SOUTH BULLETIN

Published by the South Centre • www.southcentre.org • 28 February 2013, Issue 71

Analysis of the Climate Conference in Doha (COP18)

The UNFCCC's Conference in Doha (COP18) resulted in outcomes of low ambition in emission reduction and financing. This article analyses the main outcomes of the latest Climate Conference and the issues ahead for the 2013 negotiations.

• Pages 2-5

UNFCCC

Delegates at the closing of the Climate Conference in Doha.

Equity and Its Links to Ambition in Climate Talks — Report on South Centre Side Event in Doha

• Pages 6-7

Reflections on the IP System: A Development Perspective

– Speech by Prof. Carlos Correa at the South Centre side event to the 50th WIPO General Assemblies in Geneva

• Pages 12-14

Excerpts of statements at the handover ceremony of the Chairmanship of the G77 and China in New York & Geneva

- **By Mr. J. V. Bainimarama, Prime Minister of the Republic of Fiji, on the occasion of Fiji's assumption of the Chairmanship of G77**
- **By Ambassador Mourad Benmehidi, Permanent Representative of Algeria, Chair of the G77 for 2012**
- **By Ambassador Miguel Carbo Benites, Permanent Representative of the Republic of Ecuador, new Chair of G77 in Geneva**

• Pages 8-11

The Use of Compulsory Licenses in Latin America

By Carlos Correa

This article examines the laws and policies in Latin American countries on compulsory license—and how Brazil and Ecuador have issued such licenses for drugs.

• Pages 15-20

An Analysis of the Doha Climate Conference (COP18)

The UNFCCC's Conference in Doha (COP18) resulted in outcomes of low ambition in emission reduction and financing. This article analyses the main outcomes of the main outcomes of the latest Climate Conference and the issues ahead for the 2013 negotiations.

UNFCCC

The podium at the closing ceremony of COP18 in Doha in December 2012.

By Martin Khor

The annual United Nations climate conference held in 2012 in Doha concluded on 8 December with low levels of commitments by the developed countries in two crucial areas -- emission cuts by them, and provision of climate financing for developing countries.

The Doha meetings of the 18th Conference of Parties of the UN Framework Convention on Climate Change (dubbed COP 18) can thus be described a climate summit of "low ambition."

The conference adopted many decisions. The main ones were on Kyoto Protocol's second period in which some developed countries committed to cut their emissions of greenhouse gases for the period 2013-2020; on remaining Bali Action Plan issues in the working group on long-term cooperative action, which has now terminated its work; on a new set of activities on assisting developing countries suffering from "loss and damage" resulting from climate change; and on the work programme of the Durban Platform, which will be the main arena of new negotiations starting in 2013.

Many delegates left the Doha conference quite relieved that they had reached agreement after days of wrangling over many issues and an anxious last 24 hours that were so contentious that most people felt a collapse was imminent. The relief was that the multilateral climate change regime has survived yet again, although there are such deep differences and distrust among developed and developing countries.

The conflict in paradigms between these two groups of countries was very evident throughout the two weeks of the Doha negotiations, and it was only papered over superficially in the final hours to avoid an open failure. But the differences will surface again when negotiations resume in 2013. Avoidance of collapse is a poor measure of success. In terms of progress towards real actions to tackle the climate change crisis, the Doha conference was another lost opportunity and grossly inadequate.

The conference was held at the end of a year of record extreme weather events, including Hurricane Sandy in the United States and heavy rainfall and flooding in many parts of Asia. Scientists are increasingly linking these extreme events to climate change. As the Doha conference started, news of the typhoon in the Philippines which caused over 600 deaths and made 300,000 homeless reminded the participants of the present reality of the climate crisis. Before the conference began, a new report by UNEP reaffirmed that there was an enormous gap between what countries had pledged to do to curb emissions, and what is needed to be done if the average global temperature rise is to be restricted to 2 degrees Celsius above pre-industrial levels. The World Bank released its own report warning that the world is heading towards global warming by 4 degrees if countries do not offer to do more.

Despite the clear signs that the climate crisis is already with us, and that greater disasters are just round the corner, the dictates of economic competition and commercial interests unfortunately were of higher priority, especially among developed countries, which explains their low ambition in emission reduction. They also broke their promises and commitments previously made to provide adequate funds and to transfer technology to developing countries. The prospects for effective actions are thus rather gloomy, post-Doha.

Kyoto Protocol's Second Commitment Period

The most important result in Doha was the formal adoption of the Kyoto Protocol's second period (2013 to 2020) to follow immediately after the first period expires on 31 December. However, the elements in the agreement are weak. With original members Canada, Russia, Japan and New Zealand having decided to leave the Kyoto Protocol (in the case of Canada) or to remain but not to participate in a second period, only the European Union and other European countries, Australia, and a few other countries (totalling 35 developed countries and countries in transition) are left to make legally binding commitments in the second period.

Also, the emission cuts these Annex I countries agreed to commit to are in aggregate only 18% by 2020 below the 1990 level, compared to the 25-40% required to restrict global temperature rise to 2 degrees Celsius. The countries in the main submitted the low end of the range of the pledges they had made in the previous climate conferences in Copenhagen (2009) and in

AWG-KP Chair Madeleine Diouf (left) before the AWG-KP plenary meeting .

Cancun (2010) as their Kyoto second period commitments, which was a bad disappointment although expected, and this was a major component to the overall "low ambition" status of the Doha conference.

A saving factor in the Kyoto Protocol decision is the "ambition mechanism" put in by developing countries, that the countries will "revisit" their original target and increase their commitments by 2014, in line with the aggregate 25-40% goal. It was this provision that persuaded the developing countries to go along with the decision, as otherwise they gave notice that they found the draft with the low numbers on emission reduction unacceptable. Of course, whether the 2014 review of commitments results in higher figures eventually remains to be seen.

There were at least two other points that the developing countries had to fight for in the Kyoto Protocol decision. Firstly, the decision severely limited the amount of credits or surplus allowances that can be used during the second period. These credits were accumulated in the Kyoto Protocol's first period by countries that cut their emissions more than the targeted level. According to the decision, these countries cannot use or trade most of the surplus allowances as a means to avoid current emission cuts. The most important country affected is Russia, and in the final plenary session it strongly objected to the way the President of the Conference, Abdullah Hamad al-Attiyah of Qatar, bulldozed through the Kyoto Protocol decision even though it and two other countries tried to object.

Secondly, the developing countries were adamant that Annex I countries that are not party to the Kyoto Protocol or that decided not to participate in the second period should not be allowed to make use of the protocol's "flexibility mechanisms" that enabled countries to offset their domestic emission reduction commitments by paying other countries to do the mitigation on their behalf, such as through the Clean Development Mechanism. Some developed countries wanted this flexible mechanism to be open to these parties.

In the draft decision floated on the eve of the closure, the Kyoto Protocol draft decision did not contain many of the demands of developing countries. A determined effort by these countries, including a like-minded group, to make their grievances known to the Ministers coordinating the issue, yielded a result that was just about acceptable to them.

No commitment on new finance

A major criticism of the Doha decisions is the very unsatisfactory results on the issue of financial resources for developing countries to enable them to take climate actions. In Cancun in 2010, the Conference of Parties decided that developed countries would mobilise climate finance of US$100 billion a year for developing countries, starting by 2020. It also agreed that US$30 billion of "fast start" finance would be provided in 2010-12.

The fast-start period will end in 2012. There is a gap between 2013 and 2020, with no commitment for that period. The G77 and China, representing all developing countries, made a demand that this gap be filled up, with a benchmark of $60 billion by 2015. However, at Doha, the developed countries were in no mood for giving any numbers nor even any qualitative commitment. The decision on finance at Doha only "encourages" developed countries to provide at least as much as they had in the 2010-12 period. This "encouragement" is thus for only $10 billion a year in aggregate, which is a climb-down from the previous fast-start period in which the annual $10 billion was at least a commitment. Moreover there is no road map of a progressive increase towards the $100 billion target in 2020.

The lack of a credible finance commitment led to an outcry by developing countries on the plenary floor. This lack of commitment on funding leaves a major gap in the chain of undertakings and actions in the climate regime. Under the Convention, developed countries made a commitment to finance the incremental costs of mitigation actions by developing countries, the full cost of preparing national communications (reports on emissions and actions by countries) and to help meet the costs of adaptation.

Estimates by UN agencies and other international organisations show that the mitigation and adaptation costs by developing countries are in the order of many hundreds of billions of dollars, or even exceed a trillion dollars a year. Thus even the $100 billion goal for 2020 is an under-estimate, while the lack of any clear commitment or even target for the 2013-2020 period goal became a major factor for the mood of despondency among developing countries at the close of the Doha conference.

Decisions on Long-Term Cooperative Action

The Doha conference also adopted a set of decisions under its ad hoc working group on long-term cooperative action (AWG-LCA), which was formed to negotiate on the Bali Action Plan adopted in December 2007. Before and at Doha, the developed countries were insisting that there were only very few outstanding issues left to be decided on based on a report at the end of the previous Conference of the Parties in Durban in December 2011. The controversial report had been prepared by the then Chair of the AWG-LCA, Dan Reifsnyder of the United States, "on

AWG-LCA Chair Aysar Tayeb

his own responsibility" (meaning that it had not been approved by the members of the AWG-LCA) and which many developing countries had considered one-sided, as it had ignored their views on several key issues and had also omitted several issues altogether.

Before and at Doha, a like-minded group of 25-30 developing countries (including India, China, the Philippines, Malaysia, Pakistan, Egypt, Saudi Arabia, Mali, Democratic Republic of Congo, Argentina, Bolivia, Ecuador, El Salvador, Venezuela, Nicaragua, Cuba) proposed two major things: that several outstanding issues of interest to them that were unresolved since the launch of the Bali Action Plan in 2007 should be decided on, and that other issues be transferred together with their contexts and frameworks to other bodies of the UNFCCC. Only then could there be a successful conclusion of the work of the working group.

The chair of the working group, Aysar Tayeb of Saudi Arabia, produced a succession of drafts that were heatedly debated at Doha, as the developed countries were adamant that he should not produce texts while developing countries were strongly in favour of them.

