers. Participants took part in their personal capacity and thus the final outcome of the deliberations does not necessarily reflect the official position of the respective countries.

The objectives of the regional dialogue were to:

- Provide a platform for a strategic discussion among relevant stakeholders on trends and thematic issues in the area of intellectual property (IP) and their implications for sustainable development;
- Analyse current trends in IP standard-setting in the Arab region;
- Explore linkages between sustainable development policies and intellectual property;
- Develop elements of a "regional agenda" for development-oriented IP policies and informal mechanisms for its advancement mainly through joint research and networking.

During the dialogue the following four main issues were discussed:

- General trends and the emerging international IP architecture;
- Health, 2005 and beyond;
- Access to knowledge and educational material;
- The protection of expressions of folklore, cultural heritage and traditional knowledge in the Arab region.

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<sup>1</sup> Draft summary prepared under the responsibility of the organizers of the Dialogue

This summary highlights the main aspects of the deliberations and the most important actions that could be pursued to address the relevant issues. The Annex includes the recommendation made during the Dialogue including areas for further research.

## **1. General Trends in the field of IPRs<sup>2</sup>**

The Dialogue began with a discussion of the recent developments in the field of IPRs. Two broad trends taking place at the institutional and the substantive level were identified. At the institutional level, there has been a proliferation of fora and processes for international IPR norm setting, shifting the focus from the WTO to the World Intellectual Property Organization (WIPO), for example with respect to negotiations on a Substantive Patent Law Treaty (SPLT). On substance, two somewhat contradictory trends were observed: on the one hand, efforts to integrate the development perspective into the field of IP, as illustrated, *inter alia*, by the Doha Declaration on the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) and Public Health, and recent proposals of a development agenda for WIPO. On the other hand, the proliferation of rules going beyond the minimum standards of the TRIPS Agreement (TRIPS-plus), particularly at the regional and bilateral level (FTAs), but also at the multilateral (WIPO Internet treaties) and national level (through implementation).

There was a general impression that questions concerning IPRs and their wider impact on sustainable development have received very little attention in the region so far. Furthermore, debate that did take place mostly looked at IPRs from a very technical perspective without acknowledging their wider developmental implications. With particular respect to TRIPS-plus commitments, concern was expressed on the lack of adequate coordination between national ministries in the preparation of and participation in IPR deliberations and the weak involvement of civil society. It was noted that there was a need to balance the costs and benefits of new IP commitments. The lack of awareness of the implications of IP among different local stakeholders and the need for capacity building of human resources was also noted.

It was felt that further attention should be paid to countries in the region that are currently involved in the WTO accession process. In this respect such countries should try to learn from other countries that have gone through the same experience. It was felt that emphasis should be put on maintaining the present level of TRIPS standards. Furthermore, the need was highlighted to benefit from countries' experience in bilateral trade negotiations or implementation of national IPR regimes.

Additionally it was observed that very little of the widely distributed material in other parts of the world that could support an analysis of IPRs from a more holistic perspective was available in the Arab language. Also, few regional studies that would raise some of the core questions seem to be accessible.

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<sup>2</sup> Discussion were based on a presentation given by Ahmed Abdel Latif

## 2. Health<sup>3</sup>

Today, the world faces a global health crisis. If improving access to medicines had been one of the cornerstones of previous successes in tackling global health problems, this policy has been threatened by recent trends. The strengthening of IPRs may erode past progress in improving health worldwide in particular by increasing prices of medicines and by making generic drugs harder to obtain. In other words, future IP policies need to identify ways how to protect R&D without compromising public health needs, especially in terms of access to medicines at affordable prices.

As TRIPS has fully taken force for developing countries (apart from LDCs) in 2005, many questions and challenges arise. As an overall assessment, it was observed that TRIPS represents a major change in terms of minimum standards for IPRs protection, in particular in the field of pharmaceutical products. What are the implications of the entry into force of the TRIPS obligations in 2005 in most developing countries? Do developing countries in their implementation take full advantage of the flexibilities provided by the TRIPS Agreement / Doha Declaration? Will local patent offices be able to handle the flood of new applications in the mailbox? In fact, concerns were raised about patent offices issuing patents without examination, based on patent grants in other countries – to the extent of not taking fully into account the patentability requirements.

