THE INTERNATIONAL INSTITUTIONAL REGIME FOR INTELLECTUAL PROPERTY PROTECTION: A COMPARATIVE STUDY OF THE WORLD INTELLECTUAL PROPERTY ORGANIZATION AND THE WORLD TRADE ORGANIZATION

Dissertation submitted to the Jawaharlal Nehru University in partial fulfilment of the requirement for the award of the degree of

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DECLARATION

I declare that the dissertation entitled **"The International Institutional Regime for Intellectual Property Protection: A Comparative Study of the World Intellectual Property Organization and the World Trade Organization"**, submitted by me in partial fulfillment of the requirements for the award of the Degree of **Master of Philosophy** of Jawaharlal Nehru University, is my original work. This dissertation has not been submitted for any other degree of this University or any other university.

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CERTIFICATE

We recommend that this dissertation may be placed before the examiners for evaluation.

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CONTENTS

ABBREVIATIONS

DSB	Dispute Settlement Body
ECOSOC	Economic and Social Council
GATT	General Agreement on Tariffs and Trade
GI	Geographical Indication
IB	International Bureau
ICJ	International Court of Justice
IP	Intellectual Property
IPR	Intellectual Property Right
LDCs	Least Developed Countries
MFN	Most Favored Nation
MNCs	Multinational Corporations
OECD	Organization for Economic Co-operation and Development
PCT	Patent Cooperation Treaty
PLT	Patent Law Treaty
SPLT	Substantive Patent Law Treaty
TA	Technical Assistance
TRIPS	Trade Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization
WWA	WIPO Worldwide Academy

CHAPTER 1

CHAPTER 1

INTRODUCTION

Intellectual Property (IP) is understood as 'creations of the human mind'. IP traditionally has five acknowledged forms - 'patents', 'copyrights', 'trademarks', 'trade secrets' and 'industrial designs' that have served as the focus for both domestic and international protection regimes and now includes newer forms such as 'geographic indications', 'traditional knowledge' and 'cultural expressions'. Debate over the need for the protection of 'intellectual property' at the international level is not a new development. The main objective of IP protection is to keep a balance between the need to provide incentive to reward and spur innovation and the need to ensure that society benefits from having maximum access to new creations.

Initially, developing countries were not interested in the field of Intellectual Property Rights (IPR) but after the emergence of new areas such as biotechnology, computer software and technological development and with the increasing pace of globalization, a demand has emerged for strengthening the international legal framework for the protection and enforcement of IPRs. Unlike developed countries, however, developing countries are not in favor of a strong IPR regime. As far as the IPR regime is concerned, there are several institutional mechanisms at the national, regional and international levels. The primary international organization devoted to IPR protection is the World Intellectual Property Organization (WIPO) but the World Trade Organization through its Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) also regulates IP.

One of the first international gatherings to address the growing problem of international piracy of copyrighted works was chaired by Victor Hugo in 1878. The efforts of Hugo and Charles Dickens and others led to the establishment of the first multinational treaty the Paris Convention for the Protection of Industrial Property Rights in 1884 – followed by the Berne Convention for the Protection of Literary and Artistic Works in 1886. The reason for the emergence of these two conventions was the lack of effective IP protection at the national level. The most important feature of these two conventions is National Treatment which had proved fruitful to prevent

disparity in IP laws among member- nations at that time. The lack of substantive standards and enforcement mechanisms under the two conventions led to the creation of an international bureau known by the French acronym BIRPI, under which both the Paris and the Berne Conventions were united in 1893 (Kunz-Hallstein 1989: 702).

The present incarnation of the BIRPI was set up by the convention establishing the WIPO, which was signed at Stockholm on 14 July 1967 and came into force in 1970. The WIPO, a specialized agency of the United Nations, has historically been the central international IP related institution in the UN system. WIPO's institutional mandate is specific in so far as its main task is to promote the protection of IP throughout the world. WIPO is also called upon to perform the administration of certain treaties in the field of IP and to provide legal and technical assistance to member states, in particular, to developing countries (WIPO 1993: 14).

Scientific and technological development in many fields such as agriculture and also the emergence of new areas such as biotechnology and computer software in developed nations, created a need to extend the scope and effectiveness of the IPR regime to cover new areas. The developed countries led by the US, in the meantime, raised the concern that international differences in the scope of IPRs and effectiveness of the enforcement mechanisms for IPR protection resulted in distortions in international trade. They made a strong plea on this basis that IPRs be included in the agenda of the General Agreement on Tariffs and Trade (GATT) in its eighth round of negotiations - the Uruguay Round launched in 1986. The developing nations were hostile to the very idea and argued that WIPO, not GATT, was the forum for such discussions (Gopalswamy 1998: 28). What would be the role of GATT when WIPO was already working in the field of IPRs.

The shortcomings of the WIPO stemmed from a variety of related reasons. WIPO is a weaker forum and failed to secure appropriate levels of IPR protection due to lack of uniform standards and strong enforcement and dispute settlement mechanisms. GATT, which had operated towards liberalizing trade in goods, added to itself new issues areas such as services and IPRs during the Uruguay Round and was established as the WTO by Marrakech treaty in 1995. Whereas the WIPO does not possess effective means of implementation, the WTO has an effective dispute

settlement mechanism and this can be invoked against countries that do not follow the rules of IP protection. The WTO's threat system is a more credible, which is why IPR was brought into the WTO (Debroy and Saqib 2005: 30).

The launch of the Uruguay Round of trade negotiations in the context of the GATT led to new initiatives by countries and actors seeking the strengthening of IPR frameworks. The Uruguay Round witnessed the usual struggle in the international economic field between the developed and developing countries. The reasons for eventually signing up to the TRIPS Agreement were mostly that it was made part of the broader package deal of the Uruguay Round, which included other agreements, which were perceived as beneficial to the developing countries. India for instance, would generally gain in areas such as market access while it would lose in the 'new areas' in the Uruguay Round process.

In the field of IP, the role of the WTO is limited and it is still WIPO which administers IPR issues on a day to day level. The central objectives of the TRIPS Agreement outlined in its preamble are the reduction of distortions and impediments to effective and adequate international protection of IPR. The Agreement provides for the integration of significant parts of existing IP conventions such as the Paris Convention and the Berne Convention. The TRIPS Agreement introduces a set of minimum standards of protection that all countries must respect in regulated areas such as trademarks, geographical indications, patents, undisclosed information and industrial designs (Watal 2001: 10).

The TRIPS Agreement unconditionally links IP and trade. 'Most Favoured Nation' (MFN) and 'National Treatment' are two core principles of WTO that have been extended to IPRs under the TRIPS Agreement (unlike the WIPO). At the time of the finalization of the TRIPS Agreement in the Uruguay Round, there was a widespread belief that the initiative for further multilateral development on IPRs had effectively shifted from the WIPO to the GATT (Watal 2001: 34). Due to the TRIPS Council and its effective dispute settlement mechanism, it was seen as a more relevant forum for any future negotiations on IPRs than the General Assemblies of the WIPO.

On paper, the role of WIPO has remained largely unchanged over the past few decades. However, WIPO's activities have increased in the post-TRIPS period e.g.

Patent Law Treaty (PLT), Substantive Patent Law Treaty (SPLT) etc. Among the new areas covered by the WIPO, Information Technology, Biotechnology, Integrated Circuit Treaty, New WIPO Digital Agenda, WIPO Copyright Treaty, Broadcasting Treaty etc. are a few. However, WIPO's new initiative – SPLT – to harmonize the patent laws among members has been creating problems as it is likely to erode the flexibilities available under the TRIPS Agreement that are useful and necessary for developing countries to fulfill their development objectives.

Apart from that, WIPO's legal and technical assistance related activities are unique which differentiates it from the TRIPS Agreement and also makes WIPO the richest organization in the field of Intellectual Property Rights. Also, in 1995, WIPO entered into a cooperation agreement with the WTO to provide technical assistance for TRIPS implementation, as WIPO has many more resource for such activities (Musungu and Dutfield 2003: 16). These activities are coordinated under the 'Cooperation for Development Division' and its aim is to enable developing countries all over the world to establish or modernize IP systems. Unlike WTO-TRIPS, WIPO has significant financial resources independent of the contributions from its Member States.WIPO carries out many tasks related to the protection of IPR, such as administering international treaties, assisting governments, organizations and the private sector, monitoring developments in the field and harmonizing and simplifying relevant rules and practices (WIPO 1993: 28). Through the WIPO World-Wide Academy, WIPO is engaged in offering various IPR related courses to bring in IPR awareness to the people world over[1]. The link with the UN strengthened the WIPO's position in many ways: it was able to gain both diplomatic advantage and demonstrate its central role in the realm of global economic governance (May C. 2005: 438).

WIPO also presents a neutral forum without influence like trade pressures impinging on decisions (Watal 2001: 6). For these reasons, since the finalization of TRIPS, WIPO has become a forum for the steady evolution of international IP law on specialized subjects, while the TRIPS Agreement reflects strong economic interests on the part of right owners in developed countries. WIPO maintains until today its central role in the administration of IPR treaties.

[1] For further details, see: http://www.wipo.int/academy/en/.

The new role of the WTO in IP was formalized through the adoption of the *WIPO – WTO Cooperation Agreement* on March 1995. This Agreement seeks to foster cooperation between the two organizations concerning administrative matters such as notification of laws and regulations as well as legal and technical assistance in favour of developing countries[2]. This Agreement allows WTO to access the WIPO's collection of IP laws and regulations and vice versa. The WTO and WIPO could enhance their cooperation on legal and technical assistance, provided by WIPO, relating to the TRIPS Agreement, so as to maximize the usefulness of their activities and ensure their mutually supportive nature.

In July 1998, a joint initiative was launched by the two organizations to maximize their combined resources to ensure that developing countries meet their obligations under the TRIPS Agreement by 1 January 2000. Many developing countries have sought help from both the WIPO and the WTO under this initiative. The WTO has very little human resources to devote to its tasks; the TRIPS Council and the Dispute Settlement Body (DSB) are two main 'sticks' - the WTO has no 'carrots' to ensure compliance. It is WIPO that has enormous resources, both human and financial, to devote to assisting countries with compliance. In fact, the TRIPS negotiations had envisaged cooperation between WIPO and WTO explicitly during the Uruguay Round (Watal 2001: 368).

Although there are some overlapping institutional provisions, these two organizations are quite distinct from each other. Developing countries have tended to consider that the purpose of IPR is simply to reinforce the economic power of developed countries and transfer wealth from poorer to rich countries. Factors such as information deficiencies, lack of resources and weak economic status in developing countries were not fully envisaged during the negotiation of the TRIPS Agreement, resulting in continuing disagreement between the developed and developing countries that has in turn resulted in uncertainty and adverse impact on states. The salient issue of concern relates to how the IP protection regime can achieve a balance between rewarding innovation and improving competition on the one hand and protecting public interest and general welfare on the other hand.

[2] For futher details, see: http://www.wto.org/english/tratop_e/trips_e/wtowip_e.htm

India has been emphasizing on harmonization and norm setting of IP laws and implementation-cum-enforcement related matters and has made a strong pitch in favor of a development agenda under the WIPO. By stressing this, the Indian approach at WIPO has been widely interpreted as a constructive measure to bridge the gap between developed and developing countries[3]. On the other hand, under the WTO, India has had to change its laws according to the TRIPS Agreement. Recently, the Indian government enacted the Third amendment to its *India Patent Act, 1970* (Patents Act), bringing it in line with the TRIPS Agreement and taking India into the 'TRIPS-plus' regime. However, the Amendment fails to protect the public from aggressive monopolies (Dhar and Rao 2005: 1501). There is an urgent need for India to balance this situation with effective instruments to ensure that the public interests issues e.g. access to medicines at affordable prices are also addressed.

THE OBJECTIVE AND SCOPE OF THE STUDY

IP protection is a necessary condition for economic growth but not sufficient; it also must consider global welfare. WIPO and WTO both promote IPR protection. Although there is some overlap in institutional provisions, the two institutions are quite distinct from each other.

This study will mainly focus on an institutional analysis of the WIPO and WTO in the context of the IPR regime and a comparative assessment of their functioning. It will attempt to identify the similarities and differences, and the areas of overlap and cooperation between these two institutions. More broadly, it will attempt to examine up to what extent the IPR protection regime creates a balance between right holders and users.

The succeeding chapters under this proposed study mainly focus on the general description of the WIPO and WTO-TRIPS in particular; and give a comparative analysis between WIPO and TRIPS in the context of IPR regime. The second chapter explains the evolution and institutional aspects of WIPO and examines the new developments and changes under WIPO and its implications especially on developing countries. The second chapter introduces the WTO-TRIPS Agreement, explaining its negotiating history, institutional aspects and examining implications of

[3] For further details, see: http://www.ipjustice.org.

the TRIPS Agreement particularly on developing countries. The third chapter is a comparative assessment of these organizations. It compares the origins, evolution, structure objectives, structure, new developments and changes etc. of these two organizations and evaluates their role in the field of IP. It also focuses on areas of overlap and on the existing and potential cooperation between WIPO and WTO-TRIPS. The Fourth chapter contains concluding observations relating to the comparative roles of the WIPO and WTO in IP protection.

CHAPTER 2

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THE WORLD INTELLECTUAL PROPERTY ORGANIZATION

The WIPO (World Intellectual Property Organization), a specialized agency of the United Nations, has historically been the central international Intellectual Property (IP) related institution in the UN system. WIPO's institutional mandate is specific as far as its main task is to promote the protection of IP throughout the world. WIPO is also called upon to perform the administration of certain treaties in the field of IP such as the Paris Convention and the Berne Convention and to provide legal and technical assistance to member states, in particular, to developing countries. It holds special knowledge and expertise in the field of intellectual property.

ORIGIN AND EVOLUTION

The *Convention Establishing the World Intellectual Property Organization* was signed at Stockholm in 1967 and entered into force in 1970. However, the origins of the WIPO can be traced back to two important conventions - *the Paris Convention for the Protection of Industrial Property Rights* of 1883 and *the Berne Convention for the Protection of Literary and Artistic Works* of 1886. The formulation of these two conventions was a response to the lack of effective protection that domestic laws granted to foreign titleholders. These IPR laws were less restrictive in nature that influenced by their national interest.

The *Paris Convention for the Protection of Industrial Property Rights* provides for the protection of patents, trademarks, and an industrial design and has presently ninety-eight member states. The principle features of the convention are the obligation of states to extend national treatment to residents of other states and a right of priority to applicants of foreign member states for their patent, trademark and design filings (Kunz – Hallstein 1989: 702).

An important international treaty for protecting copyright is the *Berne Convention for the Protection of Literary and Artistic works*. The Berne Convention has seventy-six states as signatories. The major features of the Convention are the extension of national treatment to foreign authors and the recognition of minimum copyright term.

The purpose of the Berne Convention is to bring the nations of the world together and provide copyright protection in an effective and uniform manner. In order to obtain these objectives, the Berne Convention introduced in its preamble the most significant principle of National Treatment. Under this principle, each member nation must give the same treatment to the nationals of other member nations as it gives to its own nationals (Gadbaw 1989: 379). However, the preamble of the Convention also contains the principle of reciprocity, pursuant to which member states may limit the protection granted to foreign nationals for their domestic protection. This principle is an obstacle in the expansion of protection of IP rights.

Both the Paris and Berne Conventions have been criticized for their lack of substantive standards and enforcement mechanisms. Though the Paris and Berne Conventions provide for the submission of disputes over interpretation or application to the International Court of Justice, they do not establish enforcement measures; they depend instead on the voluntary cooperation of the affected member states. Thus, these Conventions do not provide for a meaningful dispute settlement mechanism. Apart from that, these treaties were criticized for their lack of attention to certain important subject matter areas. The Paris Convention, for instance, does not include substantive standards for trademarks and the Berne Convention has no provisions regarding trade secrets. Lack of participation of important countries is also an obstacle of effectiveness; the US has never joined the Berne Convention, arguing that National Treatment becomes meaningless when the national laws of developing countries are inadequate or not properly enforced (Kunz-Hallstein 1989: 704).

In order to overcome their shortcomings, these two Conventions were amalgamated in 1893, resulting in the formation of an International Bureau, known by the French acronym BIRPI, which became the primary body responsible for international IP protection and placed under the supervision of the Swiss government. It was an international agency till the 1960's. In the first half of the 20th century, BIRPI sponsored negotiations for agreements related to new technologies that widened the scope of its underlying principles of the protection for IPRs. During the post1945 period, many new independent countries joined the BIRPI (WIPO 1988: 8).

At the 1967 diplomatic conference in Stockholm, all existing multilateral treaties administered by BIRPI were revised because member countries wished to establish an

organization of governments with the same status as all other intergovernmental organizations. The proposal to establish an organization in place of the BIRPI structure to deal with the subject of intellectual property was advocated by the United Nation Economic and Social Council (ECOSOC). Thus, after the establishment of the United Nations, BIRPI was re-incarnated as the WIPO. In 1974, WIPO became a specialized agency of UN because during the conference, BIRPI argued and believed that working in the UN system would encourage more developing countries to join the organization and enable the internal administration of the organization to benefit from the advantages available to UN agencies. However, there were concerns amongst the US, European and Japanese delegations that developing countries would create obstacles and question more closely the WIPO's activities (WIPO 1988: 11).

The WIPO is dedicated to developing a balanced IP protection through out the world, which rewards creativity and innovation as well as contributes economic development and safeguards the public interest. While the WIPO convention provides the umbrella framework for the organization, it is an administrative treaty only because its important task is to provide administrative and technical assistance in the field of IP. Its headquarters are in Geneva, Switzerland. Currently, the member states are 184 under WIPO (May C. 2005: 435).

THE MANDATE, FUNCTIONS AND STRUCTURE OF THE WIPO

The WIPO Convention established the organization and its secretariat, set its objectives, mandate and its decision-making framework.

Mandate

Article 3 of the WIPO Convention sets out the objectives of the organization - to promote the protection of intellectual property throughout the world through cooperation among states; to ensure administrative cooperation among the Paris and Berne Union (Dutfield 2003: 5).

Functions

The Convention spells out the functions of WIPO under Article 4. WIPO has a variety of administrative functions and substantive functions, which are as follows –

a) to promote the development of measures which facilitate the efficient protection of IP throughout the world.

b) to encourage the conclusion of international agreements related the promotion of IP.

c) to assemble and disseminate information concerning the protection of IP, carry out and promote studies in this field and to publish the results of such studies.