In the end, the developing countries were satisfied with several of the decisions, including specific issues or paragraphs, including on equity in the context of long-term global mitigation targets, the need to continue discussions on unilateral trade measures taken on the grounds of climate change, and the need for technology assessment.

On the contentious issue of intellectual property and technology transfer, developed counties led by the United States, were very adamant in rejecting any text on intellectual property, even a mere mention of this term. They even rejected any mention of the concept of access by developing countries to affordable technology.

The final draft contains only a reference to a report of the UNFCCC's Technology Executive Committee, which itself has a reference to barriers to technology transfer, including the possibility to discuss IPRs based on evidence and on a case-by-case basis. This debate on and treatment of technology transfer shows that the developed countries, particularly the United States, does not have an intention to fulfil their commitments to technology transfer to developing countries on concessional terms.

Even though the decisions on these issues were extremely weak, the United States registered its disagreement or reservations on many of them, after the adoption of the text in the final plenary, giving a foretaste of how it will continue to object to future discussions on these issues.

Advance on issue of "Loss and Damage"

A positive decision made in Doha was to prepare for the setting up by the Conference in 2013of an "international mechanism" to help developing countries deal with loss and damage caused by climate change. So far, loss and damage suffered by developing countries as a result of the effects of climate change, such as increased incidence and level of strength of storms, hurricanes, heavy rainfall, flooding and drought, have been largely excluded from the scope of the adaptation issue in the Convention. They are thus not included in the discussions for financing under the Convention.

At Doha, the developing countries fought hard to get greater recognition and more detailed elaboration of the issue, and to affirm that loss and damage would be eligible for financing under the Convention. Several developed countries, particularly the United States were resistant to elements of the concept, particularly any link to the notion of liability by countries responsible for a significant stock of emissions in the atmosphere.

It was thus a considerable advance for developing countries that there was an agreed decision on loss and damage, with a preamble "highlighting the important and fundamental role of the Convention in addressing loss and damage associated with climate change impacts", and an operational decision acknowledging the need to enhance finance and technology for actions. The decision includes the establishment at the next Conference of "institutional arrangements, such as an international mechanism" to address loss and damage in developing countries that are particularly vulnerable. Meanwhile the Secretariat is asked to carry out interim activities, including an expert meeting and preparation of technical papers on non-economic issues and gaps in existing institutional arrangements on this issue.

Battles on the Durban Platform

The Doha conference also adopted a work plan for the new working group on the Durban Platform, which is the new negotiating process launched at the Durban climate conference in December 2011. The negotiations are targeted to end in 2015 with a "protocol or another legal instrument or an agreed outcome with legal force under the Convention, applicable to all Parties", and which would take effect from 2020.

There were major fights in Doha over the decision on the work plan, which continued the battles that had begun in Durban itself during the plenary session that launched the Platform and that had continued through two sessions in Bonn and Bangkok during 2012. Many developing countries, led by a like-minded group, insisted that mention be made in the Doha decision that the Durban Platform will operate on the basis of equity and common and differentiated responsibilities (CBDR). They proposed that the Doha decision on Durban Platform refer to the Rio Plus 20 summit's outcome that in a section on climate change recalled that "the UNFCCC provides that parties should protect the climate system… on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities."

However, the developed countries were adamant in rejecting this reference to the Rio plus 20 climate text. They even refused to accept a compromised weak reference to merely "taking note" of the Rio plus 20 outcome without any mention of the climate section, let alone the terms equity and common but differentiated responsibilities. What was eventually placed in the text, as proposed by Uganda and supported by China, was a reference that the Durban Platform's work will be "guided by the principles of the Convention." This was a small gain because in Durban the decision only referred to the fact that the Durban Platform's outcome would be "under the Convention" without mentioning the key word "principles".

A press conference by BASIC countries during the COP18 in Doha in December 2012.

IISD

The understanding of the developing countries is that equity and CBDR are among the fundamental principles of the Convention. Even then, the United States in the final plenary placed a reservation that reference on "guided by the principles of the Convention" has no effect on the mandate for the negotiations agreed to in Durban, and that the provision cannot and will not be the basis upon which the US will engage in the work of the Durban Platform group.

Another fight in the Durban Platform negotiations in Doha was over whether there remains a difference in the nature of mitigation obligations between developed and developing countries in the outcome of the new Durban Platform. In the last plenary session on the Durban Platform, India proposed to amend the text on ways of defining and reflecting the "undertakings" of the parties to "commitments and actions" (instead of the single term undertakings). To observers, it was clear that the Indian proposal was referring to the understanding in the Convention and in previous negotiations (including under the Bali Action Plan) that there is a difference between the more binding commitments of developed countries, and the voluntary actions of developing countries, supported by finance and technology.

The Indian proposal to amend was supported by several developing countries including China and Argentina. However the US strongly rejected the wordings "commitments and actions", stating that this was language used in the Bali Action Plan but that the Durban Platform is not the Bali Action Plan, which elicited a response from China that the Bali Action Plan was not "poison" and that the title of the Durban Platform decision referred to "enhanced action" and it could thus not understand why the word "actions" could not be used. In the end, it was agreed that the term "undertakings" be amended to "ways of reflecting enhanced action."

This reveals how much lacking in the spirit of international cooperation that the United States and some other developed countries have become. They are no longer willing to assist the developing countries, and incredibly are even objecting to the principles of the Convention being applied to negotiations to set up a new agreement that will be under the Convention.

More than anything else, this shows the tragic paradox of the Doha conference. It succeeded in adopting many decisions and kept the functioning of multilateral regime alive, but the actual substance of actions to save the plant from climate change was absent, as was a genuine commitment to support the developing countries.

The process in Doha

On the process in Doha, a positive feature was that the developing countries were more united and coordinated than in previous Conferences of the Parties, often speaking with one voice on some critical matters including loss and damage, finance and the Kyoto Protocol. There was also the emergence in this COP of a group self-designated as "like minded developing countries", which operated on several negotiating fronts.

The developing countries found the management of the COP to be more transparent and participatory because of the connection between the negotiators' process (in contact groups and their "informal" spin-off groups) with the "Ministerial process" (in which a few Ministers or high-level officials were requested by the Presidency of the COP (the host country Qatar) to hold consultations to resolve outstanding issues that could not be settled by the negotiators).

In the final official plenary session, the President of the COP gavelled through all the decisions of the working groups and the COP one by one in quick succession. There was a serious objection by Russia, on the issue of carry-over of the surplus allowances, in the Kyoto Protocol decision, but this was over-ruled by the President of the COP. There thus remains the uncomfortable issue of how the procedure of how formal decisions are adopted at the final moments of COPs. Since the Copenhagen COP in 2009, each Conference has had its own way of adopting decisions, and each of these have been controversial.

Martin Khor is Executive Director of the South Centre. He can be contacted at: director@southcentre.org.

South Centre COP18 Side Event:

Equity and Its Links to Ambition in the Climate Talks

By Anna Bernardo

The South Centre hosted a side event during the UN Climate Change Conference in Doha entitled "Equity and its Links to Ambition in the Climate Negotiations" on 1 December 2012. The theme of the side event was to discuss and highlight equity and development as the gateway for climate ambition.

Mariama Williams of the South Centre opened the event as the moderator of the panel with what many have termed a deregulation of the UNFCCC's rule-based system. She said that there is a shift that has been happening for at least many years now which is the weakening of the collective ability of developed and developing countries to address climate change. Developed countries are trying to escape from their commitments in the Climate Convention to mitigate, provide finance and technology transfer.

Williams mentioned that we have just come out of a crisis that was the result in fact of many years of deregulation of the economic and financial system and we know the ultimate, rampant effect it had, and therefore we ought to be worried about the same happening to the climate regime.

At the same time of this impetus towards deregulation of developed countries' commitments, there is an attempt to upgrade the mitigation obligations of developing countries.

Williams said that at stake in these negotiations are very fundamental questions: Is there a role for principles such as equity, common but differentiated responsibility (CBDR) in this context? What do we say about the mitigation gap, development gap, adaptation gap, finance gap and how do these link to ambition and the negotiations? Are we in a stage in our evolution that we can jettison principles especially equity because there is a planetary crisis? When do we begin to unravel human rights, indigenous and women rights also on these grounds? These are just some of the questions the other experts in the panel were going to address.

Matthew Stilwell of the Institute for Governance and Sustainable Development (IGSD) addressed how to share an ambitious global goal effort for reducing emissions fairly. He mentioned that the global goal sets the level of global effort. For a more ambitious goal, who does the work in terms of mitigation? Who provides the finance and technology? How are countries supported to adapt?

In terms of mitigation, he brought up an example used by a former developing country negotiator. If you are building a dam to hold back a flood, a first question is how high is the dam? A second question is who brings the rocks to build the dam? The approach Annex I countries are proposing is bring as many rocks as you like, but there will be no guarantee then that the dam will be built to a level that will hold back the flood. This is the deregulatory approach.

Moreover, Annex I countries have made weak proposals in terms of their own level of their mitigation ambition. They don't, in other words, intend to contribute many rocks to the dam.

The Annex I Parties' emission reductions are in the order of 3.9 Gigatons (Gt) by 2020 based on a variety of different analyses of the Cancun pledges, and they have access to around 4Gt of loopholes, meaning that in total they could make "no net contribution" to the global effort by 2020.

The EU has put on the table a pledge of about 20% from 1990 levels by 2020 and studies suggest that they have achieved 17.5% of that already. Similarly, the numbers Australia has put on the table are quite low.

So it is likely, based on these pledges, that Annex I Parties would contribute little in terms of mitigation, while consuming a significant portion -- almost half -- of the global emissions budget that UNEP has said is broadly consistent with the 2 degrees Celsius goal.

That means that 20% of the people that live in rich countries would consume half, and the 80% who live in the developing countries would need to develop within the other half of that budget in 2020. This is clearly not an outcome that is consistent with a fair or an effective deal.

Stilwell also brought up the means of implementation in the UNFCCC – the issues of finance, technology and capacity building.

The developed countries are reluctant to put forward a collective pledge of the money that will be available in 2013, while on the other hand they are asking developing countries to put forward pledges for their mitigation efforts and to begin planning their adaptation actions.

Studies suggest that very small proportions of the money provided between 2010-2012 has been genuinely new and additional. This suggests that funding mostly had either been previously pledged or was double counted as official development assistance (ODA).