As far as FTAs are concerned, the view was expressed that the conclusion of such agreements should not be an objective per se, but should be carefully assessed in terms of real economic and social benefits and costs. One particularity of recent trade agreements was the extreme brevity of the actual negotiations. It was further observed that there was a general lack of health-related impact assessment prior to the respective negotiations. It was emphasised that countries should play an active role in putting forward proposals to influence a positive outcome. As far as the sustainability of the trade offs in FTAs is concerned, it was observed that developing countries make permanent concessions with respect to IPRs, in exchange of possibly short-lived market access commitments. Furthermore, there was a risk of developed countries ignoring their new FTA obligations as these might actually go beyond their domestic laws. Concern was also expressed regarding TRIPS-plus obligations contained in recent FTAs such as the patentability of new uses of known substances, data exclusivity commitments, linkages between patent rights and marketing approval procedures, the inclusion of non-violation complaints, and the proliferation of TRIPS-plus commitments through the TRIPS most-favoured-nation (MFN) principle. It was stressed the importance to make better use of existing health-related flexibilities such as the Doha Declaration on TRIPS and Public Health as well as the 2003 Decision.

How regional players will respond to these challenges is not clear. At the minimum and as part of the first steps, there is a need for enhanced monitoring, identification and exploitation of gaps in the current patent landscape, more strict application of patentability criteria (such as novelty and inventiveness), and the incorporation and use of

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<sup>3</sup> This session was based on presentations made by Othoman Mellouk and Carlos Correa

safeguards and mechanisms such as compulsory licenses, parallel imports and competition policy. The need to tackle the issue of unilateral measures was equally stressed.

### **3. Access to knowledge and educational material<sup>4</sup>**

Access to knowledge and educational material, at a reasonable cost, is an issue of primary concern particularly in developing countries where the income of individuals, and consequently their purchasing power, is much lower than in developed countries. The discussion centered on the conflicting interests of rights owners and users, and on how these conflicting interests may be reconciled so that access to knowledge is facilitated at affordable prices.

Discussions highlighted that in the context of copyright in the educational sector even developed countries face challenges in balancing the interests of copyright holders with user access interests. Particular reference was made to the situation in the United Kingdom where difficulties exist concerning the distribution of benefits by collecting societies. It was felt that often the authors themselves were prevented from distributing copies of their own publications. The view was expressed that royalties to be paid to the copyright holders seriously impede access to educational materials, a situation which is aggravated in a developing country context, given the financial constraints of educational facilities and the wider public.

The following points were further stressed in the discussion:

- The degree of awareness, in the Arab world, of copyright law must be enhanced.
- Access to knowledge, especially scientific and educational, must be available to citizens of developing countries at affordable prices, and this can be achieved through:
  - Users taking advantage of the exceptions found in national laws and international treaties governing copyrights.
  - Collective bargaining between Arab Universities on the one hand and publishers and knowledge providers taking place so that universities and their students will have access to knowledge at low prices.
  - Use of the human rights argument in order to mitigate the harshness of the terms imposed by the providers of knowledge as well as the harshness of some of the provisions of international copyright treaties.

The social and economic dimensions of copyright must be taken into account when drafting copyright laws so that all segments of society should have access to knowledge. Compulsory licensing must be resorted to more freely and frequently when necessary.

It was suggested that it is preferable to have two set of rules governing copyright: one, for scientific and educational knowledge and the other, for the entertainment industry. The former should make access to knowledge easier and less expensive. Developed countries

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<sup>4</sup> Discussions were based on a presentation given by Uma Suthersanen

should provide developing countries with access to scientific and educational knowledge at nominal prices as a form of technical and scientific assistance.