The mandate and function as set out in the Convention are narrow and questions have been raised over whether WIPO takes in to account the development aspects and issues or not. WIPO currently administers 23 treaties including the WIPO Convention. The various treaties can be divided into three main categories - intellectual property protection treaties, global protection system treaties and classification treaties (Dutfield 2003: 5).

Structure

The main WIPO bodies are the General Assembly, International Bureau, the Conference and the Coordination Committee. In terms of decision-making, the main WIPO bodies are the General Assembly, the Conference and the Coordination Committee. The General Assembly is established under Article 6 of the Convention, which also sets out the functions. Its membership consists of states party to the Convention, which are members of any of the Unions[1] (Dutfield and Musungu 2003: 5). Apart from that, its functions include – the appointment of the Director General, reviewing and approving reports of the Director General and Coordination Committee, giving instructions to Committee and Director General, adopting the biennial budget expenses to the union. Each state has one vote at the General Assembly. Thus, the General Assembly is the most important legislative body of the organization[2].

[1] Unions are defined under Article 2 of the Convention such as Paris and Berne Union, and other agreements designed for IP protection. The word 'Union' is meant to convey the idea that the states party to a treaty, together form an entity, which has legal personality and its own finances.

[2] for further details, see: http://www.wipo.int.

Article 7 of the Convention establishes the Conference and membership status is same as that of the General Assembly. The main functions of the Conference are to discuss matters of general interests in the field of IP and to establish the biennial program of legal-technical assistance (Dutfield and Musungu 2003: 8).

The Coordination Committee is an advisory body. It is established under Article 8 of the Convention. The Committee consists of states party to the Convention, which are members of the Executive Committee[3] of the Paris Union or Berne Union or both. The main function of the Committee is to give advice to the organs of the union, the General Assembly, the Conference, the Director General on all administrative, financial and other matters, and to prepare the draft agenda of the General Assembly. Thus, the General Assembly, Conference, Coordination Committee are the highest governing bodies of the WIPO. They meet in September/October in Geneva in ordinary session every two years and in extraordinary session in alternative years (Musungu 2003: 8).

The WIPO Convention establishes the International Bureau as the secretariat of the organization under the direction of the Director General. The International Bureau is very active and plays a significant role in determining the vision of the organization, shaping the nature and outcome of treaty and other negotiations, discussions and in preparing the draft agenda for the General Assembly. Because of the member driven nature of WIPO processes, the International Bureau's significant and influential role has been reducing in treaty negotiations. But, it is difficult to curtail its influence in soft law processes where these laws emanate from non-member bodies such as the Advisory Commissions, an example being the World Intellectual Property Declaration adopted by the Policy Advisory Commission in 2000 (Dutfield & Musungu 2003: 8).

WIPO has proved to be an effective forum for IPRs – related negotiations. The WIPO Secretariat's role in administering multilateral conventions such as the Patent Cooperation Treaty has become increasingly important and the WIPO Secretariat provides valuable technical expertise to developing countries.

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[3] Executive Committee - One- quarter of the member countries of the Assembly are elected the respective Executive Committees of the Unions which are part of the Coordination Committee.

MEMBERSHIP

WIPO's member states determine the strategic direction and activities of the organization. They meet in the assemblies, committees and working groups. There are currently 184 member states, which are over 90% of the countries of the world, are a part of the WIPO. To become a member, a state must deposit an instrument of ratification or accession with the Director General of WIPO. To become a member of the organization, there is a need for a state to be a member of the Paris or Berne Union or treaty administered by WIPO or a member of the UN. If the particular country does not contain this criterion then it can become a member, if the WIPO Assembly invites for this[4].

The link with the UN strengthened the WIPO's position in many ways: it was able to gain both diplomatic advantage and demonstrate its central role in the realm of global economic governance (May C. 2005: 438). It also increased in membership because of its status of a specialized agency of the UN.

Unlike other specialized agencies of the United Nations, WIPO has significant financial resources independent of the contributions from its Member States.WIPO carries out many tasks related to the protection of IPR, such as administering international treaties, assisting governments, organizations and the private sector, monitoring developments in the field and harmonizing and simplifying relevant rules and practices (WIPO 1993: 12). Through the WIPO Worldwide Academy (WWA), WIPO is engaged in offering various IPR related courses to bring in IPR awareness to people world over[5].

DECISION-MAKING PROCESS

An important WIPO process concerns the actual rule making. There are two basic rule-making processes - one is treaty- making and the other is the development of the soft laws norms. The treaty- making process is considered as slow and time

[4]for further details, see: http://www.wipo.int/members/en/#admission_criteria
[5] for further details, see: http://www.wipo.int/academy/en/

consuming and therefore ill suited to deal with fast changing circumstances. That is why, recently, WIPO has displayed an increasing emphasis on the soft law approach to overcome the drawbacks of treaty making. Apart from that, treaty law would only bind those states that ratify it, whereas, soft law norms such as recommendations, resolutions, declarations and guidelines could be made more generally applicable without requiring ratifications (WIPO 1993: 18).

WIPO usually attempts to reach decisions by consensus, but in any vote, each Member State is entitled to one vote, regardless of population or contribution to the funding. This is important, because there is a significant North-South divide in the politics of intellectual property. During the 1960's and 1970's, developing nations were able to block expansions to intellectual property treaties, such as universal pharmaceutical patent, which might have occurred through WIPO (May C. 2005: 439). Thus, WIPO became a platform for developing countries.

TECHNICAL ASSISTANCE

WIPO's legal and technical assistance related activities are unique which differentiate it from the TRIPS Agreement and makes WIPO the richest organization in the field of IP rights. Because WIPO administers over 24 IP treaties each of which requires different measures to implement, this raises the capacity and technical challenges for developing countries. In 1995, WIPO entered into a cooperation agreement with the WTO to provide technical assistance for TRIPS implementation. WIPO has much more resource for such activities (Musungu & Dutfield 2003: 16). These activities are coordinated under the "Cooperation for Development Division", whose aim is to enable developing countries all over the world to establish or modernize IP systems. The WIPO World Wide Academy also plays an important role in these activities by serving as a centre for teaching, advice, and research on IP (Kostecki 2005: 8).

However, WIPO's activities have become controversial and have been criticized for a variety of reasons as a provider of legal and technical assistance (Dutfield 2003: 16):

a) too little attention to development- specific interests and concerns. It has been focusing only on the protection and promotion of IP.

b) over-reliance on previous IP literature that deals with issues of concern to developed country industries. When the previous experiences are applied by experts in technical activities and transposed to developing countries, there is a risk because every country has a different level of economic development and also different domestic IP laws (Dutfield 2003: 16).

The role of the International Bureau (IB) is another area of concern, in particular, the compatibility between the Bureau's norm setting functions and technical activities. The International Bureau exercises undue influence on developing countries and does not always give the best advice to developing countries (Dutfield and Musungu 2003: 8). Access to information provided by WIPO Member States and accredited observers in response to requests of information distributed by the International Bureau is limited to registered participants. The work of the International Bureau in relation to legal technical assistance has tended to over-emphasize the benefits of IP rather than the development and growth of developing countries. The undue influence on developing countries by the IB may affect the stances of these countries in WIPO negotiations (South Centre 2004: 10). This has been affecting the processes and dynamics of the WIPO Assembly.

Technical assistance has a strategic role to play in the process of economic development in the contemporary information economy. However, WIPO's attempts at technical assistance have been variously criticized. The main reason behind the failure of technical assistance in WIPO is the 'one size for all approach', which makes little or no effort to search for development- friendly IP policies. Numerous experts arrive in developing countries without having sufficient knowledge of local IP issues and realistic IP options. Many programs are irrelevant and abstract. They are primarily interested in promotion of IP treaties that they administer. Their Technical Assistance is a marketing operation because WIPO makes money from this and fulfills its financial mandate (Kostecki 2005: 10).

A one- day conference was held in Geneva in 2001 on 'Implementation of the Doha Declaration on the TRIPS Agreement and Public Health', which gave particular emphasis on Technical Assistance. The major themes of the conference

included the nature and quality of WIPO's Technical Assistance to developing countries. Participants expressed their concern that WIPO's mandate to strengthen IP protection may not be consistent with its capacity to provide technical assistance. Against this statement, Deputy Director General of WIPO Roberto Castelo replied, "WIPO has now given technical assistance to 134 developing member states in a 'demystified and very transparent way'. WIPO has not received any one complaint from member states that it has received wrong technical assistance" (Conference Report 2002: 2).

Involvement of Private Sector and Civil Society in WIPO's Technical Cooperation Activities

Usually, countries present their request for technical cooperation to the International Bureau, which is examined by the secretariat and approved on the condition of the availability of resources. To deal comprehensively with the needs and problems of technical cooperation, WIPO has established Nationally Focused Action Plan (NFAP), which is in place for one to three year. WIPO has been collaborating with the private sector in Technical Cooperation activities for many years on an ad-hoc basis but this collaboration is based on business interests. Further, the private sector is dominated by the Multinational Corporations (MNCs), which may not correctly represent national requirements or domestic needs. MNCs have specific interests in developing countries- for instance in the field of software and pharmaceuticals- and there may emerge a conflict of interests particularly in sensitive areas like pharmaceuticals and public health. Critics argue that this can jeopardize the impartiality, neutrality and also the usefulness and advantages of the Technical Cooperation program (ICTSD 2005: 6).

NGOs and consumer organizations based on public interest have not been effectively harnessed by WIPO for the delivery of technical cooperation activities, although they are important stakeholders in the field of IP protection and have an impact on public policy objectives. Improvements in technical cooperation provided by WIPO will require greater involvement of the developing countries in WIPO's program and budget process. Several suggestions and recommendation have been made regarding WIPO's activities (ICSTD 2005: 8):

a) WIPO should establish clear guidelines and principles for the provision of technical assistance, which benefit all member states.

b) WIPO's collaboration with the private sector for the delivery of Technical Co-operation should be properly regulated.

FUNDING AND BUGDETARY SYSTEM

WIPO has a unique funding scheme that sets it apart from most international organizations. Generally, UN specialized agencies are funded by financial contributions from their member states, where as WIPO's funding comes predominantly from the registrations systems it administers such as the Patent Cooperation Treaty (PCT) and the Madrid System for international trademark applications. Together the PCT and Madrid System provide for nearly 90% of WIPO's revenues. However, contributions of member states represent approximately 7% of the organization's total income. In the early 1990's, the growth of the registration system led to a considerable increase in the organization's revenues. This shows the important implication of this unique funding scheme. Thus, there has been an increase in its manpower as well as in the scope of legal and technical activities in recent years (ICTSD 2005: 6).

WIPO has effectively two constituents – member states and market forces. A comparison of the WIPO with the WTO shows an interesting result- WIPO's budget for 2005 was 523 million Swiss francs, while WTO's 2005 budget was only 169 million Swiss francs. Whereas, approximately 600 staff staff WTO, WIPO's personnel generally number around 1000 (ICTSD 2005: 7). Unlike, UNCTAD, WIPO does not depend on its member states for its financial resources and activities.

Budget- related deliberations take place under the Program and Budgetary Committee (PBC). The Program and Budget Document (PBD) is organized into a numbers of programs and sub- programs. For example, there were 31 programs in 2006-07, designed around strategic goals, such as 'to promote IP culture', 'to integrate IP in national development policies', 'progressive development of international IP laws', 'delivery of quality service in global IP protection system' etc.(WIPO 1993: 30). The PBD reflected that WIPO has a consolidated budget incorporating all activities, income and expenditure of the organization.

Technical Cooperation in WIPO Budgetary Process

WIPO plays a central role in the provision of Technical Assistance (TA) in the field of IP. After the 1995 agreement with WTO, WIPO plays an important role in the implementation of the TRIPS Agreement in developing countries by providing TA. Thus, developing countries are greatly concerned about the TA issue in the organization's budgetary process. There is a controversy between delegations and the Secretariat over the TA programs. Several delegations note that budget allocation for TA programs have been declining for some years whereas the Secretariat claims that resource allocations for cooperation for development activities are to be found in several programs and that the amount of resources have increased substantially over the years (ICTSD 2005: 6). However, critics point out that the amount of TA resources actually allocated to operational activities benefiting developing countries may be significantly low.

Criticisms relating to WIPO's budgetary process have been narrowly focusing on Technical Cooperation activities. Besides these activities, WIPO currently provides financial assistance for a number of capital based officials from developing countries to participate in WIPO intergovernmental meetings particularly the Standing Committee and Inter-Governmental Committee (IGC) (ICTSD 2005: 7) . This assistance is valuable as it contributes to strengthening the expertise of developing countries officials in dealing with substantive IP issues and enhancing their participation in the organization's standard- setting activities. However, criteria for assistance allocation to countries are not clearly defined by the WIPO (WIPO 1993: 35).

WIPO IN PRESENT SCENARIO

New Developments

During the 1970s and 1980s, scientific and technological development in many fields and emergence of new areas such as biotechnology, computer software etc. led to the felt need to cover these new areas under the IP regime. Thus, WIPO organized many conferences to adopt treaties on particular new areas. Several treaties were not agreed upon because of the clash between developed and developing nations' interests. On 26 May 1989, WIPO organized a diplomatic conference in Washington D. C. to adopt a treaty on 'Intellectual Property in Respect of Integrated

Circuits'. The treaty was adopted by forty-nine states. USA and Japan opposed the treaty and emphasized on some objectionable points – a minimum duration of protection of eight years, liberal rules with respect to compulsory licensing, absence of effective and meaningful sanctions etc. (Kunz- Hallstein 1989: 705).

On the other hand, the semiconductor chip treaty is the most important attempt by the USA to merge IP and trade issues for the first time. The reason behind the American interest in this treaty was that the USA wanted to advance its interests in semiconductor designs by merging IP and trade. Only developing countries had incentives in this field like North Korea, India, Brazil and Singapore, which had the potential to develop their markets for semiconductor products. The USA had actively supported the interest of WIPO in developing a treaty and WIPO was impressively agile in taking up this task and moving the process forward. The WIPO secretariat brought together experts from all over the world and prepared a draft treaty, while the USA hosted a conference. However, this treaty also had weaknesses that adversely affected the chances of its implementation. It included provisions that track the USA laws closely (Gadbaw 1989: 238). The treaty was criticized as not going far enough and as providing inadequate protection. This was one of the reasons of why the USA started to try to forward its interests in the GATT negotiations instead.

DISPUTE RESOLUTION SYSTEM: WIPO Arbitration and Mediation Centre

Lack of the enforcement mechanism is the reason for the failure of new treaties, which led to an interesting development i.e. a treaty on the settlement of disputes between states in the field of IPR in 1993. This could be seen to represent a renewed interest in the WIPO. It was a fascinating exercise to move the centre of IPR gravity from WTO to WIPO. On the other hand, this was the period of Uruguay Round and TRIPS was going to be established which could create a risky situation for WIPO and move the centre of IPR's gravity from WIPO to WTO. The surprising aspect was that OECD countries other than the USA were very much behind this new treaty (Reichman 1996: 474).

WIPO Arbitration and Mediation Centre (AMC), based in Geneva, was established in 1994 for the resolution of international intellectual property disputes between member- states. The Centre is offering four procedures:

a)	*Mediation*	a non-binding procedure, in which a neutral intermediary assists the parties in reaching a settlement of the dispute.
b)	*Arbitration*	in this procedure, a dispute is submitted to one or more arbitrators, who make a binding decision on the dispute.
c)	*Expedited Arbitration*	an arbitration procedure, which is carried out in a short time and at a reduced cost.
d)	*Expert Determination*	a procedure in which a dispute is submitted to one or more experts, who make a determination on the matter referred to by the parties.

Decisions under Arbitration and Expert Determination are binding in nature. However, it depends on party's choice whether they want to submit the dispute or not. It means that expert's involvement is based on the party agreement. The Centre assists parties in the selection of mediators, arbitrators and experts from the Centre's 1000 neutrals with experience in dispute resolution and specialized knowledge in IP disputes. Where necessary, the Centre will use its worldwide contacts to identify additional candidates with the required background. The Centre believes that the quality and commitment of the neutrals are crucial to the satisfactory resolution of each case. The Centre is a part of the WIPO as an independent and impartial body[6].

Today, IPRs are as strong as the means to enforce them. In this context, WIPO's Arbitration and Mediation Centre has been increasingly used to resolve IP disputes. The rationale behind the establishment of this Centre that IP disputes have a number of particular characteristics, which may be better addressed by the Arbitration and Mediation only than by the Court litigation. Unlike Court litigation, parties are free in selecting the neutral expert under the AMC. In addition to that, under the AMC, there is single proceeding under the laws determined by parties, whereas, court has multiple proceedings under different laws. The Center's rules and procedures show it as the subject of flexibility. The Mediation rather than other procedures is an informal and

[6] For further details, see: http://www.wipo.int/amc/en/.

flexible process. These procedures are voluntary in nature. There is an overall recognition that the WIPO secretariat and WIPO committee of experts are experts in the IPRs field and this expertise is of great value to the international community (Gurry 1999: 386).

WIPO can be considered as a first international IP institution, which set up a dispute resolution service relating to the internet and electronic commerce in 1999, where it is recognized as one of the leading dispute resolution service providers for domain name disputes (Watal 2001: 8).

THE WIPO PATENT AGENDA

Since the 1970's, WIPO has been working towards harmonizing the patent system to make uniform the patent law, to protect the right of patent holders and to develop a non–discriminatory IPR system. The Director General of WIPO announced the Patent Agenda for the future development of the international patent system in 2001. As a new initiative, the Patent Agenda has placed the issue of further development and harmonization of patent law as a top priority in WIPO's activities. These activities are taking place under three pillars (Grain 2002: 1) -

a) efforts to reform the Patent Cooperation Treaty (PCT).
b) activities related to the ratification of the Patent Law Treaty (PLT), which was adopted in 2000.
c) the ongoing negotiations on the draft Substantive Patent Law Treaty (SPLT).

The PCT was originally adopted in 1970. It provides a common facility to conduct international searches of prior art[7] for patent applications. It gives international protection to patentees and establishes the priority of a patent application at the international level. Thus, this system gives great leverage to patent holders and a generous amount of time to assess the market potential of their patent in different countries. PCT is being reformed to further streamline and simplify the process. This reform process is part of the overall harmonization agenda of WIPO (Nanda 2004: 4311).

