

WIPO AND THE DEVELOPMENT AGENDA

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Last week of September 2006 will witness a momentous development in the world intellectual property rules when the General Assembly of the World Intellectual Property Organisation (WIPO) is going to decide on the Development Agenda. Decisions will be taken on how best to integrate developmental needs and concerns of the developing countries into the WIPO activities which have hitherto been devoted to international patenting business benefiting the interests of the IP holders mostly from the developed countries. This initiative beginning with arguments in the Sept - October General Assembly proceedings of 2004, has finally culminated into a resolution for a 'practical and concrete' result of a Development Agenda for the WIPO in the Sept 2006 Gen Assembly. In October 2005, the General Assembly took a final decision to establish a development oriented intellectual property regime. This move was little noticed, especially in India whose role in the reform of WIPO was not as impressive as it is at WTO; but according to the Nobel prize winning economist Prof. Joseph E Stiglitz, this decision was "as important as the WTO decision that the current round of trade negotiations be devoted to development"¹. The Doha Development round now stands indefinitely suspended due to the intransigent attitude of the USA and other developed countries. If Doha has been scuttled, is it possible to achieve a Development Agenda for WIPO, which would considerably benefit the developing countries? This entails understanding of the background of the WIPO till it was subjected recently to the new mandate of having to attend to the developmental needs of the vast majority of developing countries. How do the developed countries react to such a global initiative for reforming WIPO which has been serving principally as an instrument in areas where W.T.O. (especially the TRIPs Agreement) have put checks on their unilateral conduct? WIPO may not be as important as WTO, but this reform has attracted an unwholesome endgame from the bloc of developed countries who are chary about the success of a Development Agenda which is likely to affect current trend of working of WIPO.

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¹ *The Economic Times* 25 December 2005.

The idea of WIPO as a specialized agency of the UN can be traced to the 1967 Stockholm Conference², which has approved the WIPO convention. It actually came into existence in 1970 replacing BIRPI (*The Bureaux International Reunis pour la protection de la Propriety Intellectuelle*), the secretariat to both the Paris Convention for the Protection of Industrial Property (1983) and the Berne Convention for the Protection of Literary and Artistic Works (1986). The main objectives of WIPO have been mentioned in Article 4 of the Convention and they are:

- (i) to promote development of measures designed to facilitate the efficient protection of intellectual property throughout the world and to harmonize national legislation in the field and
- (ii) to encourage the conclusion of international agreement designed to promote the protection of intellectual property.

Amid resurgence of the forces of ‘Third World Unionism’³ during the early 1970s, steps were taken and an agreement was signed in 1974 between the UN and the WIPO recognizing the latter as “a specialized agency of the UN”. This UN-WIPO Agreement holds WIPO responsible for “taking appropriate action in accordance with its basic instrument *inter alia*, for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development.”

Following the passage of the 1970s, the enthusiasm for shaping of a pro-development profile by WIPO dried up. It remained stuck in its maintenance routine at best or promoting the cause of the private sector at worst. All these were explained away by a mission, in the words of its long time Director-General Dr Kamil Idris, “to work for robust IP protection and enforcement to ensure its continuing vitality”⁴. “The obsession with a

² The Berne Convention was revised to give special protection of some copyright issues to the developing countries. WIPO was created in this revolutionary ferment but as we shall see soon, most of its ‘shining’ was on the side of promotion of a global patent regime in furtherance of the interests of the developed countries.

³ The 1970s have been a decade of declining fortunes for the US-led camp. 1970s witnessed quadrupling of the oil prices by the OPEC countries demand for a New International Economic Order etc. This surge of aspirations from the developing countries was characterized as ‘Third World Unionism’ by the conservative American foreign policy analysts.

⁴ Dr. Kamil’s book *Intellectual Property-A Power Tool for Economic Growth* (2001) gives an inkling of how WIPO sees itself as having fulfilled its mandate

maximalist rights (IP) culture”, critics argue, seldom promotes IP as a system, it actually becomes a burden on creativity. Even in this realm of IP protection, the last 30 years’ working of WIPO has shown that while “intellectual property protection has expanded exponentially in breadth, scope and term”, the fundamental principle of balance between the public domain and the realm of property seems to have been “lost”⁵.