It was equally highlighted that there is a need to re-balance the interests between the author on the one hand and the publisher on the other. Arab countries were encouraged to look at open publishing models currently used in developed countries. Additionally, countries could seek to promote low cost publications by having recourse to compulsory licensing under the Berne Convention, as well as regimes of international copyright exhaustion. Other tools for the design of a user-friendly copyright law are contained in the TRIPS Agreement, particularly the flexibilities in Art 8.2, 40 (control of abuse of monopoly rights, for instance through the essential facilities doctrine), Art 9.2 (the expression – idea dichotomy) and Art 13 (copyright exception clause). It was observed that such flexibilities were included into national copyright legislation in developed countries, such as the USA, Germany and Scandinavian countries.

Particular concerns were voiced with respect to technological protection measures as further restrictions of fair use or private use exceptions to copyright. In this context, however, it was observed that even the US Digital Millennium Copyright Act (DMCA) contained a number of important safeguards to counter balance such technological protection. Developing countries, when implementing DMCA-like legislation, should assure comparable safeguards, particularly in the context of FTA negotiations. From a systemic point of view it was stressed that technological protection measures go beyond traditional copyright as they provide the right holder with a right to control access rather than a mere right to control reproduction.

In another context, reference was made to the particular concern in the Arab countries that experience a current lack of collective rights management as well as the need to enhance availability of Arabic content in electronic format.

#### **4. The protection of expressions of folklore, cultural heritage and traditional knowledge in the Arab region<sup>5</sup>**

The subject matter calls for a multifarious approach where law making is one among many factors. The discussions reflected the multidimensional character of the subject matter and its complexity at the national, regional and international level. The views of the participants varied widely on this issue. However, it was stressed that the existing rules governing these topics are neither sufficient nor adequate.

The concern was expressed about a general lack of awareness of the importance of preserving cultural heritage as a form of national and Arab identity. In this sense doubts were raised by some participants about the appropriateness of Western concepts for the protection of regional cultural heritage, a substantial part of which is transmitted and created orally and is characterized by continuous change. Others stressed that expressions of folklore, cultural heritage and traditional knowledge are very diverse and cannot be regulated by the same set of rules. They must be identified nationally and regionally in

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<sup>5</sup> Discussions were based on presentations made by Amna Al-Hamdan; Azza Maidan and Ahmed Moursy

order to determine what is common to more than one Arab country and what belongs to one country only. There were suggestions for alternative mechanisms of protection. In that context reference was made to the establishment of registers, catalogues or databases for the fixation of traditional customs.

Experiences from other countries such as China and Australia could provide some guidance in this respect.

In addition it was questioned on what level a framework of protection would be most appropriate. Several participants underlined the need for the establishment of an international framework, such as an international regime on the protection of cultural heritage, folklore and traditional knowledge. Others considered, as a possible starting point, the establishment of national or regional systems of protection, including *sui generis* regimes. It was mentioned that internationally the issue is being discussed in various fora, particularly WTO and WIPO. It was felt that the countries of the region should play an active role in designing the appropriate international regime.

## **ANNEX: RECOMMENDATIONS**

### **1. General Trends in the field of IPRs**

#### *Policy Options*

1. Awareness Raising
  - The need for a balanced, feasible, comprehensive, and result-oriented strategy at the national level on the enhancement of public awareness on the various aspects of IP. Such strategy should address the needs and concerns of IP users and not be limited to right holders and enforcement issues. The strategy must take into consideration the cultural, social, and economic characteristics of the respective country.
  - Given the complexity of international fora dealing with IP (such as WIPO, WTO, UNESCO and WHO), IGOs and NGOs should prepare briefings on meetings on IP-related issues targeting decision-makers among other stakeholders in Arab countries. These briefings should be translated into Arabic and distributed through existing channels to government bodies, universities, research institutes, NGOs, etc.
2. National and Regional Coordination
  - Reflecting the various national interests through better coordination among the concerned governmental bodies, including the involvement of the various players and sectors of the society, in order to adequately address the cross-sectoral nature of IP and its public policy implications. There is also a need for an ongoing process of cost-benefit analysis on any new IP norms and standards.
  - National coordination should be accompanied by a more active participation and coordination among the Arab countries in IP-related multilateral fora, in order to ensure that international norm-setting activities address their respective concerns.