[7] Prior art: publications and any document from any source that available to the public before the filing date of the patent applications. A single copy of a Ph.D. thesis available in a university library counts as a prior art. For further details, see: http://www.iusmentis.com/patents/priorart/.

PLT was adopted in 2000 and is yet to enter into force. Only a few countries and regional organizations such as the European Patent Organization have signed it. This treaty harmonizes the formalities that patent offices undertake to administer patent applications. There were differences among developed and developing countries during the negotiation of the PLT on the disclosure of the country of origin of genetic material or traditional knowledge (Grain 2002: 1). If the PLT comes into force, WIPO member states would agree to move toward the harmonization of the core rules of patenting and to enhance the position of patent owners by combining deregulatory measures with safeguards for them. Article 10 provides that non compliance by a patent holder with one or more of the formal requirements under treaty may not be a ground for revocation or invalidation of a patent except where fraudulent intention is proven (Dutfield 2003: 12). These drawbacks have delayed the complete process of ratification of PLT. Apart from that, PLT paved the way for the deep harmonization of norms and standards of patent laws in respect of some key elements through the negotiations for the adoption of the SPLT.

Currently, the WIPO Patent System is based primarily on two treaties, namely, the Paris Convention which establishes substantive standards of IPR and PCT which establishes procedural standards (Dutfield 2003: 13). Current activities under the WIPO Patent Agenda seek to unify the legal framework of patent system through harmonization.

SPLT is another controversial issue in the WIPO Assembly. It was considered in the 10^{th} session of the Standing Committee on the Law of Patents of WIPO in 2004. Since SPLT is intended to complement the Paris Convention which establishes substantive standards the negotiations on the SPLT are aimed at initially creating uniform substantive patent law standards on prior art, novelty, utility and inventiveness etc. (Dhar and Anuradha 2005: 1346).

It is claimed that like the PLT, SPLT would create more advantages for developed countries and undermine the position of developing countries because both have different priorities and interests. SPLT is likely to create difficulties for developing countries in critical areas such as public health. Further, the adoption of such a system would also mean that most national patent offices would become superfluous (Nanda 2004: 4313).

Harmonization as proposed in the SPLT drafts is likely to result in a TRIPS-Plus regime (higher standards and reduction of exceptions) for developing countries. In addition, if it were adopted, it would eliminate the flexibilities under the TRIPS Agreement that are being used by developing countries for their development objectives. The developed countries argue that there should be a 'one size fits all' international patent system whereas the developing countries claim that any patent system should have adequate flexibilities to suit their development needs (Nanda 2004: 4313).

Developed countries show their consensus on harmonization whereas developing countries want to include some flexible laws and rules regarding patents and IPR. Key developing countries have asked that issues of importance to them be included in the negotiations. They sought to include nine additional issues: 'development and policy space for flexibilities; exclusions from patentability; exceptions to patent rights; anti-competitive practices; disclosure of origin, prior informed consent and benefit-sharing; effective mechanisms to challenge patent validity; sufficiency of disclosure; technology transfer; and alternative models for promoting innovation"(Dhar & Anuradha 2005: 1349).

However, movement to an international patent system would save money, both by reducing filing fees and by reducing the legal costs of preparing parallel filings (Barton 2004: 2). Because of the relationship between World Trade Organization (WTO) and WIPO, WIPO must take care and every attempt should result in the coordination between countries, otherwise WIPO would lose its relevance as a forum for developing countries. No developing country except China has supported substantive patent law harmonization (Nanda 2004: 4312).

The positive aspect of patent harmonization is that it will help overcome the situation wherein disparity of IPR related regulations in different countries results in a number of countries creating trade barriers to protect their own companies. Uniformity of IPR regulations across nations should result in decrease of trade barriers in various markets (Grain 2002: 2).

SPLT as a serious concern can make the patent provisions of the WTO's TRIPS Agreement obsolete. The TRIPS Agreement only spells out the minimum

required elements of national patent laws. SPLT, by contrast, will spell out the top and bottom line; it will be a fixed set of rules on what can be patented and under what conditions. The core controversies surrounding the SPLT include:

a) under the TRIPS Agreement, patents are available for inventions in 'all fields of technology'. Will the SPLT retain this condition or not? This question hits an important point of discord between USA and Europe. In the USA, business methods are patentable whereas in Europe, they are not. It creates a controversy between USA on one hand and Europe with developing countries on the other hand. It is claimed what was not achieved by the USA under the TRIPs Agreement, it would like to secure in the WIPO through the negotiation of the SPLT. The USA has stated that it would withdraw from the negotiations if they were not settled in its favor.
b) usually, patent laws indicate which invention is considered patentable or what is excluded from patentability as a matter of policy. The TRIPS Agreement provides some flexibilities as members may stop patents from being granted if commercialization of the invention would offend morality or public order. The TRIPS Agreement also allows countries to exclude plants and animals from patentability as a matter of policy. There is no real proposal related to this matter in the draft of SPLT. The US stand on this point is that there should be no exclusion to patentability in SPLT. On the other hand, Europe and developing countries are arguing in favor of at least retaining the exclusions offered in TRIPS (Grain 2002: 2).

Role of the International Bureau in Patent Agenda

The role of the International Bureau in the SPLT process is particularly problematic. It is claimed that the bureau is acting like an institution with its own agenda. The international bureau's justification of the SPLT process in general is also instructive. According to the bureau, 'a number of delegations and representatives had expressed the position, at the first session, that discussion concerning further harmonization should be resumed as soon as possible' (Dutfield 2003: 13). These delegations consisted of Japan, South Korea, Australia, Canada, China and some NGOs and did not represent developing countries in general.

The role of the International Bureau in the patent agenda processes is not entirely straightforward. There are challenges that flow from the positioning of the international bureau in the overall structure and operations of the WIPO. Because of the services it offers, the international bureau has developed a high degree of expertise on many of the technical aspects of IP issues, which the bureau deals with on a day-to-day basis. If we look at the IB as a service provider, it is an interested party in many of negotiations being undertaken. For Instance, under the discussion on the reform of PCT, whatever changes are undertaken will affect the IB as it is at the centre of implementing the PCT (Dutfield 2003: 15). The other challenge relating to the IB's expertise is that in WIPO negotiations, the bureau is often asked to offer opinions or to propose the drafts for articles. Therefore, the responsibility for the ultimate outcome should go to the bureau.

Thus, WIPO's activities such as its Patent Agenda and Technical Assistance activities require critical scrutiny to ensure that they do not exacerbate the problems that developing countries have been facing in accessing essential goods and technologies (Dutfield and Musungu 2003: 16).

THE DIGITAL AGENDA

In September 1999, the Director General of WIPO announced the WIPO Digital Agenda at the WIPO International Conference on Electronic Commerce and Intellectual Property. The agenda was aimed at broadening the participation of developing countries in accessing intellectual property information and participating in global policy formulation and to promote the adjustment of the international intellectual property regulatory framework to facilitate e-commerce (Suthersanen 2005: 4). For this, the revision of copyright laws has to be done to accommodate new technologies and to incorporate a 'Digital Agenda'. Although some digital problems were resolved within the 1994 TRIPS Agreement but no consideration has been taken on the satellite broadcasting or internet communication (South Center 2005: 6). This Digital Agenda is mapping a new copyright landscape.

The Digital Agenda also encourages member states to sign up to the 1996 Internet Treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) and to negotiate the further development of international intellectual property law in the digital environment. Within treaties, the

most influential players are US, Japan and the European Community. WCT and WPPT were finally adopted and came into force in 2002 whereas the *Treaty on Intellectual Property in Respect of Databases* was neither negotiated nor adopted. WCT is perhaps the most controversial. It goes beyond the standards required by the TRIPs Agreement and the Berne Convention and also provides especially strong rights for copyright owners operating in the online environment (Suthersanen 2005: 6).

US delegates played a key role in the Diplomatic Conference on Copyright Standards and were seeking to ensure that the US Copyright standards would become international norms with which all member countries would have to comply. However, other representatives including academics, librarians, consumer electronics manufacturers and public interest NGOs opposed this IP protection and sought to limit the strengthening of copyright protection. This organized opposition affected the negotiations in WIPO. The UK Commission on Intellectual Property Rights (IPRs Commission) has warned the developing countries to 'think very carefully before joining the WIPO Copyright Treaty'. However, this is moot in many cases, since the vast majority of parties to treaties are developing countries (Dutfield 2003: 15).

Treaty dealt with audiovisual neither works nor broadcasts because film production companies and broadcasting organizations wanted a separate convention to negotiate. In December 2000, WIPO held a diplomatic conference on the protection of audiovisual performances. Although, it was expected that the WIPO Audiovisual Performances Treaty would be adopted, a stumbling block was created by the disagreement between the USA supported by India on one side (both of which have major film industries) and the EC and several other countries on another side(all more supportive of the moral rights of performers). Recently WIPO has taken efforts to revise these discussions and held a two-day meeting on the protection of audiovisual performances in Geneva in November 2003(Dutfield 2003: 15).

Broadcasting as a medium of mass communication is one of the most important mechanisms for the transmission of information and access to knowledge. The growing pace of technological change and trends in media ownership and convergence are the driving forces, which led to the discussion for the protection and regulation of broadcasting organizations. Since 1998, member states of WIPO have

been discussing the creation of a new international instrument for the protection of broadcasting organizations including cable casting organizations in the Standing Committee on Copyright and related rights. However, broadcasting organizations are currently enjoying a certain level of protection under international copyright and related right under the Rome Convention, Satellite Convention etc. Member states have been discussing whether a new international treaty to grant new protection to address the problem of signal theft is required or not (Tellez & Waitara 2007: 40).

Member states made a revised draft proposal i.e. '*Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organization*'. The discussions on the new proposed treaty has been shaped by two factors – the concerns expressed by broadcasting organizations under their status as NGO observers and the European States' demand for increased protection against signal piracy in order to protect technological advances in broadcasting particularly digital technology[8].

The developing countries have indicated that the object of the proposed treaty should be limited to signals protection and not include the content. This draft would provide broadcasting and cable casting organizations with a number of exclusive rights and additional protection beyond the rights found in the Rome Convention, which is limited to the traditional broadcasting organizations in relation to their transmission by wireless means. Member states are demanding for the extension of the rights contained in the Rome Convention. The Treaty should have provisions on access to knowledge and information to the public and particularly to developing countries. To achieve this balance, the developing countries have made a proposal to include the above provision as a general public interest clause. In order to place the public interest at the centre of the proposed draft treaty, it is relevant to include minimum standards. Public service broadcasting plays a fundamental role in developing countries. No consideration has been given to these issues in the discussions over a new treaty[9].

However, like previous drafts, the Revised Draft proposal is ambiguous on whether the protection extends only to signals or the content represented by the signal or both. Maximum term of protection (20 years), absence of special treatment to

[8] For further details, see: http://www.wipo.int/edocs/prdocs/en/1999/wipo_pr_1999_185.html.
[9] For further details, see: http://www.netdialogue.org/initiatives/wipowctwppt/.

public service broadcasting and exclusive rights may become obstacles and not facilitate the adoption of this treaty. The final negotiation on a treaty is going to be held and is expected to be concluded in 2007 (Suthersanen 2005: 8).

THE DEVELOPMENT AGENDA

For the past two years, WIPO members have intensely discussed a proposal by 14 (now 15) 'Friends of Development', led by Brazil and Argentina, to ensure WIPO activities are sufficiently beneficial to developing countries. Argentina and Brazil have developed a proposal i.e. 'Development Agenda' in September 2004 at the WIPO Assembly. Although discussions on the developmental dimension of IP had taken place at previous General Assemblies by member states, this is the first instance of a formal agenda being proposed[10] .

Fifteen developing countries the "Group of Friends of Development" lead this proposal. At the October 2004 Assembly, it was unanimously agreed that this meant that IP could only be promoted to the extent that such promotion would also serve the developmental aims of the wider UN system. The Development Agenda also resists the substantive patent law measures because they do not fulfill the development needs of developing countries by eroding the flexible measures under the TRIPS Agreement. The developing countries have supported the Development Agenda, whereas SPLT is supported by the developed countries. The Development Agenda describes the development objectives of developing countries and emphasizes that WIPO should have a development-oriented approach. The Development agenda includes the following agenda items:

a) WIPO must not only recognize and include the need for national flexibilities in supporting developmental aims, but also must better recognize the public dimension of IP.
b) Technological Transfer is a key element for development under WIPO and the present IPR system has not fostered extensive transfer of technology. Thus, a new subsidiary body in WIPO needs to be established to look at what measures could be taken to reduce the barriers to transfer of both technology and scientific research.

[10] For further details, see: http://www.wipo.int/ip-development/en/agenda/.

c) Technical Assistance needs to be better tailored to the individual country's needs and also needs to be more focused on balancing the costs and benefits of protecting intellectual property; such support must also focus on how developing countries can maximize the benefits of the existing flexibilities in the TRIPS Agreement (May C. 2006: 439).

As the WIPO is a specialized agency of the UN, it is also mandated to take into account the broader development goals of the UN, in particular the Millennium Development Goals. This should be reflected clearly in the development perspective and practices of WIPO itself. During the General Assembly's discussion on the Development Agenda, a US representative argued that the 'thought that weakening IP would further development was as flawed as the idea that an IP system alone could bring about development'. According to the developing countries, radical reorientation and restructuring of the organization is the only way to serve the development objectives and needs of the vast majority of its members. Because the US, Japan and European representatives do not accept the agenda, there has been little agreement on how to take the agenda forward (May C. 2006: 440).

The 2005 General Assembly created a '*Provisional Committee on Proposals Related to a WIPO Development Agenda*' (PCDA) to conduct an accelerated review of all proposals and make recommendations. However, two meetings of the PCDA, in February and June 2005, were inconclusive and a decision on how to proceed is left to the Assembly. Development agenda proponents stated afterward that the substance of the original proposal remained intact, and opponents said that both sides remain committed to continuing work on the issue. A key difference has been over where within WIPO to handle the development debate[11].

While agenda proponents see a need to infuse a development dimension across many activities of the organization, WIPO argues that it has always had a development dimension. Opponents such as the United States appear to prefer to address the issue in an existing, dedicated committee. However, development agenda proponents are wary of parking the issue in a single committee where they fear it will be marginalized. The Development Agenda will shift the focus of the WIPO from

[11] For further details, see: http://www.wipo.int/ip-development/en/agenda/.

promoting IPRs to a more development- related orientation, which reflects explicitly its status as a UN specialized agency. The controversy over the Development Agenda has rekindled debate over WIPO's status as a technical organization, which has obscured its political activities[12].

There are a number of issues to consider. A major issue relates to the narrow focus of the objectives and functions of the organization. The main objective of the organization – the promotion of the protection of IP – is quite narrow puts a question mark on the ability of the organization to incorporate development objectives in its activities. Other issues to be considered include the effectiveness of developing countries in setting the agenda of WIPO; the role of civil society and consumer organizations in shaping the direction of WIPO activities, and ways and means of improving the design and delivery of technical assistance (Dutfield 2003: 24).

Thus, it is clear that there is an inherent tension between the activities and processes in the organization. WIPO's new initiatives such as its patent agenda (SPLT) indicate that the organization is not so concerned with the development related issues connected with IP or with preserving TRIPs flexibilities. Developed countries see flexibilities as an impediment in the promotion and protection of IPR. The argument is that it would be impossible to rationalize and harmonize the IPR laws and exceptions among member countries. For instance, the 'fair use' rule under the US Copyright laws differ from the 'fair dealing' rule of UK Copyright laws (South Center 2005: 4). WIPO is currently facing a time of change in its activities and processes and is in the process of addressing all these issues.

DEVELOPING COUNTRIES AT WIPO

Throughout WIPO's history, the extent and effectiveness of developing countries' participation has varied. After the Second World War, an increasing number of developing countries joined the Paris Convention and Berne Convention. Under the principle of one state-one vote, a coalition of developing countries could easily outvote the developed countries. Multilateral treaty making in intellectual property was much easier for developing countries prior to the introduction of the single undertaking concept in the WTO and the principle of minimum IP standards under

[12] ibid

TRIPS. Before TRIPS, these countries fought to defend their interests and if they failed, they could strategically opt out or make reservations to clauses in treaties, which they considered detrimental to their development needs (Dutfield and Musungu 2003: 20).

Over the last couple of decades, developing countries have argued that international rules of IP can only promote development if they facilitate the transfer and diffusion of technology. However, TRIPS Agreement reflects very limited attention in this direction and on other development concerns, it will not be easy to ensure that the WIPO processes take into account their development needs. The Patent Agenda and other processes at WIPO, especially the SPLT negotiations, raise a question about the extent to which developing countries can decisively influence the outcomes of international IP standards settings processes. Peter Drahos in his study concludes that due to the continued use of webs of coercion by the USA and EC, developing countries still have comparatively little influence in international IP standard setting. Due to the colonial heritage of the developing countries, they, in fact, have never meaningfully exercised sovereignty over the setting of IP Standards. Thus, developing countries will have to pay great attention to patent agenda processes. In addition, the International Bureau is likely to continue to be wary of an influential developing country coalition, which could trigger a forum shift to other international fora or to regional and bilateral agreements. That said, the Patent Agenda process would provide a crucially important opportunity to developing countries to begin reconsidering the role of WIPO in development (Dutfield and Musungu 2003: 20).

The developing countries wield relatively more influence in WIPO negotiations and can therefore make effective attempts to protect their national interests and to incorporate elements that are favorable to them. But, it is difficult to reconcile the different interests of various groups. WIPO negotiations cover various IP subjects including patents, copyright, trademark, genetic resources and traditional knowledge. Developing countries may have different interests in each of these areas. Apart from that, business and lawyer associations exercise a disproportionate influence on the processes and outcomes at WIPO. An important counterweight to this influence lies in increasing the participation of civil society and development organizations in WIPO activities as observers (May C. 2006: 442).

INDIA IN WIPO

Since WIPO is always famous as an important forum for developing countries, India has been continuously regarding it valuable for their IPR related interests. India became a member of WIPO Convention in May 1975 and adheres to the Paris Convention, PCT (since 1998), the Berne Convention (since 1928), Geneva Convention (since 1975), Budapest Treaty (since 2001), and Nairobi Treaty (since 1983). WIPO has been an active partner in assisting India's efforts to modernize its intellectual property systems[13].