It needs to be said that WIPO’s unhappy state affair is largely due to indifference of its Member states. IP protection is a matter which interests countries with high levels of technological development and while their number is not many (especially among the developing countries), only five members contribute about 3 percent of WIPO’s budget. As per the WIPO website, 85% of its budgeted expenditure for 2004-05 was from the earnings from the registration systems under the Patent Cooperation Treaty (mainly) and other treaties it administers. Thus it is predominantly funded by the private sector users for its gate-guarding services.

On the one hand, the importance IP protection has grown by leaps and bounds while the designated body has been kept starving of funds. The history of the evolution of WIPO has thus skewed in favour of peddling for the mighty and the powerful. This is evident in its twin (major) functions of:

- (a) promoting harmonization of national laws in the developing countries to approximate higher ones from the developed countries and (b) providing technical assistance to them in implementation of the Trade-related Intellectual Property (TRIPs) Agreement which is a part of the WTO.

and what it envisions its future to be the Director-General-driven initiative began with presentation of an “Agenda for development of the international patent system” to the 2001 General Assembly (about this move later). With this turnaround, WIPO successfully sidestepped issues vital to the development of the developing countries viz., issue of genetic resources and traditional knowledge and a related issue of disclosure of source of origin (which India has introduced through amendment but the developed countries are balking), issue of flexibility’s which TRIPs Agreement affords the developing countries to have their laws of national protection against multinational’s unaffordable and expensive drugs, the rampant issue (in its original mission) of protecting authors and musicians who are being fleeced under prevailing copyright laws which mainly benefit the major industry owners etc. else.

⁵ Professor James Boyle in his presentation to the Geneva Workshop on the ‘Future of WIPO’ September 2004.

As the Nobel laureate Professor Joseph Stiglitz forcefully argues, intellectual property should never have been included in a trade agreement like GATT (General Agreement on Tariffs and Trade which provided rules for trade during 1948-94, especially in its last lap leading to creation of WTO) partly because its regulation is demonstrably beyond the competency of trade negotiators⁶. Developing countries including India were opposed to inclusion of IPRs and they thought they could be better dealt by WIPO whereas the developed countries actually carried the show by maintaining that only 'trade-related' aspects of IPR may be included since otherwise it may lead to creation of new principles. It is only in the final rounding of the TRIPs Agreement that obligations asking for a uniform standard of protection was imposed on all members. An opportunity came during the mid-term review of this TRIPs mandate but by then, both Brazil and India the leading opponents of this move were already neutralized by the US which had invoked its section 301 of the Trade Act of 1974 primarily targeting them on grounds of denying "adequate and effective protection of IPRs"⁷.

Since it applies to technology transfer, IP protection is actually more a question of trade than manufactures; further into this circle, it is more a question of intangible concepts and ideas than of physical things. Counting of world's wealth has now changed. According to Alan Greenspan, the recent retired Federal Reserve Board Chairman of US; the nature of composition of global assets has dramatically changed during the second half of the 20th century. Whereas physical resources have registered a marginally high growth rates, the value added through concepts and ideas has registered a "threefold rise". It is these, which are traded more than the physical output, which, in any case, enjoys legislated protection against any competition. Through patent pools, which the corporate houses make, they divide the market among themselves and exclude new competitors. In this way IPRs have helped establish monopoly capitalism. In the name of rights, thus governments give away to the corporate houses to make profits about which the taxpayer public often is clueless. This discrimination in domestic laws could not have been repeated in the sphere of global trade, which is based on rules of fair play and democratic decision-making among

⁶ Supra F.N.1.

⁷ V.G. Hegde: East is Not West *Combat Law* June - July 2005

⁸ Michael Perelman: the Political Economy of Intellectual Property *Analytical Monthly Review*, January 2003 Vol. 1, No. 1 p. 32

sovereign and equal nations. Under the pressure of technologically developed countries, a weak WIPO moved quickly to collaborate with the WTO in implementing TRIPs assuring to provide technical assistance to the developing countries. The unstated aim has been to bring the IPRs within the enforcement system of the WTO whose members are inflexibly bound to its decision and the global asymmetry is allowed to continue with vitality. Following an agreement signed between the two in January 1996, a joint initiative was launched to help developing countries implement TRIPs by 2000 deadline, and the least developed countries by 2006.