3. Integration of the Development Dimension
  - Promote a broader perspective on IP that fully incorporates the development dimension as stated by paragraph 8(vii) of the Doha Plan of Action adopted by the Second South Summit held in Qatar in June 2005.
4. Impact of Trade Agreements
  - The need to ensure that bilateral and regional trade agreements, which involve Arab countries, do not undermine their rights to preserve the flexibilities and exceptions enshrined in the TRIPS Agreement. IP-related impact studies and cost-benefit analysis should be undertaken on the national and regional level to assess the socio-economic impact of such agreements. These agreements should be balanced by incorporating provisions which are advantageous to Arab countries. Exchange of experiences among Arab countries would effectively contribute towards fostering their negotiating power and capacity.
5. Participation of NGOs and Civil Society
  - Enhancing the participation of NGOs of Arab countries in IP discussions through the identification of existing national and regional NGOs dealing with IP issues and encouraging coordination among them as well as cooperation with international NGOs. The active engagement of NGOs with governments and other IP stakeholders should contribute towards the integration of the development dimension in national IP policy making.
6. Technical Assistance
  - Technical assistance strategies of the Arab countries should be reconsidered and improved in order to ensure that such assistance adequately and directly addresses the national and regional needs and priorities. Technical assistance should in particular assist Arab countries to fully use the flexibilities available under IP agreements. This should entail a diversification of technical assistance providers and ensure that this assistance is not provided on a “one size fits all” basis.
  - Existing relevant IP material should be made available to Arab countries and should be translated into Arabic.

#### *Research Agenda*

1. Study on best practices for raising public awareness in Arab Countries on various IP aspects.
2. Studies to assess the socio-economic impact of FTAs on Arab countries, including identifying specific mechanisms to limit the negative affects of TRIPS-plus provisions.
3. Study to assess the impact of new international IP agreements and developments on Arab countries.

## **2. Health**

#### *Policy Issues*

1. Highlight the importance of exchanging experiences among Arab countries to foster their negotiating power and capacity and reflect their common interests on health-related IP issues such as Data Protection and Non- Violation Complaints.

2. Initiate a network for countries to exchange information and experiences about national IP laws and trade agreements.
3. Create Watch mechanism to monitor the additional obligations of FTA agreements.
4. Bridging the gap between government officials from different ministries and involving technical people in negotiations and the drafting of laws.
5. Create guidelines for measures to handle misuse of patent systems, liability regimes, how to deal with mail box, Supplementary Patent Certificates (SPC) and fair royalties taking into consideration the economic and social situations of developing and least developed countries.
6. Emphasise the importance of approving generic medicines without referring to the patent offices (prohibited linkage).

### *Technical Assistance Issues*

1. Design a tool kit for negotiators and legislators, which:
  - A. Highlights available policy space and related options to allow for the most efficient of the flexibilities of TRIPS, the Doha Declaration and the 30 August Decision 2003 in order to mitigate the negative effect of FTAs on access to medicines and public health.
  - B. Includes suggestions for the wording of proposals for agreement provisions, as well as for the wording of laws and regulations necessary to implement the trade agreements.
2. Provide technical assistance and capacity building to:
  - i. Patent offices in order to support them in how to apply strict patentability criteria and avoid the ever-greening of patents
  - ii. Judges and lawyers
  - iii. Technical staff at relevant ministries
3. Emphasising the mandatory nature of Article 67 of the TRIPS Agreement on Technical Cooperation, and the need to fully operationalise the said article in light of the principles and objectives of the Agreement.
4. Enhancing positive transfer of technology from developed to developing and least developed countries, in order to avoid all the practices of negative transfer of technical assistance.