Initially, the logic of the negotiations was that we should build on the Kyoto Protocol (KP), with the main non-party – the United States -- being brought to the standard of the KP through "comparable efforts", and then the other large emerging economies would follow; like a rising tide, lifting efforts and strengthening the rules.

However, what we are now seeing in practice is the burying of the KP. Annex I countries are transitioning out of the KP, with Canada having formally withdrawn, and some of them not putting forward a legally binding commitment in the second commitment period – Russia, Japan, New Zealand. Others have made very weak pledges and intend to transition out of the Kyoto Protocol at the end of the second commitment period.

A set of new rules built under the Ad hoc Working Group on Long-term Cooperative Action (AWG-LCA) are weaker than the KP as they apply to Annex I Parties, weaker in terms of compliance and also losing reference to

"comparability of efforts" that was included in the Bali Action Plan.

So we may end up with a weaker system of rules than we agreed to in 1997 for the developed countries.

A climb down in the rules from the Annex I Parties, inadequate action on the means of implementation, proposals of global goals that can really lead to very dangerous levels of global warming – these are tendencies that need to be arrested in the negotiations, Stilwell said.

Dr. Zou Ji, Deputy Director General, National Center for Climate Change Strategy and International Cooperation (NCSC), China, stressed the need for understanding the basic concept, the fundamentals of climate equity in the context of the international regime.

He mentioned that everybody has a right to survive, to be respected and to also fully develop, no matter what country you come from. If some stakeholders, no matter at what level, do not have the opportunity, do not have the choice, this is not equitable.

Another angle to assess if we have equity or not is the current status. One can develop a long list of indicators to assess if we have equity or not, such as income. In any economy you have the high income group and the low income group.

Emissions (per capita, total, cumulative) is also an indicator. Dr. Zou Ji stresses that given the scientific facts, cumulative emissions should be the core concept to assess emission equity.

Equity can be also regarded as a motivation to sustain efforts to take some action e.g. to mitigate, adapt and this relates to the relationship between equity and ambition. When designing and developing international and national regimes for addressing climate change, we have to pay attention to the incentive mechanisms or institutional arrangements to make people or stakeholders feel that it is equitable.

Industrialised countries' emissions in history over two centuries were what mainly led to climate change today. The underdeveloped countries like those in Africa emit very little but have to suffer from the negative impacts of climate change. This is unfair and is the basis of the responsibility system.

Dr. Zou Ji also talked about the pathway of development. In the debate on cumulative emissions, we should not forget that developing countries have been repeating the conventional pathway, in terms of the commercial model, value system, technology, etc. Industrialised countries continue to dominate world politics, the world market and even the development pathway through globalisation, international trade and investment and also through advertisements by their companies all over the world. Developing countries have been copying this pathway which is leading to new high emission sources.

We should be aware of this because this will lead to a very pessimistic future. We have to change the development pathway and change conventional ideas like market systems and the value systems. If we do not think in that way, it will be very superficial. The world cannot change, you just repeat the pattern.

Zou Ji said the wrong picture was being portrayed about China being the top emitter. This is because China also has the world's top population. In per capita emissions terms, China is still quite low. Developed countries like Germany and UK had high increases in their per capita emissions before the levels started going down.

The major source of emissions for China is manufacture and investment. The major sources for emissions per capita for industrialised countries are transport, building and consumption. In the background of globalisation, China's embodied emissions based on exports account for 20-30% of total emissions. These are very different sources.

Dr. Zou Ji was not defending the emissions themselves. What he was saying was that these kinds of analyses should help to identify the nature of the sources for economies in different stages of development and we will have a clear idea on the trends of the trajectory. He is also confident that China's peak should be lower compared to the historic peak of most industrialised countries.

Chee Yoke Ling of the Third World Network (TWN) said that many developed countries including Europe has abandoned equity in the last 3-5 years in the political decisions being made.

She also brought up the Rio Plus 20 Summit. Twenty years after Rio 1992, the fight was so hard to keep the principle of equity. There seems to be a process of dismantling one of the most important outcomes from 20 years ago. Three treaties coming from Rio '92: UNFCCC, the Convention on Biological Diversity (CBD), the United Nations Convention to Combat Desertification (UNCCD), are all rooted in equity. And they are all legally binding deals.

So when the USA, Europe, Canada, and others say that there is no legally binding regime, the NGOs get upset. This is a misleading message to the public. There is a legally binding document. It is just not being respected.

On finance, Chee said that this was that one issue the G77 made very clear, that finance implementation is important. However the USA said that the G77 and China proposal was irrelevant.

No one is paying the developing countries to adapt. During extreme events, countries have to pay themselves, or if countries are poor, they have to somehow survive or not.

Anna Bernardo is Researcher at the South Centre.

Youth representatives promoting equity during UNFCCC negotiations.

Fiji PM on the Present Priorities of the G77 and China

Below is an excerpt of the statement by Mr. J. V. Bainimarama, Prime Minister of the Republic of Fiji, on the occasion of Fiji's assumption of the Chairmanship of the Group of 77 (New York, 15 January 2013).

Prime Minister J.V. Bainimarama

Although the world is changing in a number of ways - particularly for developing nations - the founding mission of the G77 is as valid as ever. The Group of 77 was founded in 1964 to collectively boost the role and influence of developing countries on the global stage. The first Ministerial Meeting of the G77 - held in Algiers - adopted the "Charter of Algiers" on 25 October 1967, which set forth the Group's strategic vision and objectives.

Today, developing countries represent an overwhelming majority of both the world's population and of UN member states. The G77 has a vital interest in preserving the spirit and objectives of the United Nations - as embodied in its Charter and reflected in its efforts to promote peace, development, international cooperation, global public interest, and the democratization of the world order - including its structures and processes. .

Fiji is committed to supporting the G77's efforts to preserve the spirit of the UN Charter and to make the UN a more effective forum for confronting and resolving the challenges developing nations face in today's world. These challenges have expanded significantly in recent years, and a number of our demands remain unanswered. With this in mind, Fiji will continue to promote the G77's interests and will remain fully committed to its principles and objectives.

Development issues pertaining to the global economic agenda can only be advanced through multilateral processes and negotiations. Our collective interests and the successful pursuit of these interests depend on our ability to effectively mobilize our members in various forums and to maintain the most unified positions possible whenever our common development goals are at stake.

Despite our great diversity, we have managed to present a common front over the years. Fiji intends to continue this tradition. The spirit of consultation and solidarity that prevails in our Group has been a great strength. It has helped us consolidate our acquired experience and safeguard our strategic interests.

During 2013, the Group will continue to press our collective view on a number of major issues, including the ongoing global financial and economic crisis, sustainable development, the millennium development goals, and internationally agreed development goals--as well as financing for development, among others.

The follow-up processes agreed to in the United Nations Conference on Sustainable Development held in Rio de Janeiro last June will be one of the main priorities of our Group this year. In this regard, we will pay special attention to ensuring a fair representation of developing countries in the international fora and to the effective and full implementation of the outcomes of the conference. These include enforcing effective institutional frameworks for sustainable development at all levels and providing the adequate means for developing countries to implement those outcomes.

In approaching these issues, we believe that the global challenges facing our countries require better cooperation and coordination. To this end, we will continue to strengthen our cooperation with the Non-Aligned Movement - through the Joint Coordinating Committee (JCC) - in order to reinforce our positions on issues of common interest.

In this context, our Group will need to continue to defend the diverse and inclusive nature of the United Nations - the only permanent institution with a universal and global agenda - from efforts that seek to reduce it merely to an administrative body on the one hand, or that seek to make it serve the interests of a minority on the other. Our Group will need to press for a greatly strengthened Secretariat to provide our Secretary-General with the necessary support and resources to support the many diverse paths developing nations are taking to improve the lives and livelihoods of their citizens.

Since the inception of the Group of 77 - almost five decades ago - we have always given South-South cooperation a special place in the development agenda. Today, South-South cooperation remains our primary focus. The exchange of resources, technology and knowledge between developing nations has increased in importance and scope, and we believe strongly in South-South cooperation as a complement to North-South cooperation.

Therefore, we will pursue the policy of strengthening South-South cooperation by following the roadmap established by the South Summits. In this spirit, this year Fiji intends to convene a meeting of the High-level Panel of Eminent Personalities of the South to address relevant development challenges and to update the Development Platform for the South, as mandated by the Second South Summit.

Furthermore, we are fully committed to providing the necessary support to help bring the new UN Office for South-South Cooperation on line - the entity charged with coordinating and promoting South-South cooperation across the entire UN system.

South-South cooperation will continue to represent the best form of solidarity and interdependence among the members of our Group. Therefore - in accordance with the relevant mandates - meetings in various fields of South-South cooperation will be convened in order to prepare for the Third South Summit.

Outgoing Chair Reviews G77's 2012 Activities

Below is an excerpt of the statement by Ambassador Mourad Benmehidi, Permanent Representative of Algeria, Chair of the Group of 77 for 2012, at the handover ceremony of the Chairmanship of the Group of 77 (New York, 15 January 2013).

Handshake of the 2012 and 2013 chairs of G77, from left, Fiji Ambassador Thomson, Fiji Foreign Minister Kubuabola, Algerian Foreign Minister Medelci, and Algerian Ambassador Benmehidi in New York. Picture: Fiji Times.

Let me at the outset welcome you to the handover ceremony of the Chairmanship of the G-77 and China between Algeria and the Republic of Fiji. We are meeting today to hand over the helm and the torch of the chairmanship to the Government of the Republic of Fiji.

It is my pleasure to go through the work undertaken by the Group in 2012 and make some reflections on the experience accumulated, our collective achievements and the challenges yet to be faced by our Group.

Algeria's chairmanship of the G77 in 2012 coincided with a challenging agenda in economic, social and environmental realms, and in a context of a multidimensional and global crisis that had compromised development efforts of developing countries. Furthermore, we continued to face the traditional economic challenges, such as the burden of poverty and external debt, the reduction of official development assistance, the negative effects of climate change, the challenges of trade, agriculture and food security and the high levels of unemployment.

Thanks to the support and commitment of all members of the Group, Algeria's delegation has endeavored to defend the interests and priorities of the Group, during intense and lengthy negotiations with development partners. The progress achieved during this year and the positive outcomes that resulted from different processes are due essentially to the unity, the solidarity and the collective effort of our Group, in promoting our common interest and enhancing our negotiation capabilities.