Performance records of WIPO during these days show a sharp polarization tendency. On the one hand, it was mostly Secretariat-driven and in that role, was essentially engaged in harmonization of laws and reforms in procedure for patent applications. WIPO was promoting a Patent Agenda as against a Development Agenda which it was mandated to promote under the UN-WIPO Agreement. On the other hand, it has failed to accomplish the member-driven missions. According to Martin Khor Director of the Third Work Network, WIPO has clearly failed in providing technical assistance to Cambodia when it could not inform it that the least developed countries (like Cambodia) are clearly exempt from granting patent for pharmaceutical products of the multinationals until 2016⁹. Speaking at the Sept. 2004 WIPO Gen. Assembly, Mr. Khor advised WIPO to inform the member countries about what is good for their countries rather than emphasizing only on their obligations under the TRIPs. WIPO should also advise the member countries against undertaking ‘TRIPs – plus’ provisions found in bilateral free trade agreement which the developed countries trap them into signing, thus taking away fruits of democratic struggle for rules-based trade as enshrined in the TRIPs Agreement¹⁰. The Commission on intellectual Property Right set up by the UK Govt. in 2001 was also critical of the role of IPRs in transfer of technology to the developing countries. It concluded “The reality has been a victory of IPRs over affordable access to technology for developing countries”¹¹.

In nutshell, the WIPO was riven with twin forces clashing for their interests: the Secretariat’s drive for a Patent Agenda *versus* the member states who have put their acts together to remind WIPO that (i) it is a UN

⁹ Chee Yoke Ling: ‘Intellectual Property: Knowledge Creation or Protectionist Agenda?’ *Third World Resurgence* No 171/72 P. 20

¹⁰ Sangeeta Shashikant Ibid.

¹¹ See www.iprcommission.org

agency and like other agencies, its primary mission is to address the concerns of the developing countries who are also most numerous. This contradiction in the functioning of WIPO has worked in two opposite directions.

In one direction, WIPO chose to engage itself with an 'Agenda for the International Patent system'. This initiative consisted in a three-pronged strategy and all in the direction of normative setting of the standards of patenting. The Patent Cooperation Treats (PCT) has put in place a system for international patent filing and WIPO, the governor of PCT deals with harmonization of such patent filing procedures. It was due to bungling of an Indian official Mr. A.E. Ahmed in the 2003 General Assembly of WIPO that India was about to concur on an upward harmonization based on 'permissive standards' of the developed countries. Timely intervention by the Indian ambassador at UN saved the scene and the Govt.'s stand was allowed to prevail over the bureaucrat's evasive role on the floor¹². India has signed the PCT. The second leg of the patent agenda consisted in the Patent Law Treaty (PLT) which is a parallel and complimentary move to make patent systems of countries more uniform by procedure simplification and equivalence. India has not joined this Treaty. The third leg belongs to the substantive Patent Law Treaty (SPLT). In terms of official wording, the SPLT is for "greater substantive harmonization of the patent laws of the member states" which is a "desirable objective". It was hoped that owing to their overlapping nature all the three treaties are likely to converge into one by 2010.

But the 2004 General Assembly of WIPO rejected SPLT¹³ which aimed at setting maximum standards, unlike the minimum standards approach of the TRIPs and the Secretariat was asked not to proceed further without consultation with the member states. Developed countries have often adopted dubious methods to force the developing (especially the least developed) countries to fall in line. Mr. Ahmed's case belongs to the category of a person indulging in evasive action since he was endorsing the case of an 'optional protocol' for a 'procedural' reform. But as the Government of India's correctional measure has correctly instructed, in

¹² For a detailed report on this unfortunate incident which would have cost national loss of authority in favour of some specified offices in the developed countries (especially USA) for granting of patents see K.G. Narendranath *The Economic Times* 30 March 2004.

¹³ That was when a Japan - US proposal was rejected by the developing countries in the 2004 Gen Assembly.

international diplomacy 'optional' actually becomes real (as with Non-Proliferation Treaty e.g.) and what is 'procedural' tends to become a 'substantive' reform in patenting (which in the real world means submission to higher standards). But this type of arm-twisting has found an institutional basis in the regional and bilateral agreements signed by the developed countries (especially, the USA) with the LDCs and some developing countries through which multilateral democratic impediments to unilateral impositions are sought to be outflanked. For example, TRIPs does not refer to international convention for the Protection of New Varieties of Plants (UPOV) but these agreements compel them to join it. Similarly TRIPs allows members to exclude plants and animals from their patent laws. But again, these agreements force them to provide patent protection on plants and animals.

With the crescendo of opposition rising against the WIPO's preoccupation with patent harmonization, the developing countries have put their acts together to change the direction of WIPO's working so that it meets its responsibilities as a UN organ hereforth. This is the other direction of the contradiction we referred to above which itself is crystallizing in the shape of a demand to establish a Development Agenda for WIPO.