The organization has been continuing its ongoing relationship with the India in the area of IPR issue by taking new steps. For example, the WIPO has been taking initiative to strengthen its ongoing co-operation with India by exploring IP issues relating to traditional knowledge, access to genetic resources and protection of expressions of folklore, for which, WIPO with the Ministry of Human Resources Development organized seminar in New Delhi in 2002. WIPO extends its co-operation to the Government by providing experts for modernization of the Indian patent office and Trade Marks Registry. WIPO also helps in the modernization of the design wing of the patent office (The Hindu 2002: 15).

WIPO also appreciated India's efforts in revamping its legislative framework in the areas of trademarks, geographical indications, industrial design, patents, copyright, integrated circuits, plant variety, farmers rights protection and information technology. The WIPO Worldwide Academy (WWA) has also associated in various efforts by the Union Government in the area of IPR. The academy has also conducted many intensive programs on IPR such as program on IP and genetic resources. Since, WIPO introduced recent developments and trends in the trademark field at the international level, India, recently joined the Madrid Convention on Trademarks[14]. Thus, WIPO has been proved beneficial and valuable for India in IP field.

India had decided to adhere the Paris Convention and PCT in 1998 and has been a member of Berne Convention for a long time. Such a step has been benefiting the country's technological and economic development and enhancing the

[13] For further details, see: http://www.wipo.int/about-ip/en/ipworldwide/pdf/in.pdf.
[14] For further details, see: http://www.wipo.int/madrid/en/.

international intellectual property cooperation, which WIPO promotes so actively. As a leader of developing countries, India is proved as a critical player in policy debates at the WIPO. For example, India has announced its opposition to a recommendation on global patent harmonization backed by developed countries. For this, India is associated with 'The Friends of Development[15].'

CONCLUSION

Currently, multilateral treaty making processes taking place at WIPO are likely to result in TRIPS-plus standards, which will eliminate or narrow the flexibilities that developing countries have been using to design and implement their IP regimes in a manner that supports their development objectives. WIPO processes need to take into account the development perspective in the negotiation of new multilateral treaties to become a development-oriented international IP system. For this, WIPO needs to consider the following (Dutfield 2003: 24):

a) increase the participation and influence of developing countries, civil society and other developmental organizations in WIPO processes as a counterweight to developed countries like USA, Japan, EC and business groups that currently dominate the WIPO's processes.
b) ensure that the International Bureau serves the interest of all its members and does not cave into threats of withdrawal by industry players.

Technical assistance is an important tool in promoting the development related activities under WIPO. Thus, WIPO must improve the design and delivery of technical assistance to fulfill the development objectives and needs of developing countries. For this, Dutfield (2003) suggests a change in the structure of the International Bureau. He suggests that WIPO need to separate the norm setting functions of the International Bureau from its technical assistance activities. WIPO could set up an independent arm for research and technical assistance because the structure of IB is very complex. Thus, there is a need to remove this complexity.

[15] The Friends of Development is a group of fourteen developing countries that co-sponsored a fall 2004 proposal for a WIPO Development Agenda, which is under discussion this week in Geneva. For further details, see: http://www.wipo.int.

Today, WIPO still faces various challenges that need to be overcome and the basic reason for the shortcomings of WIPO is that WIPO has failed to secure appropriate levels of IPR protection due to lack of uniform standards and strong enforcement and dispute settlement mechanisms.

The WIPO administers IPR issues on a day-to-day level. WIPO's activities have been increased in the post TRIPS period e.g. Patent Agenda, WCT, WPPT etc. WIPO also presents a neutral forum without internal influence like trade pressures impinging on decisions. For this reason, since the finalization of TRIPS, WIPO has become a forum for the steady evolution of international IP law on specialized subjects. WIPO maintains until today its central role in the administration of IPR treaties because it is an administrative treaty. It has enough resources to provide the techno-legal assistance to its members, which increase the capacity of members esp. of developing and LDCs countries in fulfilling their development objectives (Watal 2001: 6).

The biggest criticism against the WIPO is that it focuses only on IP as an end in and of itself. The '*Geneva Declaration on the Future of WIPO*' of October 2004 is explicit in this context and accuses WIPO of having embraced a culture of creating and expanding monopoly privileges, often without regard to consequences (Gadbaw 1989: 3). This document was signed by non –profit organizations, academics etc. in 2004. They urged the WIPO to focus on the need of developing countries with respect to IP legislation. This declaration calls for the organization to shift its focus from IP as an end in itself to a means for benefiting humanity[16]. This declaration is an attempt to convert the WIPO's IP objectives into IP as a human, socio-economic and technological development.

WIPO's treaties and norms such as international copyright norms under the Berne Convention and Rome Convention and others like the Paris Convention have developed in a lopsided fashion. While, they have broadened and extended economic rights and development but not public interest, the most important aspect of these conventions is the two pivotal principles i.e. National Treatment and Reciprocity, through which the developing countries can fulfill their development objectives.

[16] 'Geneva Declaration on the future of WIPO' is available at, http://www.wipo.int

According to some authors, 'the Berne and Paris Convention both have reflected limitations and exceptions that have evolved over time in a large number of states' (South Center 2005: 10). It means that these conventions accepted that copyright is not an absolute right; that it is clearly recognized that copyright should be limited and exceptions and limitations must be exist.WIPO treaties have been implemented in the US and the European Union and it is interesting to note that the US and European version of implementation are vastly different. This is a clear indicator that WIPO treaties provide much flexibility in interpretation and implementation. Thus, developing countries should exploit this flexibility (Suthersanen 2005: 11).

At present, WIPO is dealing with several new IP treaties such as SPLT, Digital Agenda and Development Agenda etc. Lack of effective means of implementation, lack of enforcement mechanism and substantive standards might be reasons for the failure of several negotiations and treaties; the major obstacle is the attitude of member countries. A majority of right-holders and users in the world originate from the North like US, EU etc. with little increase in the number of users in the South like African and Asian Countries. As a result, clashes between the developed and developing countries' interests and development objectives dominate all negotiations.

If the SPLT were adopted then patent laws would become harmonized among signatories without any exceptions that would adversely affect the development interests of developing countries in new economic and technological field. WIPO will lose its position as an important forum for IP protection and developing countries.

At this moment, only the acceptance of Development Agenda with SPLT could save the status of WIPO as a primary and important forum for IP protection. Then, WIPO would prove a development-oriented organization for developing countries because the IPR rules must always ensure the preservation of the balance between right holders and public interest. WIPO should adopt such a policy that can establish a kind of balance of power among member countries, so that it can cater to the ends of natural justice.

In the light of given arguments, the preceding chapter traces the developments and recent initiatives of TRIPS Agreement with special reference to WIPO- WTO-TRIPS Agreement.

CHAPTER 3

CHAPTER 3

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights

The TRIPS (Trade Related Aspects of Intellectual Property) Agreement emerged from the Uruguay Round negotiations as one of the pillars of the WTO (World Trade Organization). The TRIPS Agreement is administered by the WTO and sets down minimum standards for several forms of Intellectual Property (IP) regulation. It was negotiated at the end of the Uruguay Round of General Agreement on Tariffs and Trade (GATT) (1986-1994). It covers various IP rights – 'Patent', 'Copyright', 'Trademark', 'Geographical Indication', 'Industrial Design', 'Trade Secret' etc. It also specifies enforcement procedures and dispute resolution procedures. Unlike other IPR institutions, the TRIPS Agreement created for the first time a link between IP law and international trade. It was the culmination of a program of eight years of intense lobbying by the US supported by the European Union (EU) and Japan. The Agreement is accused of promoting the IP-related interests of the industrialized countries (Peterk 2006: 370).

EVOLUTION

The TRIPS Agreement was negotiated under the aegis of the GATT, which was a forum for multilateral discussions on issues related to trade in goods. The significance of IP as an element of national wealth became more apparent in the post Cold War era (TRIPS Symposium 1989: 896). During the 1960s and 70s, the industrialized countries demanded efficient protection of IPR under the framework of the GATT because of new scientific and technological development. IP matters were not entirely foreign to the GATT before they formally became a negotiating issue on the agenda. But prior to the Uruguay Round, GATT essentially governed trade in goods and IPRs found only marginal reference. Additionally, GATT contains a number of basic principles that apply generally to governmental actions affecting trade including actions in the field of IPRs. In essence, these provisions forbid discrimination between

the products of different contracting parties or in favor of domestically produced goods. In the Uruguay Round, some states expressed a desire to apply these basic principles to negotiate a new, comprehensive agreement on TRIPS. The most relevant principle for the protection of IPR was the 'National Treatment' principle enshrined in Article III of GATT, although the GATT rules were related to 'products' rather than 'persons'. This principle was intended to apply only to goods and did not provide for the extraterritorial protection of IPR. The Most Favored Nation (MFN) principle under Article I of the GATT forbids discrimination between member states. It applied to the actions of government in the field of IPR. Several other provisions can apply to IPR legislation and measures because of their general applicability to trade-related governmental action. One example is Article X on the publication and administration of trade regulations (TRIPS Symposium 1989: 898).

In addition, the GATT dispute settlement provisions in Articles XXII and XXIII were important. If a Contracting Party (CP) believed that its GATT rights had been nullified or impaired by another governmental action in connection with IPR, the CP could invoke justice from a dispute settlement panel. There were several IPR-related disputes in the GATT, for example, those relating to the US manufacturing clause, section 337 of the US Tariff Act of 1930 and Japanese labeling practices on imported wines and alcoholic beverages (TRIPS Symposium 1989: 890). An important case '*The Brazilian Pharmaceutical Patent Dispute*' in which Brazil had complained against measures taken by the US in retaliation for alleged inadequate protection of US patent rights in Brazil. This case brought to light the fact that GATT provisions did not adequately address the issue of protection and enforcement of IPRs (Abbott 1989: 709).

Article XX (d), which is a 'General Exception', allows CPs to take enforcement measures in case of noncompliance and discrimination with IP laws and regulation of international trade. This Article, however, was mostly misused by CPs to fulfill their interests. Article XX (d) did not oblige CPs to adapt any enforcement measures which ensured that GATT obligations did not stand in the way of effective enforcement of IP legislation (TRIPS symposium 1989: 898).

Article IX in its five paragraphs ensured that marking requirements are not used to hamper international trade or discriminate between CPs. However, only paragraph 6 of this article is designed to promote the protection of IP which was limited in scope (TRIPS Symposium 1989: 900). Many viewed the lack of any GATT obligation for protection or effective enforcement of IPRs as a serious lacuna. They suggested that in order to prevent the trade problems arising from the inadequate and ineffective protection of IPRs, new rules and disciplines are required. Others felt that the lack of specific obligations in the general agreement ensured that measures for the protection of IP did not constitute barriers to legitimate trade (TRIPS symposium 1989: 908).

Revision of the Paris Convention was an important development which shifted the focus and attention of the industrialized countries from WIPO to the Uruguay Round negotiations. The United States considered the Paris Convention to be a weak convention because of its provisions of national treatment and compulsory licensing. No WIPO treaty contained any effective dispute settlement provisions to reduce the infringement of IPR rules. Since 1974, the developing countries had been demanding a revision of the Paris Convention to lower the standards of industrial property rights applicable to them. The revision conference was held in Geneva in 1984 but at its 4th session, the conference failed. The issue that broke the negotiations was the demand of the developing countries for the exclusive compulsory licensing of patents – a license that excludes the patent holder from using his own invention. The US and other industrialized countries opposed this demand (Watal 2001: 16).

Apart from the limitations of GATT in addressing IP matters and the failure of the revision of the Paris Convention, other factors that led the industrialized countries to bring IP matters under the framework of GATT were the increasing importance of technology as a major component of national wealth and heightened economic interdependence (Chakravarthi 1990: 4). Due to the tremendous growth in the field of science and technology in the developed countries, constant innovation became the hallmark of the OECD economies and this became a major factor in international

economic competition. The dramatic increase in the relative significance of international trade in the world gross economic product and the concomitant intensification of international economic interdependence were also relevant factors (Abbott 1989: 909).

The established industrialized economies were losing comparative advantage in some traditional sectors because of the emergence of new copying technologies and pirated goods. There was a growing trade deficit in the US; imitation technology made the private sectors vulnerable. The US had made unsuccessful attempts at the unilateral and bilateral levels to seek improved protection and enforcement of IPRs. The issue of commercial counterfeiting first appeared in GATT in 1978 at the end of the Tokyo Round. The first initiative was taken by the US to heighten GATT sensitivity to IP protection. US submitted a report titled 'Trade in Counterfeiting Goods' before a GATT panel, which contained descriptions of the adverse affects of the contemporary IP system on US trade policy. But, there was no consensus on the issue then (Watal 2001: 20).

Later, the US with the support of other industrialized countries, sought to include the IPR issue in the negotiating agenda of the Uruguay Round along with other new issue areas such as trade in services, agriculture and trade-related investment measures (Abbott 1989: 269). The Ministerial Declaration of Punta Del Este in 1986, which launched the Uruguay Round as well as negotiations on TRIPS Agreement, set out the negotiating objectives as reduction of the distortions and impediments to international trade, taking into account the need to promote effective and adequate protection of IPRs and to develop international rules and disciplines dealing with international trade in counterfeit goods. The negotiators also agreed that 'these negotiations shall be without prejudice to other complementary initiatives that may be taken in the WIPO and elsewhere to deal with these matters' (Hartridge & Subramanian 1989: 896). Many developing countries opposed the US demand for including new areas in the IPR field and gave an alternative proposal to exclude new areas from the Uruguay Round negotiation. But this proposal received little support (Watal 2001: 22). Because of the resistance and inconsistency of the developing

countries towards the TRIPS program, US threatened and imposed economic sanctions on countries like Brazil and Thailand. The US Trade Representative (USTR) identified those countries that were not providing effective IP protection in a 'Watch List'. Japan, Brazil and India were identified due to inadequate market access to US goods and services (Watal 2001: 24).

In 1982, CPs had called for an examination of the counterfeit goods issue. A Group of experts had been formed in 1984 for the determination on whether GATT would take multilateral action on this issue or not. But this group failed to address this issue. By 1985, a general consensus prevailed that an improved multilateral framework was desirable to reduce the growing problem of trade in counterfeit goods. The difference between these multilateral efforts on counterfeiting and the TRIPS initiative lay in the scope of commitments sought as well as the different context of discussions (Hartridge & Subramanian 1989: 897).

By 1986, US with the support of the European Community (EC) and other OECD countries had persuaded the full GATT members to include in the Uruguay Round Ministerial Declaration a mandate for negotiations on TRIPS. The mandate indicated that there is a need to promote effective and adequate protection of IPR in order to reduce the distortions and impediments to international trade. Developing countries like India and Brazil insisted that WIPO is an appropriate forum for the negotiation of IP standards, not GATT. In the TRIPS negotiating group, the developing countries blocked discussions of substantive issues on IPRs. Among developing countries, India and Brazil were leading and pointed out that the 1986 ministerial declaration which reiterated the principle of 'Differential and more favorable treatment' for developing countries should be included in the TRIPS Agreement. Developed country negotiators later incorporated this concern in terms of flexible implementation schedules with longer time periods for Least Developed Countries (LDCs) and Developing countries (Abbott 1989: 719). The perspective of the developing countries in the IP dialogue was set out in detail in a paper submitted by India to the TRIPS working group in July 1989. In this paper, India argued that

exemptions from patent protection in areas such as pharmaceuticals, food product, chemicals, micro organism and agriculture must be permitted. The result of the Uruguay Round mandate was the establishment of the TRIPS Working Group (Bhat 1995: 68).

In October 1987, US presented to the TRIPS Working Group its proposal for a GATT Intellectual Property Agreement. The US proposal recognized that IP as a negotiating area under the GATT must evolve with changing economic conditions and confront new trade problems. This proposal also included specific recommendations on substantive standards in the areas of patents, trademarks, copyright, trade secret and semiconductor layout. These recommendations largely reflected the US substantive standards. It also suggested that there is a necessity to include a mechanism which encourages the accommodation of changing technologies (Watal 2001: 26).

The Uruguay Mid-Term Ministerial Review took place in Montreal in April 1989 and the April 1989 text laid the framework for the final stages of the TRIPS negotiations. All negotiators including developing countries agreed upon the inclusion of adequate and effective standards for enforcement of and dispute settlement on IPRs. The developing countries were to be given transitional arrangements to comply with changes and substantive standards of IPR. Also in this process, a mutually supportive relationship was envisaged between GATT and WIPO. India played an important role in finalizing the April 1989 text (Watal 2001: 28).

Dramatic progress was made in the TRIPS negotiations from July 1989 to December 1990. Developing countries accepted the inclusion of norms and standards in the TRIPS. But they constantly restated their preferences for lodging the agreement in WIPO. Unlike in the UNCTAD and WIPO, there was no institutional mechanism for coordination of developing countries' position. Korea, Brazil, India and other developing countries sought to preserve certain safeguards and exceptions. In the second half of the 1990, negotiators moved towards a consensus on a successor organization to GATT to incorporate the results of the Uruguay Round. Canada

formally proposed the new Multilateral Trade Organization (MTO). The acceptance of this MTO proposal as a World Trade Organization (WTO) effectively ended the debate over the earlier position of the developing countries arguing in favour of the WIPO as an appropriate forum for IPR issues (Abbott 1989: 724).

After this point, initiative and control dramatically shifted from delegations to the GATT Secretariat and to the Chairman of the TRIPS negotiating group. A draft – the Dunkel Draft – was prepared. This was also known as a 'no options text' as all options were dropped the final outcomes of the discussions were stated. All members were given one year's time for to entry into WTO and TRIPS and to implement its provisions. After one year, the National Treatment and MFN principles would apply equally to all countries. Two years later on 15 December 1993, the Final Act embodying the results of the Uruguay Round was presented which contained an Agreement on TRIPS. The Final Act was adopted and signed by 124 nations on 15 April 1994 at Marrakech (Watal 2001: 40).