We are all aware of the magnitude and complexity of the multiple crises the world is facing which have shaken strongly the foundations of the international economic system and created instability and uncertainty. This global challenge calls for new approaches to address systemic and global problems and ensure a concerted regulation of globalization.

In this context, our Group continued to insist on the urgency of institutional reforms of the United Nations system, including the Bretton Woods institutions as well as the World Trade Organization, in order to ensure the full participation for developing countries in all international discussions and policy making.

Poverty remains the greatest global challenge facing the world today. Many of our members, especially the most vulnerable, are caught in the trap of poverty. We continue to stress that poverty eradication cannot be successfully addressed without a strong commitment of the international community, including the fulfillment of the commitment to the internationally agreed official development assistance, capacity building and the transfer of technologies. The international cooperation to achieve this goal as well as other Millennium Development Goals, within the timeframe previously established, cannot be overemphasized in this context.

As international trade is a vital tool and an engine for development and sustained economic growth, the G77 stresses on the importance of a timely conclusion of the Doha Round of multilateral trade negotiations that fulfills its development mandate, takes into account the needs and priorities of developing countries and prevents protectionist measures, in particular by developed countries.

In this regard, the Group reaffirmed the core mandate of UNCTAD as the focal point for an integrated treatment of trade and development and interrelated issues of finance, technology, investment and sustainable development, during the UNCTAD XIII, held in Doha, in April 2012. We hope that the international community will continue to support the efforts and activities of UNCTAD in order to contribute to the achievement of internationally agreed development goals in the coming years.

As far as sustainable development is concerned, the single challenge for the G77 and China was to evolve and maintain a common vision on the vital and complex challenges throughout

the heavy agenda for the year 2012, i.e. the United Nations Conference on Sustainable Development - Rio+20, the 18th session of the United Nations Framework Convention on Climate Change as well as the 11th session of the Conference of the Parties to the Convention on Biological Diversity. Algeria expresses its profound satisfaction at the unity and solidarity demonstrated by the members of the Group during all these processes, which allowed preserving the interests of developing countries.

The Rio+20 Conference, held in Rio de Janeiro, in June 2012, constitutes a landmark in the promotion of sustainable development agenda, in the sense that it allowed to the international community to adopt a roadmap for "The Future We Want", where poverty eradication is considered as the greatest challenge and a prerequisite for sustainable development. This roadmap reinforced the comprehensive and integrated approach to sustainable development, based on the three pillars, economic, social and environmental, and preserved the principles of the Rio Declaration of 1992 and Agenda 21, including the principle of common but differentiated responsibilities, equity and the sovereignty of States over their natural resources.

Furthermore, the Rio+20 Conference launched several follow-up processes, including a process to establish a High Level Political Forum on Sustainable Development, the intergovernmental process on Sustainable Development Goals, the intergovernmental process to assess financing needs and propose options on an effective financing strategy as well as the process to identify options for a facilitation mechanism that promotes the development, transfer and dissemination of technologies.

The commitment of the Group is needed for the successful and expeditious launch of all processes to ensure a balanced representation of developing countries and the effective and full implementation of the outcome document of the Conference, in particular the provision of adequate means of implementation to developing countries.

As far as climate change is concerned, the 18th session of the Conference of the parties to the UNFCCC, held in Doha, from 26 November to 7 December, constituted a big opportunity for the international community, in general, and for developing countries, in particular, that are suffering the most from the adverse impacts of climate change and the increasing frequency of extreme weather effects.

The adoption of the second period of commitment for Annex I countries under the Kyoto Protocol until 2020, the launching of a programme of work to mobilize financial resources for developing countries, including for the most affected and vulnerable countries as well as the substantive progress in the implementation of Cancun and Durban decisions are the main achievements of COP18. This outcome shall pave the way for further progress in climate change discussions, through addressing in a balanced and effective manner the issues of adaptation, mitigation, finance, technology and capacity building.

2012 was also the year where the 11th session of the Conference of Parties to the Convention on Biological Diversity was held, in India, from 8-19 October, which was centered on the critical issue of financial resources. In this context, COP11 took ambitious decisions that shall allow the international community to move from policy making to implementation. The G77 has contributed to the adoption of a good outcome, including significant decisions on financial issues as well as the progress made in the initiative of the G77 on the Multi Year Plan of Action for South-South Cooperation in Biodiversity.

When it comes to delivering the United Nations support on the field, the year 2012 constituted a great opportunity for the G77 to reiterate the importance of the principles that lead operational activities, including its universal nature, neutrality and multilateralism as well as their ability to respond to the development needs of developing countries, in accordance with their priorities. In this context, the Quadrennial Comprehensive Policy Review of the UN Operational Activities for Development was at the heart of the priorities of the G77 and China in 2012. The commitment and involvement of all its Member States have contributed to achieve a successful outcome, through the adoption by consensus of the Resolution on QCPR.

Concerning the administrative and budgetary issues, the Group of 77 and China after very difficult negotiations was able to maintain the integrity of the intergovernmental process and prerogatives of Member States and to preserve the budget process, while demonstrating a high sense of responsibility and constructiveness. This was in particular the case for the resolutions on budget outline and the scale of assessments as well as in developing a balanced approach for the framework on mobility, thus paving the way to a constructive discussion on human resources management at the next resumed session of the Fifth Committee of the General Assembly.

The growing economic complementarities and the capacity for developing countries to advance their priorities and development needs through mutual cooperation as well as the concrete results achieved recently in this regard, encourage us to invest more efforts and make South-South cooperation a key priority for our Group. Indeed, the regional integration in Africa, Asia-Pacific and Latin America and the Caribbean as well as the growing investments and cooperation among developing countries shall be looked at as an engine to boost the economic and social development of all developing countries. However, we reiterate that South-South cooperation is a complement to, rather than a substitute for North-South cooperation.

In this regard, our Group welcomes the adoption of decision 17/1 of the High Level Committee on South-South cooperation on the transformation of the Special Unit for South-South Cooperation into the United Nations Office for South-South Cooperation. We are confident that the Secretary-General will take all necessary measures to strengthen the capacity of the structure, by providing appropriate human, financial and technical support, in order to reinforce the status of the Office and give it the needed visibility to improve its action through the UN system.

I would like also to mention that the Consortium for Science, Technology and Innovation for the South COSTIS, created by the G77 as mandated by the First South Summit, passed to its operational stage.

Incoming G77 Chair in Geneva on Celebrating 50th Year of UNCTAD & G77

Statement delivered by Ambassador Miguel Carbo Benites, Permanent Representative of the Republic of Ecuador to the World Trade Organization and other international economic organizations in Geneva on the occasion of the handover ceremony for the G-77 and China in Geneva held on 17 January 2013.

Ambassador Miguel Carbo Benites

Next year we will celebrate the 50th anniversary of the establishment of UNCTAD as well as of the G-77 and China. This is not a coincidence: all of those who know about development issues are aware that the origin and the destiny of both organizations are closely linked. The principles and objectives that led to the convening of the first meeting of UNCTAD in 1964 are the same that led to the establishment of the G-77, the only grouping in which almost all the developing countries take part.

On the eve of this celebration, it is time to take stock of the past fifty years: In 1964 we started from a development perspective based on the approach of visionary leaders such as Raúl Prebisch, founder and first Secretary General of UNCTAD, in which social equity and inclusion were at the forefront, and then we moved towards the principles of the so-called Washington Consensus, with an obsessed focus on indiscriminate economic growth regardless of the human beings and their needs.

Fortunately, Latin America and other regions of the world are in the process of restoring the role of the State in the management of public policies. Indeed, the consequences of the implementation of the development pattern applied mainly in the 80s and especially in the 90s based on deregulation and on the dominance of markets over the economy, have led the world to the biggest financial crisis of the last seventy years which not even developed countries have been able to avoid.

In fact, developing countries faced the worst part of the crisis before the collapse of Lehman Brothers and the onset of the current financial crisis. The deepest crisis we experienced was that of the lack of ideas and political initiatives during the 80s and 90s in an almost automatic implementation of economic recipes in a one-size-fits-all development pattern which eventually resulted in a series of financial crises in countries like Mexico, Russia, Turkey and South-East Asian countries, and made almost every country in the world highly vulnerable as it has been confirmed by the current financial crisis.

In those years of political and intellectual draught, UNCTAD emerged as the international organization that advocated the adoption of public policies towards the establishment of redistribution processes in order to help countries to reduce their poverty levels and put emphasis on redressing imbalances. It is precisely the implementation of heterodox policies by a large number of developing countries which has allowed us to deal with the current financial crisis—with fewer setbacks in many cases - than those suffered by developed countries.

The chairmanship of Ecuador to the G-77 will seek to honour the UNCTAD and G-77 tradition as bastions of deeply social policies focused on development and human beings. The Government I represent is determined to underpin these principles to achieve a fairer and more compassionate society, for this is an essential precondition to build a peaceful world.

In addition to the coordination tasks now assumed by Ecuador, we have planned three activities in preparation of the G-77 for the 50th anniversary of the establishment of UNCTAD and the G-77 and China.

At a time when our developed partners have showed signs of weakening of their development commitments, our position should be more cohesive and robust to defend the principles which have driven the discourse and practice about development and to assert that the agreed principles and objectives are international commitments that ought to be respected.

I wish to conclude by reaffirming my country's commitment with the objectives and principles that motivated the creation of the G-77 and China. Ecuador is committed to the construction of a fairer world in which there is greater solidarity between nations, a world where they can come together in the pursuit of development with trade as an instrument and not as an end in itself, to improve the living conditions, well-being and peace of our peoples with due respect of the rights of nature. We hope that in this way we will honour and stand for the ideals for which the founders of our Group stood for.


The podium during the G77 handover ceremony in Geneva.

Reflections on the IP System: A Development Perspective

The South Centre held a side event during the 50th WIPO General Assemblies on the theme of "Reflections on the IP System: A Development Perspective" on 5 October 2012 at the WIPO headquarters in Geneva. Professor Carlos Correa, Special Advisor on Trade and Intellectual Property of the Centre, was the speaker of the event. Below is a summary of his presentation.

The South Centre side event during WIPO's General Assemblies period.