Parallel to these internal developments leading to the demand for establishment of a development-oriented IP regime in WIPO, we have WTO decision that the current round of trade negotiations since the Qatar ministerial meeting (2005) should be to "add" a development dimension to it. Though little noticed, this decision to have a Development Agenda marks a new and progressive stage in this 'global debate' on intellectual property. It all began in 2004 Gen. Assembly session with Brazil and Argentina launching their initiative which was quickly supported by 12 developing countries, now called Friends of Development Group comprising Bolivia, Cuba, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania, Uruguay and Venezuela. India supported the move later, but it was not among the leaders who had taken this initiative. An NGO statement signed by over 25 organizations and another group of 500 eminent persons from both developing and the developed countries comprising scientists, economists, legal experts, two Noble laureates gave their call of support in the Geneva Declaration on the Future of the World Intellectual property Organization¹⁴.

¹⁴ The General Declaration is a powerful statement articulating the interest and concerns of the developing countries. For generations, WIPO has responded primarily to the narrow concerns of pharmaceutical companies, powerful

Introducing the proposal on September 30, 2004, Brazil said that development is recognized including by the UN, as a very important principle and WIPO as a UN agency should be guided by these principles. Time has come for the WIPO to integrate development in all its activities since it is inclusive by nature. Argentina said that WIPO is a specialized agency of the UN, and the UN in its agreement with this organization has recognized WIPO's role in promoting creative intellectual activity, enhancing technology transfer and speeding up development. India which supported these initiatives argued that "A WIPO Development Agenda would obviously need to take into account any possible negative impact on the users of IP, on consumers at large, or on public policy in general, and not just the promotion of the interest of intellectual property owners" who are mostly from the developed countries.

At its September 2004 session, the WIPO General Assembly decided to convene the Intersectional Intergovernmental Meetings (IIM) to examine the proposals received from the Member states for establishment of a Development Agenda for WIPO. Seven substantive proposals were received from the US, Mexico, the Group of Friends of Development, the UK, Bahrain and other co-sponsors, the African Group, and Chile.

In addition to discussions at the IIMs, many other stakeholders including civil society groups, NGOs, industries have organized seminars, conferences and provided vital inputs making establishment of a WIPO Development Agenda "no longer a simple WIPO issue but a global discussion".

A significant amount of time at IIMs and virtually all the time at the 2005 General Assembly was taken up by discussions on procedure. That question was definitively settled by the General Assembly with the setting up of the Provisional Committee (PC) which took over from the IIM with a mandate "to come up with concrete and practical results by the end of its second session on 30 June 2006". The central task for the PC was to "integrate the development dimensions broadly" with WIPO's diverse activities and it was to be finished in two (February and June 2006) sessions.

As it transpired, there was no 'agreed' result despite the fact that there was no voice of disagreement on rumbling inside the organization against the adoption of a development agenda on which the February session has

publishers, plant breeders and other commercial elite groups. Time has come for it to become open to civil society concerns. A group of NGOs and eminent concerned persons expressed discomfort with the term "property" and preferred to rename the organization as the 'World Intellectual Wealth Organization'.

¹⁵ Mr. Rigoberto Ganto Vielman, the Paraguayan Ambassador to the WTO.

broadly discussed and cleared. Development Agenda has already become a major success in the sense it has changed the discussions at WIPO. To quote Mr. Sisulu Musungu of the Geneva-based South Centre, “No one, not even the United States is now arguing that WIPO is an organization that promotes IP, rather it is about ‘innovation’ and ‘technology transfer’”. Musungu may be right in the sense that WIPO’s patent-obsessed preoccupations have come under raps, but looking at the outcome after the June session, it really is a matter of concern the way developed countries operate and flout the development agenda whose central aim was to overhaul the organization and the functioning style of WIPO in general and its Secretariat in particular.

Contrary to all precedent and the rules of Organization, the Chairman of the session¹⁵ presented a proposal for general acceptance for the purpose of negotiations. Rightly it was objected to by Brazil and Argentina the lead proponents representing Friends of Development Group who had initiated the proposal for Development Agenda. Chair’s proposal, they argued was “not sufficiently reflective of their proposals” and the same therefore is not to be taken for consideration since “there was no agreement to use Chair’s proposal as the basis for negotiations”. According to a Brazilian official, had the Chair’s proposal been allowed through, it would have given rise to a “fast-track process” with little scope for sustained negotiations. It hinged on ‘a process of vetoing’ and a ‘negative filter’ removing unwanted elements. The proposal would have worked on ‘yes-or-no’ vote.