The whole TRIPS negotiating process showed the significant victory of the developed countries on IPRs issues. The major issues were of a North-South nature; however, there were also contentious issues within the North such as parallel trade, terms of patent protection etc. Apart from that, on North-South division, US, EC and Japan presented fairly coordinated positions and demanded the substantive standards of IP protection to be accepted by the developing countries. On the other hand, developing countries did not achieve any unity and coordination against developed countries. However, the developing countries used the obstruction strategy in the TRIPS negotiations (Bhat 1995: 74). But, because of the lack of any formal coordination mechanism such as the G-77 in GATT, different expectations of gains in other areas of Uruguay Round such as agriculture and textiles; and effective use of section 301 and economic sanctions by US on these countries; they failed to achieve some of their important goals. Thus they had only a 'take-it-or-leave-it' option in the end. The final text was accepted because of economic interests such as increasing and gaining economic status by attracting FDI (Watal 2001: 46). The degree of success that the US achieved is due to the dependence of other countries on the US for trade

and investment. In some developing countries like India and Argentina, despite liberalization of policies on trade and foreign investment, domestic opposition to TRIPS continued to be strong.

While the TRIPS obligations strengthened the international IP protection, it also allowed some crucial limits to such protection and allowed developing countries the flexibility to achieve their development objectives and bring a balance between protection and use of IPRs. According to some authors, the developing countries should move forward to implement their TRIPS obligations and learn to play by the new rules of the game, defending the hard won negotiating victories in future dispute settlement battles in the WTO (Watal 2001: 47).

PREAMBLE AND OBJECTIVES OF THE TRIPS AGREEMENT

The preamble of the TRIPS Agreement describes that there is a need for new rules and disciplines to achieve and fulfill the objectives of the agreement (Dhanjee & Chazournes 1990: 30):

a) The applicability of the basic principles of GATT 1994 and of relevant international IP agreements or conventions.

b) The provisions of adequate, effective standards and enforcement mechanism to the implementation of the trade-related IPRs.

c) Transitional arrangements aiming at the fullest participation in the results of the negotiation.

The preamble recognizes IPR as a private right while also recognizing the public policy objectives of national systems for the protection of IPR. It recognizes the special needs of LDCs in respect of maximum flexibility in the implementation of laws and regulations in order to enable them to create a sound and viable technological base (UNCTAD-ICTSD Resource Book 2005: 1).

According to some observers, the TRIPS Agreement's preamble reflects the contentious nature of the negotiations. The preamble can be considered as a source of guidance in the process of implementation of IP rules and dispute settlement. The structure and terms of the preamble reflect the generally successful effort of the developed countries to incorporate protection of IPRs in the WTO legal system (UNCTAD-ICTSD Resource Book 2005: 2).

The TRIPS objectives are laid down in Article 7 of the Agreement (Dhanjee & Chazournes 1990: 32):

a) The objective of the agreement is to establish adequate standards, effective and appropriate means for the protection and enforcement of IPR and thereby

eliminating distortions and impediments to international legitimate trade related to IPR and foster its sound development.

b) With respect to standards and principles concerning the availability, scope and use of IPR, parties agree on the following objectives:

i) to give full recognition to the need for economic, social and technological development of all countries and sovereign right of all states, when enacting national legislation, to ensure a proper balance between these needs and rights granted to IP holders and thus, determine the scope and level of protection of such rights particularly in public sector such as health agriculture, nutrition and national security.

ii) to set forth the principal rights and obligations of IP owners, taking into account the important inter-relationship between the scope of such rights and obligation and the promotion of social welfare and economic development.

The nature and scope of the obligations is that members shall be free to determine the appropriate method of implementing the provisions of this agreement within their own legal system and practice. They may adopt the extensive protection of IP. According to observers of UNCTAD, the objectives of the TRIPS Agreement are evident of the differences of perspectives among the northern tier and the southern tier (UNCTAD-ICTSD Resource Book 2005: 117). Most of the language of the preamble and objectives is influenced by the US, EC and Japan proposal.

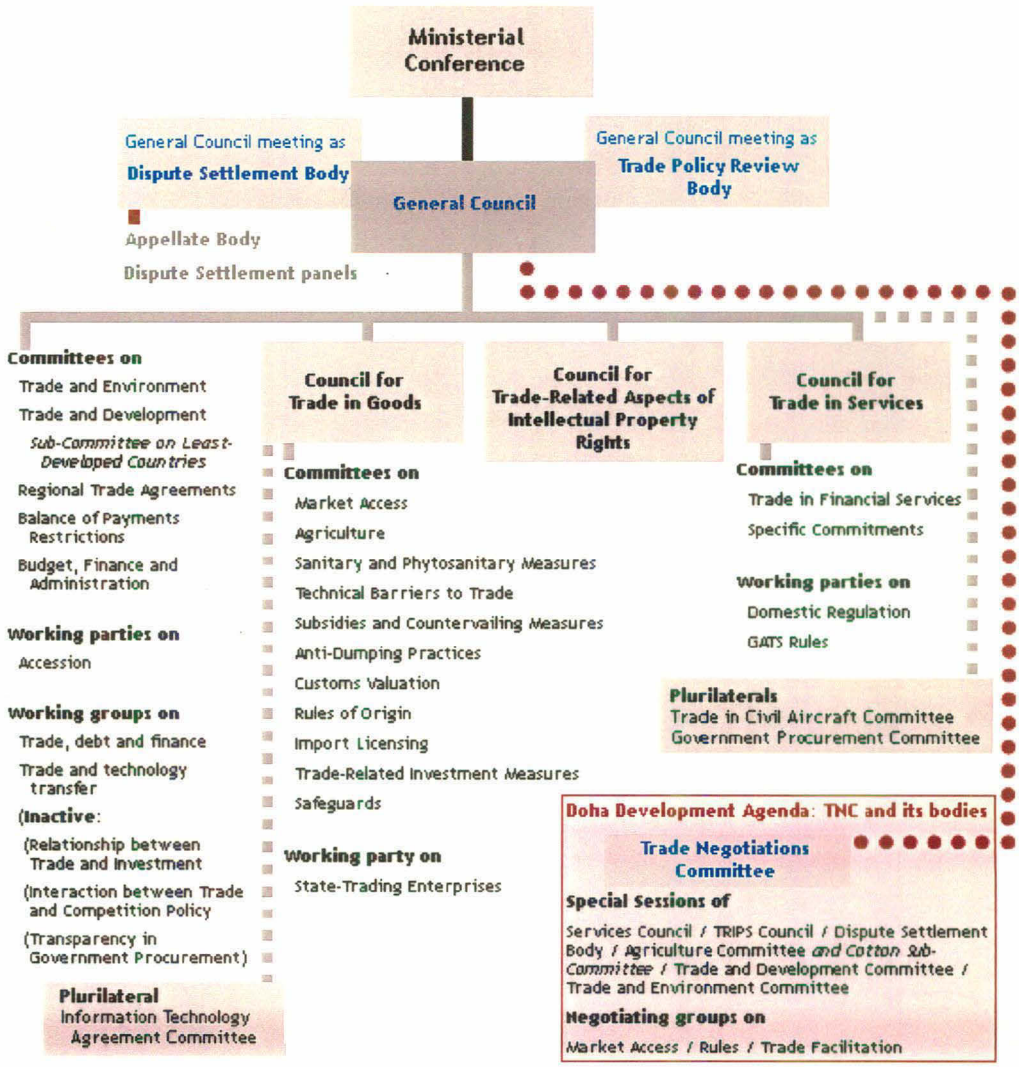
COUNCIL FOR TRIPS

The TRIPS Council is a pivotal part for the successful implementation of the Agreement. Since TRIPS is a new and complex subject in the new structure of WTO, among negotiators it was considered necessary to establish a new organ responsible to deal with the operation and implementation of the new agreement. According to Article 68, the TRIPS Council is charged with monitoring the operation of this

agreement and member's compliance with their obligations (Gopalswamy 1998: 28). The TRIPS Council carries out those responsibilities which are assigned to it by the members and provides assistance requested by members in the context of dispute settlement procedures. In respect of LDCs and developing countries, it provides technical assistance to them which helps them in changing their laws and regulations according to TRIPS (Dreyfuss & Lowenfeld 1997: 276).

The Council provides a forum for consultation on IPR related matters. It is an important contribution to the building of mutual trust and cooperation which would prevent members from having to take recourse to dispute settlement proceedings. In case of a dispute between parties, it is an important responsibility of the Council to provide assistance in using the dispute settlement procedures of the WTO (UNCTAD-ICTSD Resource Book 2005: 739).

THE TRIPS COUNCIL IN THE WTO



Source: http://www.wto.org.

The TRIPS Council consults with other organizations to seek information from any source. In 1995, a cooperation agreement was established between the WTO and WIPO. In consultation with WIPO, the Council establishes appropriate arrangements for cooperation with the bodies of that organization. They are cooperating in the following areas[1]:

a) WIPO should make available all its computerized databases of the International Bureau to the TRIPS Council and other WTO bodies.

b) Since WIPO has enough and efficient resources in the field of technical and legal assistance, it should enhance cooperation in these activities and give technical- legal assistance to members of WTO in order to implement the TRIPS obligations.

The TRIPS Council meets as often as necessary to carry out its functions. Decisions are taken by the chairman of the Council in consultation with members. The Council also meets in 'special session' for the negotiations on a multilateral system for the registration and the notification of geographical indications for wines and spirits. The Council for TRIPS operates under the general guidance of the General Council which is the ruling body of the organization and represents all members. According to the WTO agreement, the Council has established its own rules of procedures, approved by General Council. The rules are essentially the same as those for the General Council. As in other WTO bodies, decisions are always taken in Council by consensus. In case of no agreement, the Council will refer the matter to the General Council which will then take a decision (UNCTAD- ICTSD Resource Book 2005: 740).

Review of member's compliance to the TRIPS Agreement is an important task of the Council to which it has devoted a lot of time in actual practice. Members constitute the basis for reviews of the implementing legislation by notifying the laws

[1] For further details, see: http://www.wto.org/english/tratop_e/trips_e/trips_e.htm.

and regulations. The precondition of this exercise is that members have already started the process of implementing the TRIPS Agreement. Thus, one year after the entry into force of the Agreement, the Council first started the review of the legislation of developed countries whose transitional period ended on 1 January 1996. Now, this process has been completed. At present, the Council is involved in reviewing the legislation of developing countries. The review of LDCs legislation was to have begun in January 2006 (UNCTAD- ICTSD Resource Book 2005: 742).

The concerned WTO member whose legislation is being reviewed gives answers to the questions of other interested WTO member in writing. The time period provided for the questions and answers are quite flexible; a review could spread over six to nine months. Apart from that, there is also another reason for the length of procedure that developing countries do not have the resources to bring all experts for all the meeting. The TRIPS Council was specifically set up for the purpose of monitoring the operation of TRIPS. There is no other WTO organ that could take over this function except the General Council. The powers conferred to the TRIPS Council are quite considerable - it can monitor member's compliance with their obligations. The reason is that TRIPS has common minimum standards that have to be respected by members (UNCTAD- ICTSD Resource Book 2005: 745).

The proper participation of developing countries in a highly technical body such as the TRIPS Council is an issue of consideration. The meetings in the TRIPS Council are attended by experts in IP matters. Due to lack of expertise, developing and LDCs are not participating properly in these discussions[2]. The WTO Ministerial Conference held in Doha in November 2001 is important in many respects. The conference adopted a declaration that dealt with a broad and balanced work programme that included the issue area of TRIPS. Regarding TRIPS, a separate Declaration was adopted related to the support of public health by promoting both access to existing medicines and research and development of new medicines. This Declaration is known as the *"Declaration on TRIPS and Public Health"*. TRIPS issues incorporated in the work programme are as follows[3]:

[2] For furher details, see: http://www.ip-watch.org.
[3] For further details, see: http://www.centad.org/focus.asp.

a) The Declaration agreed on the negotiation of the establishment of a multilateral system of notification and registration of geographical indication for wines and spirits. Issue relating to the extension of protection of geographical indication to products would also be addressed in the TRIPS Council as an outstanding implementation issue.

b) Review of Article 27.3 (b) relating to patentability of micro-organism and micro- biological process.

c) To examine the relationship between TRIPS Agreement and the Convention on Biological Diversity.

d) Under the auspices of the General Council, to examine the relationship between trade and transfer of technology; increased flow of technology to developing countries.

The Ministerial Declaration also stated that the TRIPS Council should be guided by the objectives under Articles 7 & 8 of the TRIPS Agreement and should take into account the development dimensions in undertaking the work programme. Under the Doha Declaration, India showed its concern over the extension of GI to agricultural goods, natural goods, manufactured and handicraft goods etc. that would prevent unauthorized persons from misusing GI and would protect consumers. For this, India also has enacted the Geographical Indication of Goods Act 1999. India has many products requiring international protection under this system. Under TRIPS, there is no obligation for other countries to extend protection. The TRIPS Agreement, under article 27.3(b), excluded micro-organisms from patentability. The review process has started in 1999 but no decision has yet been finalized. The Budapest Treaty on Micro-organism and also WIPO Committee of Experts on Biotechnological Invention, both did not define the term 'micro-organism'. Some argued that when naturally occurring micro- organisms are genetically modified then it involves human input. Then there would be an angle of invention and these are useful to perform some activities. Thus, TRIPS would provide process patent for genetically modified micro-

organism. There is still no progress on this issue due to the lack of definition of terms[4].

Article 27 is the most important and controversial aspect of TRIPS. Article 27 of TRIPS stipulates that "a patent shall be available for any invention, whether product or process, in all fields of technology, provided it is new, involves an inventive step and is capable of industrial application"[5]. The members demanded that the terminologies used in this Article such as 'invention', 'new', 'involve an inventive step' and 'capable of industrial application' need to be defined explicitly so that frivolous claims are not filed.

In connection with trade and transfer of technology it may be stated that Article 7 of the TRIPS Agreement on objectives provides that "the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations". Although the situation mentioned in Article 7 is quite clear yet a problem arises. There is a need for a specific provision for transfer and dissemination of technology and knowledge. Actually, there is no room for negotiation in the working group under Article 7. So it has been suggested that such issues should have to be only under the domain of national governments and not under the WTO forum. WTO is not the appropriate forum to easily finalize such issues. However, this is an issue of serious concern for the developing countries not the developed countries (Stegemann 2000: 1238). Almost all TRIPS issues in the Doha work programme are in a state of limbo because of the clash of interests between the developed and developing countries. There is a need for a proactive approach to settling these issues[6].

The Doha Declaration on the TRIPS Agreement and Public Health has been regarded as a significant landmark in the international treaty system. The Declaration confirms that TRIPS provisions provide flexibility to members to protect public health and access to medicines. It declares also that TRIPS provisions should be

[4] For further details, see: http://www.centad.org/focus.asp
[5] For further details, see: http://www.wto.org/english/tratop_e/trips_e/trips_e.htm.
[6] For further details, see: http://www.centad.org/focus.asp.

interpreted in the light of objectives and purposes of the TRIPS Agreement which is the customary law of treaty interpretation. A paper was submitted by a group of developing countries to the TRIPS Council for special discussions on IP and access to medicine on June 2001. The main aim is to ensure that the TRIPS Agreement does not undermine the implementation of public health policies by members (Shanker 2002: 721). The fact that developing countries had to demand that provision of TRIPS Agreement should be interpreted in terms of its objectives and purpose under Articles 7 & 8 shows that the WTO dispute settlement mechanism has failed in introducing the rule of law (Abbott 2002: 40).

While the Doha Declaration is regarded as a significant landmark, the developing countries' important recommendation to developed countries not to threaten the developing countries by unilateral action was not accepted. Developing countries won limited gains which is difficult to maintain because Doha Declaration is not legally binding (Dayashanker 2002: 722).

In order to bring additional accountability to the TRIPS Agreement, Europe has led the efforts to introduce enforcement into the TRIPS Council for over a year. European Union requested the placement of enforcement on the TRIPS Council Agenda at the October 2006 meeting of the TRIPS Council. This was supported by Japan, US, Switzerland, but rejected by majority of developing countries. Developing countries have a doubt and are also worried about the inclusion of enforcement in the Council. They have been pushing the proposal on the relationship between the Convention on Biological Diversity (CBD) and the TRIPS Agreement[7].

DISPUTE SETTELMENT MECHANISM

The dispute settlement body is the new achievement of the Uruguay Round which distinguishes it from other organizations like WIPO. During the Uruguay Round, negotiators proposed the dispute settlement mechanism to discipline the members. Article 64 deals with the dispute settlement procedures of WTO. When a member considers that the rights and benefits provided to it under the WTO Agreements are

[7] For further details, see: http://www.ip-watch.org.

being impaired through measures taken by another member, the need for dispute settlement arises (Dayashanker 2002: 725).

The Developing countries were not only opposing the inclusion of IPR, they also wanted to keep this subject outside the scope of the new proposed enforceable dispute settlement mechanism in the negotiating agenda as they anticipated a threat to national sovereignty. But due to lack of unity, they were unable to block the adoption of the Annell Draft which contained the provision for IPR related disputes (Watal 2001: 34).

Since the WTO Agreements are based on the idea of reciprocal and mutually advantageous economic benefits through trade liberalization, it is the principal objective of dispute settlement to reinstall, as quickly as possible; a situation in which every member can fully enjoy the benefits it is entitled under various agreements (UNCTAD-ICTSD Resource Book 2005: 636). For the realization of this objective, DSB provides a very detailed and rule based procedure which consists of different phases. Each of which is subject to mandatory time frames.[8] The dispute settlement procedure is applicable where the complaining party asserts a violation of any WTO obligation. Besides that, under the Dispute Settlement Mechanism, there is also a provision for 'non–violation complaints' where one members' measure without violating WTO rules, results in factual impairment of benefits of another member as well as of 'situation complaints' where existence of any situation leads to the above same condition. But in the TRIPS context, currently neither non- violation nor situation complaint applies. It is noted that IPRs and the related dispute settlement mechanism were brought into the ambit of the WTO for the first time after the conclusion of Uruguay Round (UNCTAD- ICTSD Resource Book 2005: 637).

The international treaties for the protection of IPRs such as the Paris Convention provide a certain level of IP protection but do not contain their own dispute settlement mechanism. Instead, reference is made to the settlement of disputes before the International Court of Justice (ICJ) and even that is not mandatory. The dispute settlement system under GATT 1947 was different from that of the WTO. The

[8] For further details, see: http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

major difference is the shift of the dispute settlement system from a diplomatic forum to a rules based, court like procedure. So the legalization of the DS system has taken place under the framework of the WTO. Under GATT 1947, a panel report could only be adopted if all contracting parties including the losing one agreed to do so but at the WTO, the panel and Appellate Body reports are automatically adopted (Dreyfuss & Lowenfeld 1997: 316).

