INTELLECTUAL PROPERTY: PERSPECTIVE OF THE DEVELOPING WORLD

*Peter Gakunu**

One of the main preoccupations of diplomats is always saying "Thank you", and I think I should start by expressing my gratitude for being invited here in these beautiful surroundings. I have never been to this part of the United States before. For me, this is a very unique opportunity. I am also glad to note that under these beautiful and serene surroundings I might stumble into somebody that I perhaps went to school with. Unfortunately, I would need to start going back to school to join the eminent lawyers in these surroundings.

That having been said, I very much regret that Ambassador Batista from Brazil will not be here this afternoon because I would like for him to present the viewpoint of the developing countries from Brazil's perspective. As you know, the problems of Brazil are not really the problems of most developing countries. In fact, the problems of Brazil in the ongoing GATT negotiations are not problems of any developing country. Brazil is in a unique situation in these negotiations. But since the Ambassador is not here, I will try to present a comprehensive developing country perspective.

I. INTRODUCTION

As you have already been informed, I work for an organization called ACP that consists of 66 countries from Africa, the Caribbean and the Pacific. They are all developing countries with most of them at the lower end of development. So you will understand my sentiments when I speak about the problems or the perspectives of developing countries in the context of the Uruguay Round. You can imagine the daunting tasks that they face.

I shall not define the negotiating mandate on trade-related aspects of intellectual property (TRIP) because Mr. Kakabadse tried to indicate this morning generally what the negotiating mandate is in the case of TRIP. I will begin my remarks by trying to give from my own perspective the viewpoint of both the developed countries and of the developing countries. The interpretation of the mandate by the developed countries, in particular the United States, Japan, or

* Chief, Trade Cooperation Division; African, Caribbean and Pacific Group of States (ACP Group), Brussels, Belgium.

the European Community, is that the negotiations should come out with global standards for the protection and enforcement of intellectual property rights. The developing countries, however, emphasize that the negotiations should merely clarify existing GATT provisions on the trade-related aspects of intellectual property rights, and they consider negotiations and global criteria for intellectual property protection to be outside the scope of the GATT. I think you will immediately see my position vis-á-vis my predecessors.

While the developing countries only consider it a matter of clarification, in contrast the developed countries think they must come out with a legal framework. It is still necessary, however, for the developing countries to be prepared for either alternative, just in case. In other words, they must be prepared for a situation in which either clarification of relevant GATT provisions or a full-fledged GATT agreement on the protection and development of intellectual property rights is concluded. But it should also be noted that the negotiations may not yield any agreement at all, in which case adaptions of existing agreements may have to be considered.

The extent to which substantive standards on intellectual property protection are to be covered under the GATT framework is still an open question. However, it would seem inappropriate, at least from a developing country point of view, for the GATT to duplicate complimentary initiatives that take place already in WIPO and other international organizations, because I do not think that the negotiations on intellectual property are intended to renegotiate the existing conventions. It would further appear inappropriate for the GATT to negotiate modifications of these conventions. Therefore, the precise relationship between any new GATT rules and the work undertaken in these other international organizations needs to be clarified first.

Are we going to negotiate new agreements, new conventions, or are we going to amend existing conventions? If we are going to amend existing conventions, who is more competent to do it? Is it the GATT or WIPO or other institutions that are already entrusted with those conventions? If we are going to negotiate new conventions, what measures will they include in relation to those that already exist?

It would also be inappropriate to require developing countries to adopt any new rules in this area that may be inconsistent with their national development interests. The emphasis on development interests is not necessarily the same as special and differential treatment for developing countries which developed countries want to have eliminated. Of course this does not mean that the developing countries should not continue to resist these moves.

With or without special and differential treatment, the promotion of national development, which has always been central to the operation of intellectual property regimes not only for developing but also for the developed countries, must be reflected in negotiations on trade-related intellectual property rights. If we take the first approach, whereby the negotiations will be limited to clarifications of the few GATT provisions relating to intellectual property rights, then this would preclude the establishment of a new global regime on intellectual property protection.

This approach would seem to bring a lot of pressures, but it would be preferable for developing countries because it would avoid conflict with existing international instruments. If we have to follow this road, the approach will leave developing countries open to bilateral pressures to modify their policies and measures, without the benefit of any multilaterally agreed criteria. In other words, there would be no multilateral protection for developing countries. Therefore, if this approach is successful, in the final analysis, there will be a need to ensure that such bilateral pressures which may be accepted by developing countries are strictly within the GATT dispute settlement procedures, so that these pressures will not be used as restrictive trade barriers.