Having lost one opening, the mischief of the Group B countries (comprising European countries Arab states and some African States) reappeared from another. Now, the Kyrgyz republic (a member state, which happened to be the Vice Chair as well,) stepped up, owned the Chair’s proposal as its own and presented it as a Member State’s proposal. This made possible for the Chair’s proposal to make a valid entry. According to an NGO’s analysis, the chair’s proposal “had a high percentage of proposals from Group B countries”¹⁶. However, a consensus had evaded and the June 30 session thus ended with the Chairman sending the reports of two meetings (February and June 2006) drafted by WIPO and all other proposals received so far, to the General Assembly which is going to meet on September 25.

¹⁶ This NGO had attended the Assembly meeting.

Whereas the developed countries (along with WIPO officials) characterized these developments as a “lost opportunity”, Brazil and others from the Friends of Development Group are bracing up for hard negotiations on the floor of the Assembly in a spirit of ‘not everything is lost’. With the June session substantially disturbed, all the proposals on the floor of the Assembly will have a ‘natural belongingness’ to the previous February session’s identification of six thematic clusters under which these proposals are likely to be taken up for discussion. To repeat, the General Assembly’s task is to “integrate development dimensions with WIPO’s activities broadly” and these decisions are going to underpin the Development Agenda, which has been long awaited from 2004. In the absence of some other untoward happening, the Development Agenda should emerge out of the answers that the Members will formulate in answering the questions based on these six clusters. They are as given below:

1. What should be the new procedural and substantive approaches to WIPO norm-setting activities to ensure that (a) its priorities reflect the interest of both developed and developing countries, (b) the views of all including non-governmental public interest groups are taken, (c) development impact of the norm-setting activities as well as of the treaties adopted and their costs to developing countries are evaluated ‘by means of strengthened member-driven evaluation, studying and research mechanisms’?
2. What member-driven mechanisms, procedures or rules are necessary to enable WIPO to undertake independent and objective research activities and evaluate development impact of intellectual property rules?
3. In what concrete ways can the technical assistance activities be strengthened to ensure (a) increased impact and relevance to recipient countries in a fast changing world, (b) improved availability and sharing of information on the activities (c) protection of the integrity as credibility of the programmes, (d) continuous evaluation and impact assessment including development impacts?
4. As a UN agency, how would WIPO facilitate transfer of technology and what measures specially are needed within the organisation to promote competition policies for unrestricted transfer of essential technologies to the developing countries?
5. What measures are needed in WIPO to (a) facilitate access to knowledge general by around the world and specifically in developing countries, for example, by means of a Treaty on Access to Knowledge,

- (b) maintain and build a robust public domain in all WIPO member and other countries?
6. What measures need to be taken to review WIPO treaties and conventions so as to make commensurate space available to the developing countries so that their needs and concerns find scope in WIPO through this Development Agenda?

WIPO is an organization of 183 countries and as a UN agency, it cannot afford to promote 'one-size-fits-all' strategy in its norm-setting activities. LDCc and other developing countries who bring in their divergences to this UN body are sovereign and therefore entitled to 'sovereign space' in implementation of the IP laws. Like free trade and freedom of enterprise, IPRs are very much a part of the market-based democracy we are living in these days.

Democratic checks on market behaviour of the nations are vital if the Millennium Development Goals are to be achieved, widening inequality to be curbed and the benefits of a progressive IP regime to be harvested without deepening existing asymmetries. Short cuts, flexing of rules and behind-the scene moves in global decision-making have no role in a rules-based global trade system that WTO is aiming to foster. Repeated attempts to outflank the majoritarian moves for development of the poor countries only show that neo-liberalism is aggressive *warts-and-all* and the goals of the global justice appear far ahead. Researches have shown that IPRs are now as important as oil in the foreign policy agenda of the USA, the sole superpower. It is necessary therefore that fight for a Development Agenda should not tire till the goal is achieved, especially so when a substantial initiative has already matured. If the forthcoming (Sept 2006) General Assembly of WIPO succeeds in taking decisions in integrating developmental needs and concerns with the WIPO's various activities, then a new progressive era in the global trade and commerce can be said to have begun.