The first paragraph of Article 64 clarifies that the dispute settlement mechanism as developed in the Uruguay Round will apply fully to the TRIPS Agreement. Non violation and situation complaints are not applicable under TRIPS except violation complaints. The fully applicability of Dispute Settlement mechanism means that TRIPS is justifiable before the WTO. The automatic and binding character of the Dispute Settlement mechanism makes the provision of TRIPS fully enforceable (UNCTAD- ICTSD Resource Book 2005: 624).

The dispute settlement system provided by the WIPO administered IP protection treaties has proved less efficient than the DSB of the WTO. There is a WIPO draft treaty on the settlement of disputes between states in the field of IP but the utility of such a treaty is limited. Some states insisted that there would be no further need to pursue the creation of a WIPO Dispute Settlement system. Establishment of such system in parallel to the WTO DSB would bring certain political advantages. The WIPO DS Mechanism is based on arbitration and mediation and is not effective and enforceable like WTO. In case of a dispute between parties to both organizations, there may be confusion as to choice of forum for dispute settlement. If both fora handle the case on the same subject matter and give contradictory directions, what consequences would entail? (Watal 2001: 390).

TRIPS disciplines are subject to binding dispute settlement decision and constitute an important novelty for all WTO members but especially for developing countries. Developing countries' domestic IPR systems are far less developed so their adjustment to TRIPS standards requires a higher effort. If members fail to meet their obligations, they would face the risk of trade sanctions in the form of suspension of concessions. From an industrialized perspective, this is a valuable and powerful tool to ensure developing members' efforts as to the improvement of their IP protection

system. According to developing countries' point of view, enhanced IP protection is not necessarily the most suitable policy. Thus developing countries feel compelled to engage in something which is contrary to their national interests (UNCTAD-ICTSD Resource Book 2005: 638).

Developing countries can get legal advice and assistance in respect of Dispute Settlement. For this, the secretariat makes available qualified legal experts from the WTO Technical Cooperation Services. DSU (Dispute Settlement Understanding) contains some specific developing/LDC provisions in order to accommodate some of concerns of these countries. Article 8 states that in a dispute between developed and developing countries, panel should include at least one panelist from developing country member. In case of India-Shirts and Blouses and Argentina-Textiles, these entire panelists were nationals of developing countries. These provisions give special treatment and preferences to developing countries and LDCs but are limited in practical use. Under Article 12, a panel shall accord sufficient time for Developing Countries to prepare and present its argumentation. However, the DSB chairman has never taken a formal decision concerning the extension of the consultation period. Beside that, there is a vagueness in the words "might" and "appropriate" which does not ensure the protection of the national interests of the developing countries. Thus, the possibility of enforcing TRIPS disciplines through the DSU constitutes a major challenge for developing countries. The DSU actually is seeking to put WTO members on an equal footing despite their very different levels of developments and economic–political powers. All members are subject to the same rules which creates problems and lots of disagreement between developed and developing countries (UNCTAD- ICTSD Resource Book 2005: 634). But there are also some examples in the WTO dispute settlement history of developing countries successfully defending their WTO compatible interests against powerful global players (Dayashanker 2002: 730).

Shortcomings

Due to some loopholes under the new DSU, developing countries are not equipped well to defend their interests (UNCTAD-ICTSD Resource Book 2005: 651).

a) Lack of domestic human resources creates a need for foreign expertise and this entails a high cost. Sometimes, developed countries do not give enough

assistance and show little interest. Thus, it has been proposed that the WTO develop methods to reduce such financial burdens on developing countries.

b) In many developing countries, there is a lack of an effective mechanism to ensure the flow of information between the government on one side and the private sector on the other side. Since only governments are authorized to launch a WTO dispute, they are wholly responsible for defending their domestic industries' interests.

DEVELOPING COUNTRIES UNDER TRIPS

Like the developed countries, the developing countries have sought economic gains under the TRIPS Agreement. Some observers argue that IP protection provided by TRIPS significantly benefits developing countries. But in the multilateral trading system, developing countries have always remained on the periphery and that is why they demanded compensation in the form of concessions without any commitment in the negotiating process (Gana 1996: 937).

During the Uruguay Round, while the participation of the developing countries was initially not good, however, they were pushed to participate in the Multilateral Trading System. The merger of trade and IP under the Uruguay Round is for the developing countries, a matter of means rather than ends. TRIPS reflects the success of US, EC and other industrialized countries. Developing countries and LDCs did not achieve their interests. TRIPS obligations applied to all members equally, but developing countries were allowed extra time to implement the applicable changes to their national laws (Transitional Arrangements). Transition period was given by WTO to developing countries till 2005 where as to LDCs, it extended to 2016(Gana 1996: 746).

Thus, although strict IP laws are detrimental to poorer countries' development, TRIPS has provided flexibilities. However, according to a World Health Organization Report, many developing countries have not incorporated TRIPS flexibilities in their legislation. The main reason for this is the lack of legal-technical assistance and expertise which is needed to draft legislation according to their objectives and that implement flexibilities (Sell 1995: 320). This has resulted from the fact that the

developing economies directly copy the developed countries' IP legislation or rely on the Technical Assistance of WIPO. IPR interacts with the social, economic, legal and political structures of developing countries to promote innovation and development. Without the strong IPR system, stable government, free market capitalism, it is unlikely that modern IP has the potential to transform developing countries into the technology producers which they aspire to become. Under the TRIPS Agreement, developing countries are getting concessions in the area of textiles and agriculture but the value of these concessions can not be used to offset the costs of higher protection for IP (Gana 1996: 749).

The Uruguay Round indicated the general movement in the western hemisphere to reorder the basis of economic relationship. Since the developed countries were giving first preference to protection of IP, the TRIPS Agreement is concerned primarily with protection and not with dissemination which hinders the process of access to new knowledge in developing countries which are keys to development objectives and can be possible by a process of transformation. For this, there is a need of the infusion of new methods and new advances into society which increase social welfare and living standard (Gana 1996: 750).

Patent Protection

The TRIPS Agreement significantly extends the scope of patent protection. The most controversial provision of TRIPS is Article 27 which provides patent protection for processes and requires that patent be available in "all fields of technology" including biotechnology. This scope of protection is not granted under domestic patent laws of most developing countries and also not provided by the Paris Convention (Debroy & Saqib 2005: 36). Developing countries are concerned about the impact of patenting biotechnological processes and products because they do not have enhanced level of R&D (Research and Development) in the biotech field. Thus their concerns range from ethical issues e.g. should plant life be patented to legal issues e.g. are they new to economic issues? Patented biotechnological process and product would adversely affect the growth of agriculture and the vetinary and pharmaceutical fields. Ethical and developmental issues affect developing countries concerns over extending patents to pharmaceutical and chemical products. The TRIPS Agreement makes ineffective these concerns by granting Transitional Arrangements to developing countries. Thus,

now the success of TRIPS is dependent on the extent to which countries can transform their legal and social obligations according to TRIPS obligations within a time period (Gana 1996: 747).

Under TRIPS, there is a possibility of dissemination of technological information under a patent application. Disclosure of the invention is the subject of the application. The application should describe the invention in enough detail and it must be innovative for the recipient country. Since increased dissemination of technical knowledge is in the interest of the developing countries, they welcome it under TRIPS. But the ability to utilize the invention for domestic purposes or to adopt the invention to suit peculiarities in other countries is still not available legally which becomes stumbling block in the dissemination of technological information. There are similar concerns in relation with Broadcasting and related rights (Gana 1996: 753). Thus, developing countries courts and administrative body must be careful about these concerns. Another concern for the developing countries under the TRIPS Agreement is the extension of the period of protection to 20 years which extends the period of monopoly for the patent holder. Thus patent protection is not creating meaningful benefits to the developing countries under the TRIPS Agreement (Debroy & Saqib 2005: 38).

To ensure protection of IP, the TRIPS Agreement invokes the threat of trade sanctions. This is to say that violation of TRIPS gives rise to the legitimate use of trade sanctions against the contracting party. While it provides for dispute settlement but after the failure to resolve a dispute, a party may invoke trade sanctions against another party who has acted inconsistently with its TRIPS obligations.

India's patent law is now moving from The Patent Act 1970 law that was clearly anti patent to a pro patent system. India has applied a patent regime that allows the grant of patents for both products and processes for all eligible inventions. To comply with TRIPS obligations, India adopted changes in its patent laws in 1999, 2002 and 2005. Indian industry and government believe that there should be a stronger patent protection which will also attract local R & D and FDI, where as on the other hand, NGO's and civil society are in favor of a weak patent protection law.

This has resulted in a confusing patent law which appears to be in conflict with the TRIPS Agreement (Commentary 2005 a: 2).

Under TRIPS, it is recognized that an invention must meet the three criteria – novelty, inventive step and industrial applicability in order to be granted a patent. The TRIPS Agreement leaves countries free to define these criteria. These criteria existed in the 1970 India patent law. The 2005 patent amendment laws retain these criteria but further specify a 'new invention'. According to some observers, this amended patent law could increase the capacity of patent holder in extending the life of a patent through the grant of new patents on formulations, dosage forms or minor chemical variations of an earlier patented product. It is not difficult to prove that the improved form is more efficacious (Gopakumar & Amin 2005: 1503).

The new procedural and substantive changes seem to weigh in favor of the patent applicant. Problems have now started to arise, as was visible in the case of the Swiss pharmaceutical company Novartis challenging the Indian patent law in a High Court because of the rejection of a patent application for one of its medicines. The new 2005 amendment seems to suit the interests of global pharmaceutical firms more than to than protect the citizens' right to affordable medicines (Commentary 2005: 2).

Copyright Protection

After the defeat of the Stockholm Protocol to the Berne Convention, developing countries became inactive in international copyright relations. Under the copyright provisions, the TRIPS Agreement allows limitations or exceptions to exclusive rights in certain special cases which do not conflict with a 'normal exploitation' (refers to photocopying for industrial and gains) of the work and do not unreasonably prejudice the 'legitimate interests' of the right holders (Gana 1996: 758). The same exceptions extend to all rights covered by TRIPS. However, unlike the Berne Convention, these two terms are not clearly defined under the TRIPS Agreement.

The problematic phrase 'legitimate interest' of right holder is dependent on the particular vision of the country's IPR system e.g. moral right is considered as legitimate interest of the author in continental countries, different countries have different legitimate interests of right holders. Moral rights are not included under

TRIPS. So it can be argued that the country has freedom to determine its own copyright philosophy and to define the scope of the phrase 'legitimate interest' under TRIPS (Gana 1996: 760).

ENFORCEMENT PROCEDURE

The TRIPS Agreement specifies the terms on which enforcement procedures are to be administered. It requires that enforcement procedures of IP laws in member countries must conform to its terms. But the extent of this requirement is not clear. There are two types of enforcement under TRIPS Agreement – Internal Enforcement and External Enforcement. The probabilities of success for enforcement of the TRIPS Agreement is depend on these two perspectives (Gana 1996: 769).

a) *Internal Enforcement* - It requires member countries to ensure that enforcement procedures as specified in the Agreement are made available under national laws. The Agreement specified terms which include an expeditious process, written decisions and an opportunity for judicial or administrative review. What exactly developing countries are required to undertake internally in order to comply with TRIPS Agreement e.g. where a developing country does not have a judicial system that is equipped to provide the 'due process' requirements of TRIPS Agreement (Gana 1996: 770).

b) *External Enforcement* - External enforcement contains the prospects of trade sanctions as a motivating force to secure compliance of developing countries with TRIPS Agreement. Use of trade sanction is the most important tool of developed countries to secure its interests in developing countries. While the threat of trade sanctions can be useful, it cannot in itself accomplish enforcement of the TRIPS Agreement. Developing countries' core issue is development – the need for infrastructure, the provision of basic human needs and the guarantee of basic human right and upward mobility of people in general. Developing countries always oppose this because it hinders their development process.

It has been argued that the double route of enforcement is illegitimate and would adversely affect the achievement of development objectives of developing

countries. TRIPS has been a sensitive issue for the developing countries right from the signing of the GATT Agreement in 1994. Provisions under TRIPS are seriously challenged by some countries through unilateral action. For instance, the Brazilian Ministry of Health challenged TRIPS provisions on the issue of AIDS drugs. While Brazil was a founder member of the WTO, it threatened to disobey the system of patent protection to safeguards the interests of poor AIDS patients. Such protests and threats are being used by Brazil as a negotiating tool for bringing down prices by the patent holders. Major pharmaceutical companies with patent rights are prudent on their part to avoid the Dispute Settlement route and go in for a negotiated settlement on this. Thus, what is important is to ensure that public good remains paramount while legislating, interpreting and implementing any agreements on matters that impact people's health, food security and subsistence (Nair 2006: 15).

CONCLUSION

Today, skills, knowledge and technology have become decisive assets in the global economy. Our global economy has become an information- and knowledge-based economy. As a result, IP has emerged as a key asset in ensuring technical advancement, growth and competitiveness. At the time when the Uruguay Round was launched, it was felt that an appropriate global IPR regime would be necessary in order to face new developments and challenges. The TRIPS Agreement led to the emergence of a growing global debate on IP. The most important debate has been that relating to the 'effect of IP on development' in terms of developing countries' efforts in implementing the TRIPS Agreement. Has TRIPS been successful in creating a balance between IP protection and public interest? Basically, the TRIPS Agreement raised a debate on 'more IPRs, the better vs. fewer IPRs, the better' (Lamy 2004: 924). This debate has emerged because of the contradiction between IPRs and public policy objectives.

Under the TRIPS Agreement, problems lie not in the provisions, but in the way, they are interpreted. TRIPS does not have any provision related to interpretation. It introduces common minimum standards for IP protection which makes it clear that it does not take an approach of strict harmonization or standardization. While TRIPS does not have an interpretation provision, it provides flexibilities to developing countries to fulfill their own economic capacities and development goals. It was

pointed out at the WTO Ministerial meeting in 1999 that TRIPS should be seen as a flexible instrument. However, while recognizing flexibility is one thing, using it in practice is something else. Developing countries and LDCs do not possess the necessary legal and technical expertise to utilize these flexibilities. Capacity building and technical assistance are crucial issues so that there is a need of flanking policies to maximize the efforts of IP (Lamy 2004: 926). There is a lack of development in different areas e.g. education, market reform etc. in developing countries. Developed countries are benefiting from this lack of basic amenities in developing countries leading to a high cost of products. This condition has pushed developing countries to embark on a comprehensive development strategies addressing areas such as education, market reform and stable economic policies regarding FDI.

Thus, Gana argues that 'the real challenge facing developing countries in their development objectives is a need to evaluate traditional strategies for overall development goals rather than focus primarily on the international proprietary system' (Gana 1996: 737). One of the great strengths of the WTO system is the new dispute settlement process which favors rule-oriented approach to dispute resolution which is mandatory in the WTO. This process is streamlined and the time period between decisions and enforcement is now effectively shortened. It also eliminates the possibility of blocking a panel report which was a serious problem in the old GATT system. Under this new system, there is an increased chance that measures taken by developed countries against developing countries will be subject to greater scrutiny. If the panel's decisions are not implemented, the party is entitled to seek compensation. The overall enforcement prospects of TRIPS will be determined by the general efficacy of the dispute settlement system of the WTO.

Under the TRIPS Agreement, developed countries are mostly using the threat and pressure against developing countries to comply with TRIPS obligations. But pressure and threats alone do not work. The TRIPS Council and the dispute settlement system are using enforcement processes to ensure compliance. Apart from these 'sticks', compliance can be achieved through 'carrots' such as discussion, capacity building and technical assistance. Technical-legal and administrative assistance part of TRIPS is weak, for which it takes help from WIPO.

Thus, the success of the TRIPS Agreement is dependent not only on the willingness of the developing countries to comply with WTO decisions and provisions but also on the generosity of developed countries in giving technical assistance and concessions. TRIPS should be equitable and also implement its rules in the light of development dimensions.

After the analysis of TRIPS Agreement, the next chapter would be a comparative analysis of WTO-TRIPS and WIPO i.e an attempt to figure out their differences and similarities.

CHAPTER 4

CHAPTER 4

A COMPARATIVE ANALYSIS OF THE WIPO AND THE WTO TRIPS AGREEMENT

Today, our globalized economy can be understood as a 'Knowledge Economy'. This is due to the increasing importance of the Intellectual Property (IP) regime at all levels–national, regional and international. IP is defined as 'creation of the human mind'. As far as governance of the IPR regime is concerned, there are several institutional mechanisms at the national, regional and international levels.

The primary international organization governing IPRs is the *World Intellectual Property Organization* (WIPO) but the WTO through its *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPS Agreement) also regulates IP. These two institutions engage in the same task of IP protection, differ from each other not only in their historical, organizational and institutional perspectives, but also in objectives and mode of functioning.

AREAS OF DIFFERENCES

Historical Perspectives - a comparison of evolution and development

The reasons behind the origin of WIPO and that of the TRIPS Agreement are different and because of this fact, there are differences between them in many aspects. The proposal to establish an organization in place of BIRPI was advocated by the United Nations Economic and Social Council to deal with the subject of IP. Due to the international agency status of BIRPI, member countries expressed a desire to establish a formal international organization and revised the multilateral treaties administered by BIRPI. The 'Convention Establishing the WIPO' was signed at Stockholm in 1967 and entered into force in 1970, and WIPO became a specialized agency of UN in 1974. BIRPI believed that working in the UN system would encourage more developing countries to join the organization and enable the internal administration of the organization to benefit from the advantages available to UN agencies. On the other hand, the US, European and Japanese delegations were concerned about the developing countries could create the obstacles in the WIPO's activities. The WIPO Convention provides the umbrella framework for the organization – it is an

administrative treaty only because the most important task of the WIPO is to provide administrative and technical assistance in the field of IP (Dutfield 2003: 6).

On the other hand, rapid scientific and technological developments, breakdown of the attempts to revise the Paris Convention and the limitations of GATT in addressing IPR issues were the factors that led the industrialized countries to bring IP issues under the framework of GATT (Abbott 1989: 909). In the post Cold War era, with the increase of trade in every sphere, the developed countries were facing the problem of trade distortion in the IP field due to the lack of effective protection of IP in new fields, and lack of substantive standards and effective enforcement mechanisms under WIPO.