By Carlos M. Correa

I will focus on three areas during this presentation. Firstly, I am going to talk about the relationship between intellectual property (IP) and innovation, mainly based on the views of economists from developed countries. Secondly, I will discuss some trends in legislation, jurisprudence and policies in developed countries that limit IP protection in some respects. And thirdly, I will refer to lawmaking in IP.

Let me start with a quote from the Austrian-American economist Fritz Machlup who, in a study for the US Senate made half a century ago, said that "If we did not have a patent system, it would be irresponsible, on the basis of our present knowledge of its economic consequences, to recommend instituting one". Machlup was saying basically that for smaller economies - not necessarily economies like the United States of America - it would have been better to abolish the patent system.

IP and Innovation

Of course, a lot has changed in the world since Machlup produced his report, with increased globalization, new technologies, etc. However, the view that IP does not necessarily have a positive effect on economic development is still predominant among economists. For instance, based on an analysis of historical studies, Bessen and Meurer (2008) concluded that "…nations with patent systems were no more innovative than nations without patent systems. Similarly, nations with longer patent terms were no more innovative than nations with shorter patent terms". In accordance with Boldrin and Levine, "[I]ndeed, historical evidence provides little or no support that innovative monopoly is an effective method of increasing innovation" .

On the cost-benefit of patents, Bessen and Meurer also said that "Note that patents *do* provide profits for their owners, so it makes sense for firms to get them. But taking the effect of *other* owners´ patents into account, including the risk of litigation, the average public firm outside the chemical and pharmaceutical industries would be better off if patents did not exist." The Nobel Prize laureate Joseph Stiglitz (2007) said "…are the incentives provided by the patent system appropriate…? Sadly, the answer is a resounding "no". Richard Posner (2012), judge of US federal appeals court and Chicago University professor said "In most [industries], the cost of invention is low; or just being first confers a durable competitive advantage…so there's no point to a patent monopoly that will last 20 years… Most industries could get along fine without patent protection".

In addressing the importance of non-IP incentives for innovation, Torrance and Tomlinson (2009) concluded that "[A] growing body of empirical research appears to support the view that patent systems do not necessarily 'promote the Progress of…useful Arts'".

Not only economists have this view; it is shared by a growing sector of business actors. For instance, the Computers and Communications Industry Association (CCIA) whose members include Google and Microsoft said that "We do not think it is an accident that innovation has flourished in a society that values an open, competitive economic marketplace, nor where original independent and free speech are enshrined in law… Therefore, our commitment to vigorous competition, freedom of expression, and openness is a natural product of the understanding of what has helped our industry thrive, and what it needs to continue to do so".

The WHO/CEWG (The Consultative Expert Working Group on Research and Development: Financing and Coordination) also recommended open approaches to research and development (R&D) and innovation. It found that there is insufficient R&D for diseases that prevail in developing countries and endorsed the adoption of a binding convention that guarantees the results of R&D will be public goods i.e. not subject to appropriation but free for use, to generate medicines needed particularly in developing countries. They also recommended prizes as incentives to innovation, in particular milestone prizes.

In summary, there is no conclusive evidence on IP and innovation. IP may promote innovation but it is not a 'magic tool'. It may also deter it. A large number of factors (such as the R&D infrastructure, the availability of risk capital, the qualification of personnel) can influence the nature and rate

of innovation in developing countries. It is crucial, hence, to consider non-IP mechanisms to effectively promote innovation in those countries.

Trends in Legislation, Jurisprudence and Policies in Developed Countries

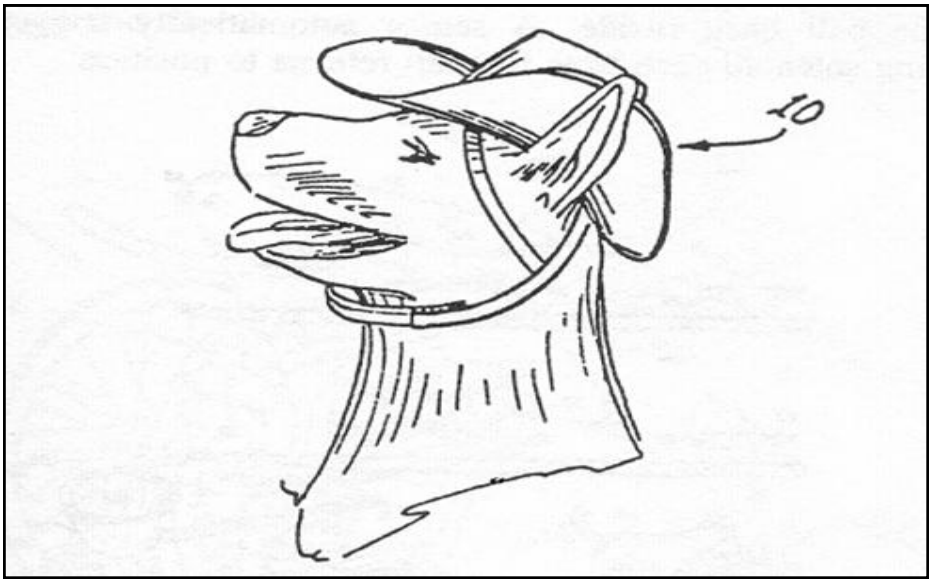
The last twenty years has shown a trend towards more and more IP protection. IP has expanded and been strengthened. Are there limits to this protectionist trend? I will explore four areas to answer this question: gene patents, inventive step, permanent injunctions and counterfeiting.

Regarding gene patents, when a gene is found to perform a certain function, if an absolute protection is granted, further research can be discouraged. The patent holder will be able to appropriate any possible use, including those he had never discovered. In order to address this problem, France limited the scope of patents to the specific use of the gene. Article L613-2-1 of the French Industrial Property Code, as amended in 2004, says

"The rights created by a patent grant that includes a gene sequence can not be invoked against a later claim on the same sequence if this claim complies itself with the [patentability] requirements… and it discloses another specific application of this sequence."

Similar limitations to gene patents have been made in other developed countries' laws such as in Swiss and German laws.

In the case *Association For Molecular Pathology, et al., vs. United States Patent and Trademark Office, et al.*, the plaintiffs challenged patents held by Myriads over genes and diagnostic methods relating to BRCA1 and BRCA2 (breast cancer type 1 and 2 susceptibility protein). The U.S. District Court for the Southern District of New York held that the patents were invalid on the grounds that the isolated genes are not patentable products of nature and that the diagnostic method claims were mere thought processes. The court went even further and stated that claims of 'isolated' genes were just "a lawyer's trick". The US Department of Justice's Amicus Curiae indicated that "The chemical structure of native human genes is a product of nature, and it is no less a product of nature when that structure is 'isolated' from its natural environment than are cotton fibers that have been separated from cotton seeds or coal that has been extracted from the earth". (Pollack, 2010)



Animal Hat Apparatus and Method—the subject of a patent granted in the US. There has been a growing trend in the granting of "trivial" patents.

How much skilled PHOSITA (person having ordinary skill in the art) is, in the US practice? Burk and Lemley (2002) have concluded that "The courts have endowed the PHOSITA with mediocre personality traits; she is conceived of as an entity that adopts conventional approaches to problem solving, and is not inclined to innovate, either via exceptional insight or painstaking labor". In fact, patents are too easy to obtain on any subject matter, and the low PHOSITA standard is partly to blame. An example of this is the Animal Hat Apparatus and Method. A redefinition of the inventive step standard in favor of the public domain was suggested in the US Supreme Court decision in *KSR v. Teleflex* which indicated that "A person of ordinary skill is also a person of ordinary creativity, not an automaton". However, a substantial change in the policy of the US Patent and Trademark Ofiice is not apparent so far.

Regarding permanent injunctions, an interesting case is *eBAY Inc. v. MercExchange, L.L.C.* MercExchange had sought a permanent injunction to prevent eBAY from continuing use of patented subject matter. Despite the fact that it was found that eBAY had infringed the patent rights, the District Court denied the request. The United States Court of Appeals for the Federal Circuit reversed this. The US Supreme Court then overturned the Federal Circuit's approval of the injunction. It indicated that "the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts."

In *Amado v. Microsoft* (February 26, 2008), Carlos Amado had sued Microsoft for patent infringement of U.S. Patent 5,293,615 – a "point and shoot interface for linking database records to spreadsheets". Microsoft requested the Federal Court of California a compulsory license which was granted against a royalty of US$ 0.12 per copy; Amado had requested US$ 2 per copy.

These examples show the use of flexibilities in the implementation of the patent system in the United States, which illustrate well the policy space available under the TRIPS Agreement, and the significant use of legislation and case law in such circumstances.

Developed countries are actively pursuing a crackdown on counterfeiting and piracy, focusing on its allegedly negative effects. If broadly understood, this may also affect the commercialization of legitimate products, such as in the case of the Anti-counterfeiting Act that Kenya was induced to adopt. The Anti-counterfeiting Trade Agreement (ACTA) is another example of a broad approach. It is often argued (based on an OECD estimate) that annual losses due to counterfeiting and piracy amount to around $200 billion. However, more nuanced views than the unqualified anti-counterfeiting approach, generally articulated by developed countries and their business associations, can be found in a study published by the US Government Account-

ability Office (*INTELLECTUAL PROPERTY: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods*, April 2010). The study concludes that current estimates of losses due to counterfeiting are not reliable, and considers both the negative and positive effects of counterfeiting. It found, for instance, that there are potential positive effects of counterfeiting and piracy:

- Some consumers may knowingly purchase a counterfeit or pirated product because it is less expensive than the genuine good or because the genuine good is unavailable, and they may experience positive effects from such purchases. For example, consumers in the United States and other countries purchase counterfeit copies of high-priced luxury-branded fashion goods at low prices, although the products' packaging and sales venues make it apparent they are not genuine. Consumers may purchase movies that have yet to be released in theaters and are unavailable in legitimate form.

- Lower-priced counterfeit goods may exert competitive pressure to lower prices for legitimate goods, which may benefit consumers.

- …companies that experience revenue losses in one line of business—such as movies—may also increase revenues in related or complementary businesses due to increased brand awareness. For instance, companies may experience increased revenues due to the sales of merchandise that are based on movie characters whose popularity is enhanced by sales of pirated movies.

