

Workshop Report - Recent Multilateral and Bilateral Trends in IP Policy Making: Lessons And Challenges For Africa

6 October 2006 | The President Hotel, Bantry Bay, Cape Town, South Africa

The IP workshop was conceived with the objective of providing a platform for a strategic discussion on important trends at the multilateral and bilateral levels; generating a deeper understanding of new IP obligations in the new generation of FTAs and exploring implications of new IP standards in FTAs.

The event was held on the afternoon of 6 October 2006 after **tralac**'s annual conference on Economic Partnership Agreements (EPAs). The speakers were a combination of specialists from NGOs, government departments, international organizations and academia. Below is a summary of the event's proceedings.

The workshop was opened by **tralac**'s Executive Director, Trudi Hartzenberg, who emphasized the important implications that IP has on development. David Vivas from ICTSD added that one of the aims of the workshop was to examine the main IP issues concerning Africa, especially the controversial ones. Dalindyabo Shabalala from CIEL proceeded to highlight the fact that lots of analytical work still needed to be done in the field of IP with its application in modern FTAs being of particular importance.

Session I: New Multilateral and Bilateral Trends **Chair: Robert Wilson (tralac)**

Barbara Rosenberg - Getulio Vargas Foundation, Brazil

Presentation Title: *New trends in Multilateral IP policy making: The suspension of the WTO negotiations and the debate on the WIPO Development Agenda*

She talked about the three levels of IP negotiations seen in the multilateral, bilateral and regional contexts. She outlined the difference in IP regulation before the coming into being of the TRIPS Agreement, when there was a wide scope for local interpretation of IP law by national governments, and after TRIPS, when that scope narrowed considerably. She also pointed out that the scope for interpretation has not entirely been done away with as the TRIPS agreement is "deliberately imprecise" in order to allow national governments to interpret it according to their particular needs. The link between IP and trade and their effects on individual countries' prices and access to medicines was also explored. The speaker stated that, although TRIPS sought to balance IP owners' rights with developmental objectives, it was necessary to rebalance the Agreement for the benefit of developing countries. This aim, she pointed out is reflected in the TRIPS Declaration (DOHA 2001), which affirms the rights of members to use TRIPS flexibilities. The role of WIPO in capacity building was underscored; along with a view held by some developing countries that WIPO's agenda suited developed countries' agendas.

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Maximiliano Santa Cruz - Department of Foreign Affairs, Chile

Presentation Title: *The new generation of FTA with IP provisions and implications for developing countries: The US and the EU models*

His presentation focused on the main differences between the EU and the USA's templates for negotiating IP provisions in FTAs. The main emphasis in EU IPR chapters was on accession to multilateral treaties and protection of GIs for wine and spirits.

On the other hand, the main focus of the USA's IPR chapters was on copyrights in the digital environment, patents and protection of undisclosed information and enforcement. He pointed out that new generation FTAs often clarified certain TRIPS issues, and gave the example of time limits for patent protection.

He also stated that US FTA IP chapters featured the extension of copyright protection from TRIPS standards as a matter of course.

Diana Mandaza - Medicines Control Authority of Zimbabwe

Presentation Title: *New IP policy making: Challenges for Africa (Emphasis on Zimbabwe)*

Her presentation focused on the implementation of TRIPS flexibilities in Zimbabwean domestic law. She explained that Zimbabwe already had IP law before the coming into being of the TRIPS Agreement.

One of the features of Zimbabwean IP law is the ban on patents for surgical processes used to treat people and animals. This provision was seen as a positive one by the speaker. She also talked about the provision that allows the use of patented inventions by the state.

She explained the various provisions in Zimbabwean law that utilise TRIPS flexibilities. She, however, lamented the fact that the country has yet to take full advantage of these flexibilities. Some of the proposed provisions that would have seen Zimbabwe maximizing its benefits from the flexibilities were rejected by the executive.