Thus, the US and other industrialized countries negotiated the TRIPS Agreement because of intensive efforts. Unlike WIPO, the TRIPS Agreement linked IP matters with trade for the first time. The entire TRIPS negotiating process represented a victory for the developed countries on the IPRs issue (Abbott 1989: 724). While both the TRIPS negotiating process and the Stockholm Conference showed a North-South division, a higher degree of North-South division was visible in the TRIPS negotiating process. In the Uruguay Round, the developing countries failed to achieve any unity or coordination.

During the Uruguay Round, US made use of trade sanctions like Super 301 on the developing countries to produce agreement on the TRIPS Agreement. For instance, the Republic of Korea agreed to the extension of patent terms to 20 years under the threat of use of Super 301 in 1987. This indicates that developing countries were pressurized by US to adopt TRIPS. Many sensitive sectors of economic and social activity in developing countries such as agriculture, health, education and culture were affected by the changes demanded by the TRIPS Agreement. During the Uruguay Round, demanders such as US and EC focused on the implementation of and dispute settlement under the TRIPS rather than on further development that resulted in the aggressive demand later for amendment of the TRIPS by the developing countries (Watal 2001: 114).

Before the existence of TRIPS Agreement, there were differences of IPR laws (especially patent laws on exclusions) between the countries of the North and those of the South countries. Foreclosing such exclusions was the most important goal and achievement of the TRIPS. Pre-TRIPS, countries were not required to change their IPR laws such as terms of patent. Countries had 7, 6, 10 years of patent protection in their laws but after the TRIPS Agreement, they have to change their laws according to their TRIPS obligations. However, the developing countries had not been required to amendment in their laws while signing the Paris Convention. In the case of the WIPO, the developing countries had a bigger say during the negotiations (Watal 2001: 117).

If we equate the 1968 Stockholm Conference with the TRIPS negotiating process, then according to most analysts, transformation of WIPO from BIRPI did not have as dramatic an impact on world wide intellectual property protection as TRIPS has had (Watal 2001: 2).

ORGANIZATIONAL- INSTITUTIONAL DIFFERENCES

Analysis of Objectives

Although both the WIPO and the TRIPS Agreement are concerned with IPR protection, there are differences in their objectives. WIPO's main aim is to promote the protection of IP throughout the world and to ensure administrative cooperation among the unions (Musungu & Dutfield 2003: 5). On the other hand, TRIPS aims to establish adequate standards and effective means for the promotion and enforcement of IPRs; thereby eliminating international trade distortion related to IPR and ensuring a proper balance between IP holders, social welfare and economic development (Dhanjee & Chazournes 1990: 30).

Unlike TRIPS, the objectives of WIPO are narrow in terms of the development-related aspects. TRIPS links IP with trade in its objectives whereas WIPO does not. Besides that, the TRIPS objectives are influenced by the US and other developed countries due to the intense lobbying by US during the Uruguay Round. It has been observed that the objectives of the TRIPS Agreement are reflective of the differences of perspectives between the North and the South where as under the WIPO; this difference does not seem to exist (UNCTAD-ICTSD Resource Book 2005: 4).

Under WIPO, there are two important conventions - the Paris Convention and Berne Convention – that incorporate the National Treatment principle, which is also enshrined in the GATT and subsequently in the WTO. But, there is an important distinction between the subject matter of the national treatment rule in the GATT and in the Paris and Berne Conventions. The GATT rule relates to 'products' whereas the rule in the IP conventions concerns 'person' (Abbott 1989: 899).

Structural Analysis

The structure of both organizations is somewhat similar, although nomenclature differs. The main governing and decision-making bodies of WIPO are the General Assembly, the Conference and the Coordination Committee. The General Assembly is the highest decision making organ, which sets out WIPO's functions. The Conference is important in establishing the program of legal- technical assistance. The co-ordination committee as an advisory gives advice to the organs of the unions, General Assembly, the Conference and the Director General of the International Bureau on all administrative, financial and other matters. The day-to-day activities of the WIPO take place in standing committees and working groups (Dutfield and Musungu 2003: 9).

TRIPS is an agreement and not an institution in itself. Its functions are implemented under the framework of the WTO structure. However, there is a separate Council - the TRIPS Council for the review of the implementation of its provisions. The TRIPS Council operates under the overall supervision of the General Council of the WTO[1].

Under the WIPO scheme, there is separate place for dispute settlement - the Dispute Arbitration and Mediation Centre. In the WTO, the General Council meets also as the Dispute Settlement Body.

In the WIPO, there is a one nation-one vote system for decision-making. The WTO also supposedly applies the one-country-one-vote system, but in practice,

[1] For further details, see: http://www.wto.org.

decisions are taken by consensus. Thus, the developing countries have a bigger voice in the WIPO than in the WTO.

Under WIPO, states parties have dual membership – membership of WIPO Convention and membership of those treaties that administered by WIPO. Membership of the latter is voluntary. In contrast, under the 'single undertaking' system of the WTO, those who signed the Marrakech Treaty are automatically members of all WTO agreements including the TRIPS Agreement.

Despite of the differences, the two institutions follow some common platform of working. Treaties administer by the WIPO as Paris and Berne Convention, are also followed by the TRIPS Agreement. TRIPS Agreement is an offshoot of the series of negotiations going on around the world since the inception of the Paris Convention in the year 1883. It has been made mandatory for the member countries of the TRIPS Agreement to comply with the some articles of the Paris Convention regarding the protection of Industrial Property[2].

Both the Berne Convention and the TRIPS Agreement apply to copyright. The TRIPS Agreement corresponds to the Berne Convention. The international copyright norms under the Berne and TRIPS Agreement have developed at an unaccountably accelerated pace. Both the Berne Convention and TRIPS provide exceptions. It is clearly accepted by both that copyright is not an absolute right and it is recognized that copyright is limited inherently by the public interest that limitations and exceptions must exist (Suthersanen 2005: 3).

COOPERATION BETWEEN WTO-TRIPS AND WIPO

The new development in the IP field was formalized through the adoption of the WIPO-WTO cooperation agreement on March 1995. This Agreement seeks to foster cooperation between the two organizations concerning administrative matters such as notification of laws and regulations as well as legal and technical assistance in favor of developing countries[3].

[2] For further details, see: http://www.tifac.org.in/do/pfc/pub/conven/paris.htm.
[3] For further details, see: http://www.wto.org.

The developing countries are ready to adopt or modernize their IP legislation but the time given by TRIPS (as of January 2000) is not sufficient for this. Developing countries are also in need of technical assistance to modernize their administrative infrastructure to apply the new legislation effectively. The General Assembly of the WIPO already mandated the International Bureau in its 1994 and 1995 sessions to study and to assist members of WIPO on matters related to WTO-TRIPS. The aforementioned resolutions of the General Assembly of the WIPO in 1994 and 1995 led to the Agreement between WTO and WIPO of 1995, which came into force in January 1996 (WIPO 2004: 1).

The International Bureau should make available to those developing countries that are not members of the WIPO but have membership of the WTO the same legal-technical assistance, as it makes available to WIPO member states. For this, the International Bureau and WTO Secretariat shall enhance cooperation in their legal-technical assistance and technical cooperation activities related to the TRIPS Agreement for developing countries to maximize the usefulness of those activities. The International Bureau and WTO Secretariat always remain in contact to help each other and exchange non-confidential information. For instance, access of the computerized database of IB is freely available to WTO members.[4]

Due to the mandate of the WIPO General Assembly and WTO-WIPO Agreement, IB has carried out extensive activities related to the TRIPS Agreement since January 1996. These activities have been incorporated into the WIPO's ongoing development program, which has been organized for WTO developing countries members in respect of a WTO-WIPO Agreement. Such activities included legislative advice, awareness building and human resource development, institution building of the IP system and enforcement, and studies and publications. The conclusion of the TRIPS Agreement facilitated the task of WIPO in the field of techno-legal assistance. WIPO renders intensive legislative advice in the implementation of the TRIPS Agreement and assists in the preparation and finalization of hundreds of IP laws. Thus, it enhances the importance of WIPO (WIPO 2004: 2).

[4] For further details, see: http://www.wto.org/english/tratop_e/trips_e/wtowip_e.htm.

The human resource development program of WIPO has always been a central part of its cooperation for development program. However, it was reoriented to include specific provision of the TRIPS Agreement. Its activities involve, organizing mega meetings in various regions of the world including training courses, inter regional courses and seminars. It has also undertaken the preparation of periodicals, studies and reference materials to promote awareness of protection of IP under the TRIPS Agreement. The establishment of the WIPO World Wide Academy shows the importance of WIPO and places on human resource development in order to provide concrete assistance to developing countries and LDCs in the area of IP (WIPO 2004: 3).

Another important area is to assist developing countries build up or upgrade their intellectual property offices with adequate institutional infrastructure and resources, qualified staff, modern management techniques and access to information technology support systems. In this connection, WIPO sends advisory missions to developing countries, sponsors visits of a large number of officials from developing countries to offices in industrialized countries to study various aspects of modernization and renders extensive assistance and equipment for computerization. (WIPO 2004: 3).

Enforcement of intellectual property rights, as an integral part of the TRIPS Agreement, has been incorporated into the WIPO programs since January 1996. In order to raise awareness of enforcement in the area of intellectual property rights, WIPO has organized more than hundred interregional, regional, sub-regional and national meetings concentrating wholly or partly on the enforcement provisions of the TRIPS Agreement. Effective enforcement of IP rights means that right holders should be in the position to obtain decisions which are well-founded, rendered within a reasonable period of time and affordable, taking into account fees of courts, administrative bodies and attorneys (Das 1994: 18).

In 2004, WIPO Advisory Committee on Enforcement focused on the role of judicial authorities in the field of IP enforcement. A series of presentations related to the theme of global governance by top judges and senior government officials took place. This includes the issue of the integration of mediation procedures within

judicial structures, streamlining of procedures in IP litigation, importance of judicial training and specialization in the field of IP. In order to administer this committee and to intensify education and training activities in the field of IP enforcement, WIPO established the "Enforcement and Special Projects Division" which has a task of raising awareness of social and economic implications of violations of IP rights. Due to the prevalence of world trade in counterfeiting and piracy activities, this was established in order to reduce these problems. All these efforts show WIPO's improvement (Das 1994: 20).

Apart from that, according to WIPO's observers, by agreeing to TRIPS, developing countries may have lost. Under TRIPS Agreement, developing countries have either to sign or to stay out of WTO (unlike WIPO).

RISING TRENDS OF CO-OPERATION BETWEEN WTO-TRIPS AND WIPO

Global Electronic Commerce (GEC)

IPRs related to GEC were discussed in the Second WTO Ministerial Conference held at Geneva in 1998. The TRIPS Council has put out a general report on electronic commerce and the specific study on the TRIPS provisions and electronic commerce and it has been continuing this work. TRIPS Council invited the representatives of WIPO for providing information about their activities dealing with electronic commerce. Thus, this work carried out under the aegis of WIPO[5]. Because, WIPO had taken an earlier initiative to launch substantive work on electronic commerce. This work has resulted in two new treaties (WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty), dealing with issues arising out of electronic commerce on copyright and related rights in 1996 and in the area of domain names and well-known trademarks in 1999. Developing countries were actively involved in these discussions in the WIPO and all countries welcome guidance at the international level on how to cope with new kind of infringement cases.

[5] For further details, see: http://docsonline.wto.org-IP/C/20.

Whereas, under the WTO, members have not come to an agreement due to some issues such as questions of jurisdiction, electronic contracts etc. WIPO, rather than WTO, will set the pace on this set of issues. It remains to be seen whether decisions in WIPO will be incorporated into TRIPS (Watal 2001: 374).

Domain Names

Domain Names are the user-friendly form of internet addresses that generally end with .com, .org, .net or with a country code. The problem connected with electronic commerce and IP is the issue of registration of misleading domain names or 'cyber squatting'. WIPO was the first international institution, which took initiative in order to cope with this problem. For this, the establishment of an electronic commerce section in 1998 under WIPO has made substantial progress. Negotiations on domain names also relate to trademarks (Watal 2001: 373).

Domain names are usually registered with minimal procedures on a first come-first serve basis. Famous and well-known marks are the particular target of cyber squatting and misleading use. Not only the developed countries but also the developing countries that have begun making use of cyberspace face this problem. WIPO established an international consultative process in 1998, which made rapid progress in attempting to develop a consensus on ways of dealing with the complex issues that arise in the interface between domain names and IPRs. WIPO submitted its final report to the Internet Corporation for Assigned Names and Numbers (ICANN), a private corporation established by the international community to manage the Domain Name system and to the member states of WIPO. Developing countries have participated in large numbers and played an important role in the discussions (Watal 2001: 394).

The importance of WIPO's work in this area is that it goes beyond any other international agreement on IP. Member states, for the first time, have agreed to subject their private enterprises to a supranational enforcement mechanism, the WIPO Arbitration and Mediation Centre. This centre began functioning from December 1999 and has gained rapid market acceptance with the filing of large numbers of complaints and some successful settlements by mid 2000. Due to the success of WIPO in this field, TRIPS Council is taking an assistance of WIPO's expertise and

trying to correspond this. Analysts argue that in future, TRIPS might have included the WIPO's new treaties such as WCT, WPPT, for the finalization of its new IP developments[6].

Countries such as UK and US, which traditionally promote stronger copyright laws, adopt a very conservative and lukewarm approach to moral rights under TRIPS; in the TRIPS Agreement, the moral right provision is expressly not adopted. On the other hand, the *WIPO Performances and Phonograms Treaty 1996* confers for the first time in international copyright history, moral rights to phonograms performers (Suthersanen 2004: 2).

IMPLICATIONS OF WIPO'S NEW DEVELOPMENT ON TRIPS

IP and Global Issues

WIPO has a new division, established in 1998-99 to study the links between IP and global issues such as traditional knowledge, biotechnology, biological diversity, folklore and selected aspects of economic, social, cultural and technological development. WIPO has been organizing discussions on these issues with developing countries. Given the link made by developing countries in TRIPS between biotechnology and biodiversity, WIPO could play an important role in preparing a meaningful agenda for future negotiations in the WTO (Watal 2001: 395).

Copyright and Related Rights

In order to accommodate new technologies and to incorporate a 'digital agenda', WIPO Committees introduced and discussed new international copyright norms. Although some of digital problems such as computer programs and databases were resolved within the TRIPS 1994, the TRIPS Agreement was silent in relation to satellite broadcasting and internet communications (Suthersanen 2004: 6).

The result of the WIPO's initiative is the two treaties i.e. WIPO Copyright Treaty and WIPO Internet Treaties of 1996, which provide an additional layer of protection for copyright holders. The WIPO treaties have been implemented in EU and US. However, the EU and US versions of the implementation are vastly different

[6] For further details, see: http://docsonline.wto.org-IP/C/18

(Suthersanen 2004: 8). Thus, it is clear that the WIPO treaties provide much more flexibility than the TRIPS Agreement in interpretation and implementation. Thus, there is scope for the developing countries to exploit these flexibilities.

The WIPO Copyright Treaty has not only affirmed the TRIPS Agreement, it has also introduced significant TRIPS plus obligations. For instance, authors now have distribution rights, which they did not receive either under the Berne Convention or under TRIPS. The treaties under the WIPO framework are *de-facto* rather than *de-jure* (Netanel 1997: 442).

Broadcasting Treaty

WIPO's new proposed broadcasting treaty provides a new layer of rights, which goes beyond the TRIPS Agreement. Historically, broadcaster's rights were tabled together with performers and phonogram producer right within the 1961 Rome Convention. These rights were supplemented under the WIPO Internet Treaty 1996. But, broadcasters were of the opinion that they had a different set of interests and that they required a different treaty (Watal 2001: 8).

Analysts argued that this treaty hinders access to information and knowledge by providing additional protection to broadcasters. Under this new treaty, Broadcasters' rights will be increased from 20 years to 50 years, much beyond the TRIPS standard of 20 years. Therefore, here too, TRIPS plus obligations are evident. Both developed as well as developing countries are wary of this treaty and feel that it requires clarification (Watal 2001: 8).

INTERPRETATION PROVISION

The interpretation provision is necessary to clarify the provisions under any agreement. There is no specific provision within TRIPS and WIPO dealing with the interpretation of these treaties. This can be considered as a lacuna under TRIPS and WIPO. It has been observed that the TRIPS Agreement is probably the most difficult treaty to interpret among WTO members because of extreme vagueness in its provisions and its language. However, TRIPS and WIPO both provide exceptions; developing countries cannot use these exceptions fully due to the absence of the interpretation provision. Developing countries do not have enough expertise in this field (Suthersanen 2004: 11).

However, under the Doha Declaration on TRIPS in 2001, member countries agreed upon the adoption of 'customary rules of interpretation of public international law'. Article 31 of the Vienna Convention states:
" a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"(Dayashanker 2002: 727).

This has been under WTO to maintain and increase the legitimacy of the Dispute Settlement System because DS system of WTO in relation to TRIPS failed in its duties as the protection of IPR and the protection of right holders and responsibilities in using object and purpose in the interpreting the relevant TRIPS provision (Dayashanker 2002: 723). This adoption made the system *de-jure*. Thus, WTO Appellate Body refers to both the literal approach (*de facto*) and teleological approach (*de jure*) of interpretation (Suthersanen 2004: 12). However, the Doha Declaration is not legally binding and it provides only a context for interpretations. It is difficult for developing countries to implement and maintain this declaration. It is not implemented properly as it was accepted.

Flexibilities under the TRIPS Agreement are useful for the developing countries helping them to comply with their TRIPS obligations and to fulfill their development objectives. But, due to lack of a proper interpretation provision and lack of awareness about the use of these exceptions, developing countries do not get adequate benefits from these flexibilities. Unless the WTO dispute settlement system decides that developing country modifications comply with the exceptions provided under TRIPS, they are likely to face trade sanctions. Thus, there is very little guidance on how these provisions should be interpreted. However, while the WIPO does not have an interpretation provision, it has enough technical- legal expertise for providing assistance to developing countries for the implementation of the WIPO obligations.

According to Uma Suthersanen, developing countries should advocate "localised globalism" which occurs when local conditions, norms, structure, and traditions change in response to international influences. Localised globalism can be understood as ways by which a country avoids more harmful effects of implementing

a higher level of IPR protection. Developing countries do not have either the political or the legal luxury of ignoring international obligations. (Suthersanen 2004: 16). Thus, it is strongly argued that such countries must undertake localized globalism in a positive, dynamic fashion by interpreting international laws in the light of local economic and social conditions.