- ….consumers may use pirated goods to "sample" music, movies, software, or electronic games before purchasing legitimate copies, which may lead to increased sales of legitimate goods. In addition, industries with products that are characterized by large "switching costs," may also benefit from piracy due to lock-in effects.

This analysis confirms that the right balance regarding this issue should be found in implementing national policies.

Another example of a more critical view of intellectual property than that generally articulated by developed country representatives is provided by a study undertaken by Professor Hargreaves at the request of the UK Prime Minister. The Hargreaves Report (2010) found, inter alia, that:

- Copyright, once the exclusive concern of authors and their publishers, is today preventing medical researchers studying data and text in pursuit of new treatments. Copying has become basic to numerous industrial processes, as well as to a burgeoning service economy based upon the internet. The UK cannot afford to let a legal framework designed around artists impede vigorous participation in these emerging business sectors.

- Government should firmly resist over-regulation of activities which do not prejudice the central objective of copyright, namely the provision of incentives to creators. Government should deliver copyright exceptions at national level…The Government should also legislate to ensure that these and other copyright exceptions are protected from override by contract.

- Government should ensure that development of the IP System is driven as far as possible by objective evidence. Policy should balance measurable economic objectives against social goals and potential benefits for rights holders against impacts on consumers and other interests. These concerns will be of particular importance in assessing future claims to extend rights or in determining desirable limits to rights.

Some of these recommendations are in tune with the positions held by developing countries in dealing with the WIPO Development Agenda and in other exercises and fora.

In view of some of the case law and reports mentioned above, it is pertinent to question whether the positions in international fora of some developed countries are consistent with changes in internal policies and perceptions on IP. Flexibilities on IP should not only be implemented at the national level, but preserved and developed at the international level, such as in normative activities in WIPO.

Law-making in IP

ACTA, a plurilateral agreement negotiated in a secretive manner, has been developed to set a standard to be followed not only by its contracting parties but by other countries. ACTA is functional to the interest of big companies, but overlooked the interests of small and medium enterprises and the general public. Despite the efforts of the small club of countries who are the proponents of ACTA, it did not turn out to be a successful story. There was strong resistance to it in civil societies. For instance, during the Valentine's Weekend in 2012, there were mass protests all across cities in Europe. In Poland, the prime minister suspended the ratification process of ACTA after widespread protests and attacks on government websites. In the Polish Parliament, several members disguised as 'Anonymous' as a sign of protest. The European Parliament voted by 478 to 39 to reject ACTA on 4 July 2012. It is a question now whether this initiative is still alive.

There were also important protests regarding the Stop Online Piracy Act (SOPA) and Protect Intellectual Property Act (PIPA), two bills submitted to the US Congress that would give authority to the U.S. government to block access to foreign websites on the grounds of copyright infringement. In one single day, on 18 January 2012, 10 million petitions against those bills were signed through different sites, 8 million calls were made to US Congressmen, 4 million mails were sent to the Congress and 115 thousand sites participated in a blackout, including Google, Yahoo and Wikipedia. On the same day thousands of people mobilized against these Bills in different cities of the United States. In the US Congress, the number of those in favour of SOPA dramatically decreased and those against dramatically increased after these protests. The number of Senators who publicly opposed PIPA went from only one Senator on 16 November 2011, to 32 on January 18. The bills were not passed.

These examples show the potential direct influence that civil society may have in IP law-making. With the widespread use of Internet and social networks, civil society can play an important role in shaping or opposing new IP initiatives. This may help consumers and users of technology to be heard, and developing countries' interests and concerns to be taken into account, ultimately leading to more balance in IP rules nationally and internationally.

The Use of Compulsory Licenses In Latin America

This article examines the situation in Latin American countries with respect to their laws and policies relating to compulsory licenses—and how Brazil and Ecuador have made use of such compulsory licenses for drugs.

By Carlos M. Correa

Compulsory licensing is one of the important 'flexibilities' recognized under article 31 of the Agreement on Trade-related Aspects of Intellectual Property Rights (the TRIPS Agreement).

Since January 1995—the general date of entry into force of the TRIPS Agreement—at least 12 developing and Least Developed Countries (LDCs) have granted compulsory licenses (CLs) or decided the public non-commercial use (hereinafter 'government use') of patents. The great majority of CLs/ government use involved drugs for HIV/AIDS. Only a few related to drugs for other communicable or non-communicable diseases: cancer (Thailand and India) cardiovascular disorders (Thailand) and avian flu (Taiwan). In one case a CL was also granted for patents unrelated to the pharmaceutical field.

Latin American countries have used the policy space left by the TRIPS Agreement to design national legislation on intellectual property (IP) to a different extent. So far, only two countries (Brazil and Ecuador) have threatened or made effective use of CLs/government use provisions.

Complaints under the Dispute Settlement Understanding (DSU) of the WTO based on the alleged inconsistency of national provisions on CLs with the TRIPS Agreement, were submitted against two countries in the region (Argentina and Brazil), in both cases by the USA. These complaints, however, did not lead to changes in legislation.

This paper examines, first, the modalities for CLs/government use available in Latin American legislation, and addresses its relationship with the provisions relating to test data protection. Second, it describes cases in which the TRIPS-consistency of the provisions on CLs was questioned in the context of the WTO rules. Third, it considers cases in which the possibility of the grant of a CL led to price reductions of the concerned products; the case of an unsuccessful request for a CL is also mentioned. Fourth, the CLs/government use granted in the region are briefly reviewed. Fifth, the status of implementation of the WTO Decision of August 30, 2003 in the Latin American region is examined. Finally, some conclusions are drawn from the previous analysis.

Provisions on CLs and government use

Patent legislation in Latin America provides for different grounds for the grant of compulsory license, as well as for the possibility of ordering the government use of any patent. An illustrative list of such grounds is provided in the Table below.

Grounds for granting CLs and government use in Latin American legislation

While a number of Latin American countries have signed free trade agreements (FTAs) with the USA and the European Union, such agreements have not introduced limitations on the possible grounds for CLs. This is possibly the result of the unambiguous confirmation by the Doha Declaration on the TRIPS Agreement and Public Health (hereinafter 'the Doha Declaration') of the WTO Members' right to determine the grounds for CLs.

As a result of such FTAs, however, the execution of CLs may be impeded if test data are subject to exclusive rights. Although the TRIPS Agreement only requires, under article 39.3, to protect such data against unfair competition, the FTAs with the USA and the European Union impose the so-called 'data exclusivity' that, under certain conditions, prevents a generic company from using or relying on the

Grounds for issuing CLs	**Countries where these grounds are provided for**
Failure to exploit a patent	Andean Community, Argentina, Brazil, Dominican Republic, Honduras, Mexico, Chile, Uruguay, Costa Rica
Public interest	Andean Community, Brazil, Dominican Republic, Honduras, Mexico, Chile, Uruguay, Guatemala, Costa Rica
National emergency and other circumstances of urgency	Andean Community, Argentina, Brazil, Dominican Republic, Honduras, Mexico, Chile, Uruguay, Guatemala, Costa Rica, El Salvador
Remedy for anticompetitive practices	Andean Community, Argentina, Brazil, Dominican Republic, Chile, Uruguay, Guatemala, Costa Rica
Failure to obtain a license under reasonable terms	Argentina, Dominican Republic, Honduras, Uruguay
Dependent patents (when a patent cannot be exploited without using another patent)	Andean Community, Argentina, Brazil, Dominican Republic, Honduras, Chile, Uruguay, Costa Rica

Source: Updated from Oliveira, Zepeda Bermudez, Costa Chavez, Velázquez (2004)

data developed by another company to obtain marketing approval of a medicine containing the same chemical entity. In these situations, while a CL may allow the use of a patent, the compulsory licensee may not be able to obtain the required marketing approval for its own product.

Although in an imprecise manner, some FTAs have attempted to clarify the relationship between CLs and test data protection, through 'side letters' that state that the FTA would not prevent the Parties from taking measures to protect public health.

In the case of the FTA between the USA, the Central American countries and Dominican Republic (CAFTA-DR) an"Understanding Regarding Certain Public Health Measures" states that "[T]he implementation of provisions of Chapter 15 of the Agreement does not affect the ability of either Party to take necessary measures to protect public health by promoting access to medicines for all. This will concern, in particular, cases such as HIV/AIDS, tuberculosis, malaria and other epidemics as well as circumstances of extreme urgency or national emergency." This wording is clearly limitative as it refers to cases where a measure is 'necessary' (a concept generally interpreted narrowly under WTO law) and to particular diseases.

In order to overcome the ambiguities in the relationship between data exclusivity provisions and CLs, the Chilean regulation on test data has clarified that such protection 'shall not apply, when: … the pharmaceutical or agrochemical product is subject to a compulsory licence, as established in this Law" (consolidated text, Industrial Property Law, No. 19.996, Article 91). This clause provides a good model for countries where a conflict between data exclusivity and CLs may arise.

Consistency of CLs provisions with the TRIPS Agreement

Lack or insufficient working of a patent

The obligation to work a patent – understood as the local manufacturing of a patented product or the industrial use of a patented process – was provided for in a large number of national laws in the XIXth century. During the twentieth century, however, most industrialized countries relaxed or eliminated such an obligation in order to ensure patent holders the option of exploiting their patents merely through importation and thereby facilitate transborder activities in an increasingly globalized world market.

During the Uruguay Round negotiations there was an intense North-South debate on the admissibility of CLs for lack of or insufficient working of a patent. Developing countries wanted to secure that a future Agreement did not restrict the possibility of granting CLs on those grounds, as allowed by article 5A of the Paris Convention. The divergences on this issue remained unsettled until the very final stage of the negotiations in December 1991, when a compromise was reached on the basis of wording incorporated into article 27.1 of the Agreement:

'…patent rights shall be enjoyable without discrimination...whether the products are imported or locally produced".

Many commentators and policy makers have read this provision as the death sentence of working obligations for patent owners. In fact, although some national laws have maintained or specifically provided for the grant of CLs for lack of or insufficient working, after the adoption of the TRIPS Agreement such provisions are not so common as before. In some cases, 'working' is interpreted broadly so as to encompass the importation of the patented product or of the product manufactured with a patented process. This obviously dilutes the working obligation as a tool to promote local manufacturing.