### *Research Agenda*

1. Conduct impact assessments of the TRIPS Agreement, bilateral and regional arrangements at national level to include, inter alia, the following:
  - Access to medicines by the poor and affects on prices.
  - Price effect of introducing alternatives (generics) on originator drugs and the resulting impact on health expenditures on medicines.
  - Investment; both foreign direct investments (FDI) and local investment
  - Technology transfer; licensing, contract manufacturing, etc.
  - Explore the benefits of and limitations to reverse engineering as a tool to develop local pharmaceutical capacities.
  - Research; both on new molecules, and clinical research.



- Trade, both imports and exports, of active pharmaceutical ingredients and finished products.
- Number of products approved by drug regulatory authorities.
- 2. Conduct a study on the impact of granting patents to applications in the mail box on public health and access to medicines.
- 3. Conduct a study on the feasibility of establishing an Arab Regional Patent Office to strengthen the national and regional examination capacities to apply strict patentability criteria based on a comprehensive data base for prior art; and to avoid the ever-greening of patents.

### **3. Access to knowledge and educational material**

#### *Policy Options*

1. Awareness-Raising
  - The need to improve awareness in the Arab world about the existing flexibilities related to access to educational materials and knowledge.
  - There is a need to raise awareness in Arab countries about new approaches to copyright, such as open source/open publishing models as well as the creative commons movement.<sup>6</sup>
2. New Copyright Legislation
  - The need to ensure that new treaty/agreement obligations related to copyright do not undermine existing rights facilitating access to knowledge.
  - The need to review existing domestic copyright laws to ensure the highest possible access to knowledge.
  - Consider possibilities for the future to distinguish, in domestic copyright laws, between access to knowledge provisions, on the one hand, and copyright related to entertainment, on the other hand.
3. National and Regional Cooperation
  - National coordination between relevant government bodies, libraries, universities, private sector and civil society.
  - Regional coordination between relevant bodies to facilitate mutual access to relevant knowledge.
  - Exchange of experiences concerning laws and practices in the field.
  - Promotion of collective bargaining between Arab universities on the one hand, and publishers and knowledge providers on the other hand.

#### *Research Agenda*

1. Research is needed on how to operationalise the copyright-related flexibilities available under the TRIPS Agreement (Articles 13; 8.2, 40; 9.2), including the impact of FTAs on these flexibilities.
2. Comparative study of developed countries copyright provisions related to access to knowledge.

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<sup>6</sup> For a directory of open access journals, see <<http://www.doaj.org/>>; for the creative commons movement, see <<http://creativecommons.org/>>.

#### **4. The protection of expressions of folklore, cultural heritage and traditional knowledge in the Arab region**

##### *Policy Options*

1. Preservation of Cultural Heritage (Cultural and Natural Heritage)
  - Set up databases or catalogues for the registration and protection of cultural heritage as those carried out by the Center for the Documentation of Cultural and Natural Heritage ([CULTNAT](#)), one of the specialized centers affiliated to the Bibliotheca Alexandrina. This should include necessary funding for the establishment of the relevant institutions running such databases.
  - Ensure that legislation reflects the rights and interests of all stakeholders in the collection of cultural heritage.
  - Inclusion of cultural heritage in national teaching curricula.
  - Make sure in domestic laws to prevent any dilution of cultural heritage
2. National and Regional Cooperation
  - Promote collaboration between relevant entities for the training and capacity building of staff required for the collection and registration of cultural heritage.
  - Promote ongoing efforts in various multilateral organizations in this field, including the promotion of flexibilities for the preservation of cultural heritage.
  - Exchange of experiences concerning laws and practices in the field. With regard to the collection and archiving of musical works, Arab countries could look at the experience and practice of the Tunisian *Centre des Musiques Arabes et Méditerranéennes*.
3. Trade-Related issues
  - Non-imposing of unnecessary elements (technical barriers) covered by one or more forms of IP in order to avoid elimination of competition from Arab countries adopting identical functional elements that originates or is inspired by Traditional Knowledge.

##### *Research Agenda:*

1. Best practices and means of protection of cultural heritage, including IP and alternatives.
2. Comparative study of the Latin American countries' experience with regard to the documentation of their national heritage especially in the field of medicinal plants.