One of the flexibilities utilized resulted in the declaration of a period of emergency for ARVs. As a result, a plant has been set up to manufacture ARVs for the countries HIV/Aids sufferers. This plant is currently producing limited quantities of ARVs but still requires the approval of the WHO. She pointed out the irony that manufacturing plants in developed countries did not seem to require similar approval. She later on stressed the need for regional cooperation on ARV issues.

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**Session II: Implications of new IP standards in FTAs
Chair: Ana Maria Alvarez (UNCTAD)**

David Vivas - ICTSD

Presentation Title: *The Treatment of Geographical Indications in the US and EU Bilaterals*

David gave a brief background of the origins and history of Geographical Indications (GIs). He also explained the difference between GIs and certification trademarks. He also pointed out that the most successful GI is Scotch whisky.

The different approaches to GIs in EU and US IP negotiations were highlighted. He stated that the EU was the leading user of GIs in the world and that this is now their negotiating priority in FTAs. The EU has also extended its protection to its traditional expressions such as tawny and ruby.

The US tended to aim for the same standard of IP protection found in the US for all its FTA negotiations. The US places more emphasis on transparency and simplification of procedures than the EU. In the recent US/Australia FTA, GIs were deemed to be equal to trademarks.

He ended by recommending that African countries seek protection for their GIs, as this has hardly been done in the region. He suggested that an inventory of potentially protectable GIs be prepared and used in future negotiations.

Dalindyabo Shabalala - CIEL

Presentation Title: *The Treatment of Biodiversity and Traditional Knowledge Issues in US and EU Bilaterals*

He gave the example of a US patent that has been granted for a human gene. A great deal of concern has been expressed over this “privatization” of natural resources.

He also stated that there is a great deal of potential for commercially exploiting traditional knowledge but cautioned that there was always a danger of it being misappropriated.

In explaining the EU approach to this issue, he stated that the EU insists that its negotiating partners sign up to the existing multilateral rules such as the Budapest Treaty and other forms of international treaty protection of plant varieties. The US approach can be surmised in the statement that “all forms of technology are patentable.”

For African countries, he stated that the Cotonou Agreement is a good template to base negotiations with the EU on. He concluded that multilateralism still matters and urged African countries to pursue a positive agenda.

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Andrew Rens - University of the Witwatersrand (WITS)

Presentation Title: *Access to Education Material in the Digital Environment*

This provision focused on the learning environment in the region and the effects of IP law thereon.

The problem at hand was signified by the UNDP rankings on access to education that saw countries in the SACU region ranking very low. This denotes the significant challenges that learners in the region face in obtaining a meaningful education as incomes were low and textbooks were expensive.

An example was given in which learners and lecturers at a well-known East African university relied on photocopied books and journals in order to access learning material. This prima facie infringement of the TRIPS Agreement was, however, essential for their education as they could not afford conventional textbooks.

This raised the question of whether such use constituted “fair dealing” which was permitted (subject to certain conditions) in the TRIPS Agreement. He pointed out that the interpretation of the term was controversial and hadn’t been fully settled.

Discussions and Questions

Some of the questions and comments from the floor can be summarized as follows:

- Not to underestimate the EU’s ambition of introducing a GI chapter in the EPAs. They are probably going to do so and will push for GIs to be seen as superior to trademarks. One of the panelists pointed out that GIs and trademarks can co-exist and gave the EU/Australia example.
- How many countries protect biodiversity and traditional knowledge? The panelists pointed out that indigenous groups were underrepresented in policy formulation and thus, very few countries in the region ended up negotiating for protection on these issues.
- The appropriate interpretation of the term “fair dealing” when dealing with textbooks was sought for South Africa, where there were huge resource disparities between different institutions and different groups of students at these institutions.
- Were there any legal remedies available for the indigenous people whose Hoodia plant had been commercially exploited without their consent or benefit?
- Concern was raised over the proliferation of bilateral trade negotiations in the wake of the suspension of the Doha Round. This development was likely to put underresourced negotiators in the region under intense pressure.
- The need for multistakeholder consultation in dealing with IP issues and trade negotiations was also underscored.