A proper interpretation of article 27.1, in accordance with articles 31 and 32 of the Vienna Convention on the Law of Treaties, however, suggests that the grant of compulsory licenses due to the lack or insufficient work are TRIPS-consistent. In effect, Article 27.1 of the Agreement does not specify whether the products that are "imported or locally produced" are those of the patent owner or third parties' infringing products. The "patent rights" referred to in Article 27.1 are defined in Article 28.1 of the Agreement, which only requires the granting of *negative* rights with regard to the exploitation of the invention, that is, the right to prevent third parties from using in various forms (without authorization) the patented invention. Hence, an interpretation of Article 27.1 read in conjunction with Article 28.1, suggests that the products mentioned in Article 27.1 are *infringing* products, not the products of the patent owner himself, since patents only confer exclusionary rights in relation to the former. In other words, Article 27.1 forbids discrimination between *infringing* imported and *infringing* locally made products, but it does not prevent the establishment of differential obligations with regard to products made or imported by the patent owner or with his/her consent.

Thus, the non-discrimination clause of Article 27.1 applies in cases where the rights enjoyed by patent owners are different (substantially or procedurally) depending on the foreign or domestic origin of the third parties' products. For instance, Section 337 of the U.S. Tariff Act was found inconsistent with the GATT in *United States -- Section 337 of the Tariff Act of 1930*, since it accorded less favorable treatment to imported products challenged as infringing U.S. patents than the treatment accorded to similarly

WTO

The Uruguay Round that closed in December 1993 in Geneva (above) established the TRIPS Agreement that tightened IPR rules, but which also contained flexibilities such as compulsory license.

challenged products of United States origin.

It should also be noted that Article 5(A)(2) of the Paris Convention – incorporated into the TRIPS Agreement via its article 2 - provides that each party to the Convention "shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, "*failure to work*" (emphasis supplied). In accordance with international law principles, there is a presumption against treaty conflict; that is, the Paris Convention and the TRIPS Agreement need to be read in a manner that reconcile their respective provisions. Notably, the latter does not explicitly ban or otherwise refer to CLs. In contrast, the TRIPS Agreement specifically excludes the provision on CLs (article 6.3) contained in the Washington Treaty in respect of Integrated Circuits.

Finally, article 7 of the TRIPS Agreement makes it clear that one of the objectives of the Agreement is to promote technology transfer, which may be ensured, in some circumstances, by means of compulsory licenses for non-working.

In January 2001, the US brought a complaint against Brazil arguing that the Brazilian law's authorization to grant compulsory licenses when patents were not worked was TRIPS-inconsistent. In accordance with article 68 of the Brazilian law:

(1) The following may also be grounds for compulsory licensing:

I - failure to exploit the object of the patent within the Brazilian territory for failure to manufacture the product or failure to fully use a patented process, except in case of economic unfeasibility, in which case importing shall be admitted; or

II - marketing that does not satisfy the needs of the market.

While Brazil and the USA failed to clarify the issue at the consultation stage of the WTO dispute settlement procedures and the USA was, hence, entitled to request the establishment of a panel, the USA withdrew the complaint, on the basis of an agreement reached with the Brazilian government. In accordance with this agreement, without prejudice to their respective positions, the United States and Brazil agreed to enter into bilateral discussions before Brazil makes use of Article 68 against a U.S. patent holder. This agreement does not prevent Brazil from granting a CL based on article 68, but only requires it to enter into bilateral discussions; Brazil may subsequently decide to grant a CL. It may be speculated that the USA withdrew the complaint against Brazil because of fears that an adverse ruling in WTO could set a negative precedent—from the US perspective - on the interpretation of articles 27.1 and 31 of the TRIPS Agreement. The fact is that the TRIPS-compatibility of CLs provisions for non-working has never been raised again under the DSU, despite the fact that several national laws contain provisions allowing for compulsory licenses in such cases.

CLs as a remedy to anti-competitive practices

The US questioned, in 2000, the consistency with article 31(k) of the TRIPS Agreement, of the provisions of the Argentine patent law No. 24.481, regarding the availability and grant of compulsory licenses to remedy anti-competitive practices. The US objection concerned the process for the grant of such licenses, as it wanted to make it clear that a prior determination of the existence of anti-competitive practices by the competition authority was required. US and Argentina reached an agreement on the matter, on the basis of the joint reading of the law and its implementing regulation (Decree 260/96). The agreement confirmed that 'in order to justify the granting of a compulsory license… a prior decision must have been handed down by the National Commission on the Defense of Competition (or the body that might substitute it in the future) analyzing the practice in question based on Law No. 25.156 (Law of Defense of Competition). According to this law, the existence of an abuse of a dominant position in the market must be established in order for a practice to be considered "anti-competitive".

CLs as a tool for price reduction

The number of CLs/government use granted worldwide has been low. This does not mean, however, that the provision of CL in national laws may not contribute to mitigate the effects of the exclusive rights granted to title-holders. A credible threat of a CL can discipline title-holders, particularly in respect of prices charged for protected products.

A good example of this situation is provided by the price reductions for two anti-retrovirals that the Brazilian government could secure after indicating that CLs could otherwise be granted. The Ministry of Health made HIV/AIDS medicines available free of charge to all citizens under the National STD/AIDS Programme. In 2001 the Ministry was able to obtain price reductions of 40 to 70% for Nelfinavir and Efavirenz on which Roche and Merck, respectively, held patents. The bargaining position of the Ministry was strengthened by the fact that Brazil already had manufacturing capacity in pharmaceuticals. Farmanguinhos, the main government drug producer, was able to produce several anti-retrovirals at low cost, as well as to reverse engineer and realistically estimate production costs for the drugs of interest to the Ministry of Health. This capacity was probably key in conveying Roche and Merck the message that the threat of CLs was real.

Another case that led to a reduction of the price of a combination of anti-retrovirals, but in this case, without issuing a CL, was triggered in Colombia by a request by non-governmental organizations in 2008 for the grant of a CL on Abbott's patented combination of lopinavir and ritonavir (Kaletra). This product was sold by Abbott at several thousands of dollars per person per year. However, the Ministry of Social Protection declined to issue a declaration of public interest and a CL. An "Acción Popular" (a type of class action lawsuit that can be filed when collective fundamental rights are violated or limited) was filed before the competent court. The court held that Abbott had violated a 2009 government pricing order and directed the Ministry to initiate procedures for the application of sanctions against it. On appeal, the Administrative Tribunal of Cundinamarca upheld in part the lower court's decision in September 2012. While it also declined to grant a compulsory license, it found that the Ministry of Social Protection had violated the collective right to health by not enforcing price regulations on Kaletra.

In response to the lawsuit, the government ordered reductions initially of around 54-68% of the price. The price control measures generated savings in 2009-2012 of about 100,000 million Colombian pesos. It has been argued, however, that taking the price of generic alternatives into account, savings could have been 100% higher if a CL would have been granted.

In another case, a request for a CL submitted to the competent authority in the Dominican Republic has reportedly been dismissed. It referred to the drug clopidogrel ('Plavix') marketed by Bristol Myers Squibb and Sanofi Aventis, a French company. The French embassy was reported to have written to the Secretary of State of the Dominican Republic to voice opposition to the compulsory license request.

CLs granted in the region

As noted, two Latin American countries, Brazil and Ecuador, have granted so far CLs, which are analyzed below.

Brazil

Brazil granted, in May 2007, a compulsory license regarding Efavirenz, an anti-retroviral patented by Merck Sharp & Dohme ('Merck') under the so-called *pipeline* mechanism (which allowed to retroactively obtain protection for products that would have otherwise been in the public domain in Brazil). 77,000 patients, equivalent to 42% of the total number of patients under the HIV/SIDA governmental programme, were treated with efavirenz.

Prior to the grant, the Brazilian government entertained negotiations with the patent-holder for a price reduction. The government noted that:

a) Merck Sharp & Dohme was selling Efavirenz at cheaper prices in countries at the same development level but with fewer people in need of treatment than Brazil;

b) Indian generic versions (supplied by Cipla, Ranbaxy and Aurobindo) were much cheaper than Merck's product, as cheap as US$ 0.45/pill or an annual cost of US$ 164.25/patient.

In negotiations prior to the CL, Merck offered a price reduction from US$ 1.59 to US$ 1.10 per dose, which was deemed unsatisfactory by the Brazilian government. Presidential Decree No. 6.108 (4 May 2007) decided the "compulsory license, on the ground of

Efavirenz generic version by Farmanguinhos, Brazil

public interest, of Efavirenz's patents, for public non-commercial use" , for a period of 5 years (renewable for an equal period), and a royalty fee for the patent owner of 1.5% of the finished product.

Initially, the CL covered the importation of generic versions from India at a third of the price offered by Merck. Farmanguinhos, the official pharmaceutical laboratory of the Oswaldo Cruz Foundation produced the first batch of Efavirenz in January 2009 at 45% of the price set by Merck before the CL. Due to the lack of sufficient technical information in the patent specifications, Farmanguinhos had to perform its own research activities in order to reverse engineer the product and to import small quantities of efavirenz from India; a preliminary injunction filed by Merck to stop the importation was rejected by the Brazilian courts.

The CL allowed the Ministry of Health to save around 58% (U$S 103.5 million) of the resources otherwise needed for the period 2007-2012.

The pharmaceutical company reacted negatively against the granted CL. The president of Merck's Latin American division, was reported to state that "the perception of Brazil will not be the same" and that the company was reviewing its investment plan in the country. A Merck spokesperson said that "[T]his expropriation of intellectual property sends a chilling signal to research-based companies about the attractiveness of undertaking risky research on diseases that affect the developing world, potentially hurting patients who may require new and innovative life-saving therapies." In a statement of 4 May 2007, the US Chamber of Commerce said that the '…[Brazilian] government has made a major step backward. Breaking off discussions with Merck and seizing its intellectual property sends a dangerous signal to the investment community. Merck researchers invested hundreds of millions of dollars to develop this ground-breaking medicine. Clearly, there was room to negotiate a solution acceptable to both parties…'.

Although the United States Trade Representative (USTR) had expressed concerns in the 2007 Special 301 Trade Report (drafted before Brazil issued its compulsory license) because Brazil had indicated consideration of the use of CLs on patented pharmaceutical products, no trade sanctions were pursued against Brazil after the grant of the efavirenz CL, nor an out-of cycle review of Brazil's IP regime was carried out.