If the second approach is taken (that is, the approach which the developed countries are proposing where they emphasize the advancement of global economic interests), then developing countries must out of necessity introduce counter-proposals designed to preserve and even to broaden the scope of national development objectives which are in direct contradiction with the positions taken earlier this afternoon. This is a necessary feature because there is a need to balance intellectual property rights, like any other rights, with corresponding obligations.

There is much, for example, in the historical evolution and even in the current practice of developed countries which warrants the introduction of technological and economic development objectives into the negotiations quite apart from the fact that economic development is one of the declared objectives of the negotiations as a whole. In the event that there is no such balance between the trend to liberalization as proposed by the developed countries and the development objectives of developing countries, it would obviously not be in the interests of developing countries to subscribe to any other type of agreement. While this may lead to the intensification of bilateral pressures, it would also mean that renewed efforts need

to be made to pursue or reactivate other initiatives in WIPO and elsewhere.

These are the general aspects of the problem, but I come back to the basic principles of the issue of intellectual property. As with most proposals of the developed countries, the central theme here is that increased global protection of intellectual property rights will lead to increased trade liberalization and generate increased economic growth and development for all countries. This is the main objective of liberalization of trade in this area. However, such increased protection is equally likely to strengthen the use of intellectual property rights in ways that might restrict international trade and the transfers of technology. Moreover, intellectual property policies pursued earlier by many OECD countries themselves differ from those that are now embodied in their proposals for negotiations on TRIP.

The promotion of national technological and industrial development has always been the main rationale for the protection of intellectual property rights. In this regard, the national treatment standard which is embodied in the Paris and Berne Conventions has always allowed each country the right to determine its own level of protection. There is therefore no justification for departing from this standard or substituting for it any other. This point was made in the reverse way to justify the need to introduce a new system. I do not see the justification for a new system from a developing country's point of view. This is particularly so because the GATT negotiations do not intend to amend existing conventions or replace existing institutions in this area. Since the ultimate objective of intellectual property protection and trade liberalization is economic growth and development, development considerations must therefore override all others in determining levels of intellectual property protection.

At the present time, even though the discussions are only at a preliminary stage, they have demonstrated the necessity for each country to fashion its intellectual property laws on the basis of its own economic conditions and needs. In fact, this is why the United States has brought the question of intellectual property into the context of the GATT: because of the United States's own economic conditions and needs.

Now, the principles that have been suggested, namely, national treatment, MFN, and reciprocity, are not superior to those that are embodied in the existing regime. The national treatment standard under the GATT is of course designed to ensure equal internal treatment for imported and domestic products, rather than for intellectual property. Its application to intellectual property protection

in the GATT context should not involve any departure from the Paris and the Berue Convention standards, which also require equal treatment for nationals and foreigners in the protection of intellectual property. National treatment should not be interpreted to mean treatment on the basis of global or externally imposed criteria. When you look at the reciprocity standard, it has only recently been introduced unilaterally in the U.S. legislation in order to protect semi-conductor chips and to pressure other countries to adopt similar legislation in bilateral agreements with other countries. If the reciprocity standard is to be applied to all intellectual property rights, it would arguably be a violation of the national treatment standard, since countries can withhold such treatment if this standard is not met.

Secondly, for most developing countries, and certainly for the ACP states, reciprocity will be devoid of any real meaning since these countries are importers rather than exporters of technology. They do not produce any technology, so reciprocity would not be a good thing to introduce in this particular area for these countries. Developing countries would be required to treat technology imports on the basis of externally imposed criteria in return for an empty commitment of reciprocal treatment from the other side. That cannot work.

Thirdly, reciprocity would be a regression from non-discrimination, since it will lead to discriminatory treatment of nationals whose countries cannot reciprocate. It would also be inconsistent with the general principles governing negotiations, because developing countries would be required to reciprocate, and in terms of the ongoing negotiations, these countries are supposed to get special and differential treatment in all areas. In fact, one of the conditions of the negotiations is that after they are completed there will be mechanisms to ensure that developing countries are not made to reciprocate in those areas that they are not required to.