Ecuador

Article 363 (7) of the Constitution of Ecuador provides that, for the attainment of the good living regime ("el regimen de buen vivir"), it is an obligation of the State, to "guarantee availability and access to medicines of quality that are safe and efficacious, to regulate their commercialization, and to promote the national production and the use of generic medicines that correspond to the epidemiological needs of the population.

The grant of CLs in Ecuador has been based on Article 2 of the Presidential Decree 116 of November 16, 2009, issued in accordance with Article 61 of Decision 486 of the Commission of the Andean Community and Article 154 of the Law of Intellectual Property which, taken together, establish that a compulsory license can be granted at any time for reasons of public interest, emergency, or national security.

Presidential Decree No. 118 of November 16, 2009 declared "of public interest, access to medicines used for the treatment of diseases that affect the population of Ecuador and that are priorities for public health." It specified that compulsory licenses could be issued for patents protecting medicines for human use that are necessary for the treatment of such diseases. This Decree opened the way for the grant of CLs on any patent relating to medicines considered to be a priority from a public health perspective.

In addition, Article 8 of Resolution

No. 10-04 P-IEPI of January 15, 2010, provided guidelines for issuing compulsory licenses on pharmaceutical patents. It provided that "[O]nce the documentation is examined and the patent holder is notified, IEPI, through the National Office of Intellectual Property (Dirección Nacional de Propiedad Industrial, DNPI), will request the Ministry of Public Health to indicate whether the object of the request is a medicine that is used for humans for the treatment of diseases that affect the Ecuadorean population and are a priority for public health."

On April 14, 2010 the government of Ecuador granted a CL for ritonavir, an antiretroviral drug, to Eskegroup SA, the local distributor of CIPLA, a generic company from India. The royalty (4%) was determined on the basis of the WHO/UNDP recommended 'Tiered Royalty Method (TRM)'. Eskegroup was obligated to pay $ 0.041 in royalties to Abbott for every 100 mg ritonavir capsule and $ 0.02 per lopinuine (combination of ritonavir and lopinavir). The CL led to a reduction of the prices charged by Abbott, and to the importation of generic products, with savings in the order of 30% of the original price.

The US Emergency Committee for American Trade (a business coalition) criticized the grant of the CL arguing that Ecuador's decision appeared to be 'contrary' to the TRIPS Agreement and qualified it as an effort "to nullify the protection of intellectual property". However, the reaction of the pharmaceutical companies directly affected by the measure was quite moderate. Although they emphasized the 'exceptional' nature that, in their view, CLs should have, they did not question the government's decision: 'We realize that the interests of public health are not subordinated to rights of any kind , especially in circumstances of particular gravity. And, consistent with our principle of compliance with and enforcement of laws, democratically accept the decision of the President to make legal use of this exceptional mechanism…'.

A second CL was requested to the government of Ecuador, on June 15, 2012, by Acromax Laboratorio Quimico Farmaceutico S.A., regarding the combination of the anti-retrovirals lamivudine+abacavir, protected by patent PI-08-1913 held by the Glaxo Group Ltd. The patent application, filed on May 14, 1998, had been issued on January 5, 2007 (Patent No.: PI-08-1913 ,"Una Nueva Sal"). The CL was granted by IEPI, after confirmation by the Ministry of Public Health that abacavir+lamivudine was a priority medicine, on November 12, 2012. The CL is non-exclusive, for non-commercial public use. It can be executed through importation or local production until the expiry of the patent, on May 14, 2018. In determining the royalty rate Ecuador also used the TRM. It was set as 11.7 cents per capsule. The government's aim is to reduce the cost of the medicine by 75%.

Implementation of the Decision of August 30, 2003

The Decision of August 30, 2003 established a mechanism, based on the waiver of paragraphs (f) and (h) of article 31 of the TRIPS Agreement, to allow the export of patented pharmaceutical products under a compulsory license to countries without manufacturing capacity in pharmaceuticals. WTO members decided to transpose this Decision into an amendment to the Agreement, through the incorporation of a new article, 31bis. Approval by the WTO members of this amendment is still pending, after six years from the General Council's adoption.

No Latin American country has notified the Council for TRIPS of its interest in using the mechanism established by the Decision as an eligible importing country. No Latin American country has amended its legislation either to specifically change provisions that exclude (in line with article 31(f) of the TRIPS Agreement) the possibility of granting a CL for exports only. The WTO Decision mechanism has never been used in the region.

Nine Latin American countries have approved the amendment to the TRIPS Agreement so far:

El Salvador (19 September 2006)

Mexico (23 May 2008)

Brazil (13 November 2008)

Colombia (7 August 2009)

Nicaragua (25 January 2010)

Argentina (20 October 2011)

Panama (24 November 2011)

Costa Rica (8 December 2011)

Honduras (16 December 2011)

The reasons explaining the low interest shown in the region regarding the use of the WTO decision need to be further explored. A possible explanation is the perception that the system created by the Decision is cumbersome and does not generate sufficient incentives for potential suppliers of low cost pharmaceutical products.

Conclusions

As examined above, the threat of CLs/government use has been effective in leading to price reductions for pharmaceuticals in some Latin American countries, while such licenses have only been granted in three cases, all of them relating to anti-retroviral drugs.

In comparison with other regions, Latin America has made a limited use so far of CL/government use provisions. This is despite the fact that national laws provide for different modalities of CLs, in line with article 31 of the TRIPS Agreement, and that domestic pharmaceutical companies control a significant segment (around 42% in value) of the regional market. The reasons for this limited use need to be further researched. They may relate to the fact that many drugs under patent in developed countries did not receive protection in Latin America in the pre-TRIPS era and, hence, the need for CLs/government use may have not been so pressing. Another reason may be the lack of expertise of health authorities in IP matters and on the ways to implement CLs/government use to address public health needs, and the limited weight of such authorities in decisions that may affect the country's relations with major trade partners. The fact that some patent offices have started to apply more rigorously the patentability standards may have also helped to avoid the need for CLs/government use.

Importantly, CLs may be granted to address any public interest. For instance, a CL grounded on the lack or insufficient exploitation of a patent may be conferred to allow a for-profit activity in the country of grant, in order to foster local manufacturing, incorporate technologies and create jobs. It is often wrongly assumed that CLs can only be used in cases of emergencies or public health crises, or that their use should be exceptional and always for non-profit. Nevertheless, CLs are an integral part of the patent

In April 2010, the Ecuador's government granted a compulsory license in favor of the Ecuadorian company Eskegroup S.A. for Ritonavir, a product patented by Abbott Laboratories for the treatment of patients with HIV/AIDS.

system and they can be implemented where the generation of alternative supplies is necessary or convenient for national interests, including of an economic nature. In fact, the TRIPS Agreement leaves ample room to determine the grounds of CLs/government use; it only provides in article 31 for a number of *conditions* that need to be met.

Similarly, it is sometimes believed that the government use cannot involve the participation of private entities. However, the TRIPS Agreement clearly allows the intervention of contractors, without distinction of whether private or public. The experience of the USA shows that private companies have been normally involved in and benefit from the execution of such use.

In some cases, the information provided in the patent specifications is not sufficient to implement the protected invention, and complementary know-how is necessary. CLs/government use may include, where needed, an obligation to transfer such know-how, to enable the effective use of the patent. Precedents of this kind can be found in US decisions. There are no limitations under the Latin American legislation to impose this kind of requirement, which is not banned by the TRIPS Agreement.

The national laws of several Latin American countries should be amended in order to allow for a broader application of CL/government use, including in some cases an expansion of the grounds that can be invoked, a stricter definition of working requirements, and a simplification of procedures.

Concerns about possible negative reactions from developed countries' governments and their implications for trade or political relations, may also be a factor explaining the relatively low number of CLs/government use of patents in Latin America. Such concerns may, however, be exaggerated, as shown by the case of Ecuador and – outside the region - Indonesia, which has recently granted seven CLs without any known negative repercussions. Importantly, no complaint has been submitted against countries that granted CLs/government use under the WTO dispute settlement rules. This is a strong indicator that the legitimacy of the CLs and government use under the TRIPS Agreement are out of discussion, particularly after the clear confirmation by the Doha Declaration in this regard. This should provide sufficient comfort to governments facing situations of high pricing or lack of access to certain technologies or products, and should encourage them to consider CLs/government use as an ordinary measure they can adopt. CLs/government use should not be viewed as 'exceptional' mechanisms, but as one of the instruments, inherent to the IP system, that governments can normally implement to address national needs and attain their objectives in areas such as industrialization, agricultural development, environmental protection, education and public health.

Although CLs/government use can be applied in relation to patents in any field of technology, public health concerns are likely to continue to be the leading cause for their grant, particularly to the extent that governments elaborate IP strategies that fully integrate IP measures into their national policies on public health, and that it is feared that high prices of patented medicines, particularly, anti-retrovirals, may have 'devastating' effects in the region.

Importantly, notwithstanding the efforts that the US government made during the negotiation of the WTO Decision of August 30, 2003 to limit the use of CLs to certain infectious diseases, CLs/government use can be applied to *any* medicine. Moreover, as illustrated by the case of Taiwan – and indeed of the USA - CLs/government use can be implemented to ensure access to other technologies outside the pharmaceutical field, for instance, technologies necessary to address climate change adaptation or mitigation.

Finally, it will be important for competition authorities in the region to better understand the relationship between IP and competition law, and to use CLs as a remedy in cases of anti-competitive practices, including refusal to grant a voluntary license on reasonable commercial terms when access to an essential patented technology is precluded. The CL issued by the Italian competition authority with regard to a pharmaceutical product provides a telling example of the space available in this regard. Competition authorities may also consider to develop specific guidelines to address such relationship.

SOUTH BULLETIN

EDITORIAL COMMITTEE

Chief Editor: Martin Khor

Managing Editor: Vice Yu

Assistants: Xuan Zhang, Anna Bernardo

The South Bulletin is published by the South Centre, an intergovernmental think-tank of developing countries.

South Centre website:
(in English, French and Spanish)
www.SouthCentre.org

South Centre
Tel: +41 22 791 8050
Email: south@southcentre.org