Therefore, it is neither necessary nor appropriate to stretch the GATT standards of national treatment and MFN to cover intellectual property protection. There can be no justification for superimposing a reciprocity standard on this convention. This would be a violation of and a regression from national treatment and non-discrimination.

I need to make a few other points here. First, to the extent that the various OECD proposals would require a degree of uniformity in intellectual property laws in all countries, they tend to overlook or ignore diverse technological and economic conditions amongst countries. It is very difficult to come out with a common standard of law that is enforceable. To legislate global uniformity in the face

of global diversity and plurality would not be sensible or wise for most developing countries.

Second, such an approach would duplicate the rigidity of the original GATT framework—which has proved difficult to rectify in a satisfactory manner over the past 40 years.

Perhaps I need to give a specific example of patents. I would like to touch on that briefly because among the developing countries the background of these negotiations is a picture of overwhelming foreign dominance in patent protection. There have been low levels of local working of patents granted, and the predominant use of these patents as trade monopolies or as privately controlled non-tariff barriers. Therefore, negotiations in this area should be oriented towards facilitating increased access to technology and increased local working of such technology if the objectives of trade liberalization and development are to be achieved. In fact, earlier it was said that examples were being given of patent exclusions. For example, in the case of pharmaceutical products, out of the forty-nine exclusions only eight of them apply to African countries; the rest of them apply to other countries. So you can see where the problem really is in terms of the effect.

In any case these exclusions occur in developed and in developing countries as well, mostly for technical reasons. For example, certain sensitive subjects were not includable for reasons of public health. Thus, it is difficult to conceive of a standard prescription for the treatment of this problem by all countries. Such a prescription would seem, in any case, to be futile for the most part, since this is an area highly subject to omnibus exclusions for public health and/or public policy or security reasons. So the laws would have to be rigged with exceptions. They would not be really effective laws in terms of intellectual property protection.

With respect to the other comment made on local working and compulsory licensing requirements, there is no particular problem with the inclusion of such a requirement. The problem is in the question what should be its terms. The developing countries note that for periods approaching a century or more and until very recently, a number of industrialized countries, including the United States, used patent non-use as grounds for nullification. The use of compulsory licensing has been accepted as a hard-fought compromise in the Paris Convention, to replace the more common penalty of nullification for patent non-use in the late 19th century. Now, most European countries maintain compulsory licensing requirements in their laws for reasons similar to those advanced by developing coun-

tries. Therefore, it does not seem appropriate for the developing countries to accept the abolition of the compulsory licensing requirements, and there does not seem to be any convincing justification for its abolition.

I will stop here for the time being. I would like to conclude in the following way. The developing countries prefer an agreement which is geared towards the promotion of technological and industrial development, rather than trade liberalization per se. This means that each country would continue to be free to determine the terms and conditions of protection within its territory in the context of prevailing international conventions and agreements. International protection of intellectual property must be on the basis of national treatment which ensures non-discrimination as between nationals and foreigners and as between different foreign nationals. Reciprocity is an unwarranted regression from this standard.

There cannot be uniformity in the substantive content of intellectual property laws, given the wide disparities in the underlying socio-economic conditions and needs at the national level. On this point I need to refer particularly to the developing countries in cases where they are taking structural adjustment programs; if such uniformity of law were implemented, there would be some conflict in as far as these kinds of programs are concerned.

It is also not in the interest of developing countries to fashion their intellectual property laws on the basis of criteria that are derived from the conditions and interests of the technologically advanced countries. The guiding principles must instead be the advancement of technological and industrial development, and thus must include local working and compulsory licensing requirements, the allowance of parallel imports, and the control of technology licensing restrictions and other restrictive business practices. At this point it is necessary to recall that a couple of years ago, perhaps the developmental aspects in intellectual property were more interesting to the United States than the trade aspects are at the present time. Now that the United States is at its present level of technological development, the trade aspects of intellectual property become more important for it than the development aspects. This should not prevent other countries from pursuing development objectives in preference to liberalization objectives.

With respect to the question of counterfeit goods, the enforcement of intellectual property rights imposed in respect of production and international trade must be based on the substantive rights existing in national legislation. Only the international trade aspect (with the

goal to control trade in counterfeit products) should be a subject for negotiations. Any enforcement measures that are agreed upon must be carried out in the text of development objectives and must avoid new administrative and budgetary burdens.