PUBLIC INTEREST OBJECTIVES OF WTO-TRIPS AND WIPO

UN Human Right bodies view the TRIPS Agreement as a threat to "economic, social and cultural rights". UN Human Right Council and NGOs always emphasize the need to protect the public interest in the form of access to new knowledge and innovations. There are several examples of the public interest rule within the TRIPS Agreement. Article 7 allows taking into account 'social and economic welfare'. Article 8 of TRIPS specifically states that members may, 'in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement' (Das 1994: 4).

Unlike WIPO, the TRIPS Agreement redrew the existing boundaries of international IP laws by:

a) enhancing the substantive rules found in the pre-TRIPS IP law.
b) consolidating all relevant IP rules within a single comprehensive international code.
c) unlike previous IP treaties and laws, providing enforcement provisions to safeguard against non- compliance of TRIPS (Surhersanen 2004: 22).

On the other hand, there is a readymade rule placing within the preamble of WIPO treaties such as under WIPO Copyright Treaty 1996, 'a need to maintain a balance between the rights of authors and the large public interest particularly education, research and access to information (Suthersanen 2004: 24). However, WIPO as an organization does not take into account in its objectives and functions development concerns of the developing countries.

WIPO'S AND TRIPS TECHNICAL ASSISTANCE PROGRAM

Technical assistance is a service. It builds human capacity through training, improved research skills etc. Technical Assistance related to IPR is often perceived as a tool for implementing the IPR. Technical Assistance activities are initiated to ensure progressive implementation of the TRIPS Agreement by developing countries when the Agreement came into force in 1995. Technical Assistance is seen as one of the most controversial areas of development aid between developed and developing countries. Developed countries as net exporters of IP are more interested in the higher standard of IP protection where as developing countries as net importers are not (Kostecki 2005: 10).

WIPO promotes the development objectives of developing countries by providing techno-legal assistance. It has been argued by analysts that unlike WIPO, the international IP regime as implemented by WTO-TRIPS puts emphasis on those forms of IP which give more importance to world business firms rather than issues of concern to developing countries such as protection of traditional knowledge, ethnic designs exported by developing countries' firms (Kostecki 2005: 12). Thus, here the issue of debate – whether IP regime is development friendly or not – is an empirical one.

Some analysts claim in respect of trade and IP issues that TRIPS Agreement was probably a bad idea from a development perspective, but this view is contested. Technical Assistance may create a balance between IP holders and public interest. Unlike the TRIPS Agreement, WIPO has enough human and financial resources to provide Technical Assistance to its members. Under the TRIPS, the main aim of technical assistance activities is to improve the implementation of the Agreement by developing countries. The rationale behind this is to ensure that the whole process is going towards WTO accession.

On the other hand, the aim of WIPO technical assistance activities is the same as that of WTO i.e. wider acceptance of IP agreements managed by the organization and fuller implementation of IP treaties. But, these is mainly achieved through program content that emphasizes IP friendly messages, reinforcement of pro IP lobbies within beneficiary countries and support for activities that police IPR

violation. The technical assistance program is perceived as a promotional tool to encourage wider acceptance or better implementation of the IP treaties where WTO – TRIPS is mainly interested rather than development perspective of developing countries (Kostecki 2005: 7). Developing countries are more relaxed under WIPO than in TRIPS in taking technical assistance because of the lack of enforcement. They have maximal freedom of choice in using technical assistance program. It shows that WIPO is more flexible than TRIPS.

There is no need for developing countries to implement IP treaties in order to get technical assistance under the WIPO, whereas, under TRIPS developing countries have to comply with provisions. The ends of both organizations are the same but not the means.

DISPUTE SETTLEMENT MECHANISM- a comparison between WTO-TRIPS and WIPO

Lack of an enforcement mechanism created a problem in the implementation of some new treaties such as the Integrated Circuit and Semiconductor treaties treaty. This resulted in an interesting development i.e. a treaty on the settlement of disputes between states in the field of IPR in 1993 (Reichman 1996: 474). This could be said to represent a renewed interest in the WIPO; it was an attempt to move the centre of IPR gravity from WTO to WIPO. On the other hand, this was the period of the Uruguay Round and TRIPS was going to be established which could create a risky situation for WIPO and move the centre of IPR's gravity from WIPO to WTO. Notably, the OECD countries other than USA, were backing this new treaty.

WIPO has its own dispute resolution system. There are two centers of this resolution system – WIPO Arbitration and Mediation Centre which offers three main dispute resolution procedures – mediation, arbitration and expedited arbitration. But, these procedures are voluntary in nature (Gurry 1999: 389).

Apart from the National Treatment, non- discrimination, territoriality and independence of protection, a draft treaty prepared by International Bureau also took into account the principle of exhaustion of local remedies before invoking the international mechanism, which is a line from the WTO Dispute Settlement

understanding. This is an independent treaty on dispute settlement that would govern all treaties administered by WIPO and which contain no sanctions or retaliatory remedies of any kind (Das 1994: 16). The third world countries wanted a draft treaty to be prepared but US and other developed countries that were opposed to a treaty at this stage as they were trying to establish a dispute settlement mechanism in this area through the Uruguay Round that would enable them to exercise coercive powers of trade retaliation against the developing countries. Thus, due to lack of enforcement mechanism under such a proposed treaty, US opposed the draft treaty (Narsalay 2000: 10).

The Geneva based WIPO Arbitration and Mediation Centre provides dispute resolution services relating to internet and electronic commerce. Apart from offering traditional arbitration and mediation services, the WIPO centre is recognized as one of leading dispute resolution service providers for domain name disputes. Apart from that, WIPO treaties like the Paris and Berne Conventions have no provision for dispute settlement except recourse to the International Court of Justice. This gap was one of the major reasons behind the US shifting interest to the Uruguay Round. However, the concluded WIPO treaty on semiconductors in May 1989 contains provisions for dispute settlement. Observers argued that during the Uruguay Round, much tension and many jurisdictional disputes were created between the GATT and WIPO because of the TRIPS issue on its agenda but there was surprisingly little tension at the WIPO governing bodies even in respect of patent harmonization and dispute settlement treaties (Das 1994: 24).

The WTO DSB provides a common system of rules and procedures applicable to disputes arising under any of its legal instruments, including the TRIPS Agreement. The main responsibility for administering these rules and procedures lies with the General Council, which acts as the DSB. Because of the inclusion of time limits in the DSU (12 months maximum on appeal, nine months normally), the wronged member can expect to receive compensation within a year to 18 months. One of the important principles of the dispute settlement process is that a dispute can only be brought to the DSB when efforts to settle it on a bilateral level have failed (Debroy & Saqib 2005: 29). However, there are potential benefits of the dispute settlement mechanism; developing countries have not fully equipped themselves to utilize these benefits.

Many of them lack the legal and financial resources to hire the services of foreign experts and have few legal experts of their own specializing in WTO law.

IMPLICATIONS OF WIPO'S PATENT AGENDA ON WTO-TRIPS

A new intellectual property standard – SPLT – has been taking shape under the auspices of WIPO, which greatly influenced the shape of the international intellectual property system. SPLT aims to harmonize the patent rules and marks a step towards introducing a TRIPS- plus regime.

The TRIPS Agreement introduces the concept of minimum standards for IPRs in diverse areas and places heavy obligations on national governments. However, there is some flexibility available for the design and implementation of the patent regime at the national level. Much of this flexibility now faces the possibility of being eroded or suppressed under the new WIPO Patent Agenda. The developing countries to fulfill their development objectives have used these flexibilities. Moreover, once higher standards were adopted at WIPO, pressure would build up at the WTO for further increases in IP standards for all its members because much of the substantive provisions of TRIPS are drawn from the WIPO. Due to the influence of international politics at the WTO, it would be difficult to raise IPRs standards (Nanda 2004: 4311).

The SPLT will create more advantages for the developed countries and undermine the position of the developing countries because both have different priorities and interests. SPLT will create difficulties for developing countries in critical areas such as public health. Thus, it is not suited to their needs. The adoption of such a system would also mean that most national patent offices would become superfluous (Nanda 2004: 4313).

SPLT as a serious concern could make the patent provisions of the WTO's TRIPS obsolete. TRIPS only spells out the minimum required elements of national patent laws. SPLT, by contrast, will spell out the top and bottom line. It will be a fixed set of rules on what can be patented and under what conditions (Grain 2002: 2). The draft treaty, as prepared by the WIPO Secretariat, covered the substantive issues. Some of these issues were dealt by the TRIPS Agreement such as term of a patent, the rights conferred by the patent, etc. But, the SPLT also differs from TRIPS; it goes

beyond TRIPS. Unlike TRIPS, SPLT describes substantive standards to determine what an invention is, how the patentability is to be established and what will be the scope of patent protection (Dhar & Anuradha 2005: 1348).

As per the current multilateral arrangements, an invention can be patentable, if it shows technical character, whereas the term "in all fields of technology" appears in Article 27 of TRIPS, not mandating any requirement relating to technical character. An important issue raised by the developing countries was the need to incorporate some general provisions allowing exceptions in patentability of TRIPS. However the US opposed this by arguing that the TRIPS Agreement provides for minimum requirements under the WTO where as SPLT, in contrast, would aim at establishing 'best practices at the international level' (Nanda 2004: 4313).

From the perspective of developing countries, SPLT is the most troublesome building block of the international patent system under the WIPO agenda. If this system were adopted, it would establish new binding international standards in critical areas of patent law (Dhar & Anuradha 2005: 1352).

However, a move towards an international patent system would save money, both by reducing filing fees and by reducing the legal costs of preparing parallel filings (Barton 2004: 344). Because of the relationship between the WTO and the WIPO, WIPO should take every step carefully and also every attempt should resulted in the coordination between countries, otherwise WIPO would lose its status as an important forum for developing countries. No developing country except China has supported substantive patent law harmonization. Adoption of the SPLT would weaken the strong position of the developing countries at the WIPO.

The prime driver of IP standards – US – seeks to adopt a two-stage procedure: to raise standards first at the WIPO and then export these higher standards to the WTO. Critics identify this as a game plan of the US. The same tactics were used by the US when the revision conference of the Paris Convention failed and the US shifted its interests to the Uruguay Round. Whatever was not achieved by the USA under the TRIPS Agreement, it would like to secure through WIPO through the negotiation of the SPLT. The US has firmly stated that it would leave the negotiation if the matter were not settled in its favor (Nanda 2004: 4314).

In reply to this proposed draft treaty, developing countries like Argentina, India, Brazil and Bolivia have proposed a Development Agenda at the WIPO Assembly (The Hindu 20Aug 2006). This 'Group of Friends of Development' unanimously agreed that promotion and protection of IP should serve the development aims of developing countries. The Development Agenda describes the development objectives of the developing countries and emphasizes that WIPO should have a development oriented approach[7].

If the WIPO does not include the development objectives in their mandate and functions, the centre of IPRs gravity could be moved from WIPO to WTO and WIPO could lose its position as an important forum for developing countries. However, WIPO's technical- legal assistance program helps in the development of developing countries' legislation according to new developments in the field IP.

CONCLUSION

Instead of the WTO-TRIPS, discussion on IP subjects can start easily under WIPO. WIPO can also draw upon the experts from both the government and private sector for more broad-based discussions. It presents a neutral forum without any external influences whereas under the WTO; pressure of trade interests influences all decisions. WIPO's technical-legal expertise and financial resources made it more profound than WTO-TRIPS. Developing countries have more voice at the WIPO than at the WTO.

Hence, the entire comparative analysis of WTO-TRIPS and WIPO shows that even after the finalization of the TRIPS Agreement, WIPO continues to be the forum for the steady evolution of international IP law on specialized subjects.

[7] For further details, see: http://ipjustice.org/wp/campaigns/wipo/wipo-development-agenda/.

CHAPTER 5

CHAPTER 5

CONCLUSION

A comparative analysis of the international Intellectual Property institutions points clearly towards certain basic observations. The WIPO provides a better forum for discussions and debates on IPR issues as compared to the WTO. Unlike TRIPS, developing countries are provided with independence of protection in the matters of IP under the framework of WIPO. It has been accepted that there is complementary relationship between WIPO and WTO- TRIPS, which facilitates their co-existence.

WIPO gives IP protection by providing a stable environment for the marketing of IP products and such protection facilitates international trade. Unlike WIPO, there is no institutional mechanism for co-ordination of developing countries' position under WTO. While, WTO-TRIPS provides an effective enforcement mechanism like the dispute settlement mechanism for IP protection, due to the lack of techno-legal expertise and resources; and lack of an effective mechanism to ensure flow of information among members about WTO rules, it fails to protect the interests of developing countries. Developing countries have failed to defend their interests and have not reaped the benefits of the dispute settlement mechanism.

During the Uruguay Round, the developed countries, and specially the USA –had imposed trade sanctions under section 301 on developing countries to prevent opposition from the developing countries and to implement the TRIPS Agreement as early as possible. The Dunkel Draft on TRIPS had been offered as a 'take it or leave it' package proposal. This situation was problematic for the developing countries because this draft was in favor of the developed countries.

According to some analysts, the most important success of the TRIPS Agreement, which has not been achieved by WIPO, is that it has brought the standards of IP protection in major developing countries of the WTO closer to those that exist in

developed countries largely. But, this also highlights the strict demands made of the developing countries. For them, the implications of making these changes is much more drastic because there are differences between the North and the South on the level of social, economic, scientific and technological development. The TRIPS enforcement procedure has been used upon the developing countries to make them comply with TRIPS obligations whereas many sensitive sectors of economic and social activity in developing countries such as agriculture, health, education and culture are affected by the changes demanded by TRIPS. On the other hand, developing countries had not required any amendments in their laws in signing either the Paris & Berne Convention or the Stockholm Convention (for the establishment of WIPO).

In spite of the dispute settlement mechanism and enforcement procedure, building of consensus has increasingly become problematic under the TRIPS. The impasse in the WTO in the first half of 1999 on the selection of the Director General, the unsuccessful attempts to further the Doha Development Agenda, the Cancun and Hong Kong Ministerial Conferences etc. are all examples of the difficulty in arriving at a consensus within the WTO framework.

WIPO occupies a central position in the area of IPR with WTO-TRIPS assuming a supplementary role in dealing with trade related aspects of IP matters. The most important aspect of WIPO's work is its technical assistance program because it is an administrative treaty also. WIPO has adequate resources for providing techno-legal assistance to its member countries. This program has been helping member countries esp. developing countries to fulfill their development objectives and to bring about changes in their laws in accordance with new developments in the IP field. Technical Assistance activities are bureaucracy driven. WIPO is better at the administration of IP laws. It currently provides financial assistance to officials of developing countries, which contributes in strengthening the expertise of developing countries officials in dealing with substantive IP issues and enhances their participation in the organization's standard setting activities. Thus, IP protection under WIPO is development friendly.

The Technical Assistance program of the WTO is not enriched like WIPO. Although TRIPS has been providing Technical assistance but the main aim of these activities is to improve the implementation of the Agreement by developing countries.

Developing countries are more relaxed under WIPO than in the TRIPS Agreement in taking technical assistance because of the lack of the enforcement. They have maximal freedom of choice in using the technical assistance program. WIPO is more flexible than TRIPS. There is no need for developing countries to implement IP treaties in order to get technical assistance under WIPO. Whereas, under TRIPS, developing countries have to comply with provisions in order to get technical assistance. In order to provide complete assistance to developing countries and LDCs, WIPO has recently established the human development program, which is being facilitated by WIPO Worldwide Academy (WWA). WWA is an important feature of WIPO that helps disseminate IP knowledge among students, researchers and others. There is no parallel example under TRIPS.

The WTO-WIPO Agreement 1995 is an important step taken by both organizations to facilitate cooperation in the IP field. It includes administrative cooperation as well as techno-legal assistance in favor of developing countries. WIPO gives assistance to developing countries for the implementation of the TRIPS Agreement. By this, WIPO intensifies its activity and enhances its importance. WIPO has enough resources in techno-legal assistance and TRIPS has effective enforcement mechanism as well as flexibilities. Cooperation between them would result in a fruitful symbiosis.

WIPO's primary interest lies in the promotion of IP treaties that they administer and their technical assistance is a marketing operation. WIPO has a unique funding scheme, which sets it apart from WTO. Its funding comes from the registration systems like the Patent Cooperation Treaty and the Madrid System. This provides 90% of WIPO's revenues and members' contribution is only 7%. Thus, the size of personnel and scope of techno-legal activities have been expanding in recent years. WIPO has effectively two

constituents – member states and market forces. If we compare WIPO with WTO, we see that WIPO's budget for 2005 was 523 million Swiss francs, while WTO's 2005 budget was 169 million Swiss francs. WIPO's personnel generally number around 1000 staff where as WTO's personnel consists of 623 staff (ICTSD 2005: 7). Thus, unlike WTO, WIPO does not depend on its member states for its financial resources and activities and have efficient and skilled administrative staff.

Recent developments under WIPO shows that WIPO, rather than WTO, will set the pace on the set of new issues e.g. Global Electronic Commerce, WIPO Internet Treaty, WIPO Broadcasting Treaty and WIPO Performances and Phonograms Treaty (1996). In the post-TRIPS period, developments in WIPO are taking IP laws beyond the TRIPS levels of protection e.g. WIPO Copyright Treaty 1996 and SPLT.

The proposed draft SPLT as an attempt to harmonize the patent laws among members is likely to erode the flexibilities under the TRIPS Agreement. The developing countries are opposing it because it forecloses the exceptions and flexibilities using by developing countries for their development objectives. Developing countries have proposed the Development Agenda, asserting that WIPO should focus on development perspectives of IP protection as well.

WIPO's technical assistance program can be considered as an important activity that enhances the development of social, economic, scientific and technical aspects of developing countries. By harmonizing the patent laws, SPLT will remove the trade barriers between members and increase trade liberalization related to IPR. Despite that, WIPO should consider the developing countries' proposed 'Development Agenda'. Otherwise, WIPO would lose its position as an important forum for developing countries.

The extent and effectiveness of developing countries' participation is more under WIPO than WTO. Because of the 'one nation-one vote' system, a coalition of developing countries can easily outvote the developed countries. Developing countries have argued that international rules of IP can only promote development if they facilitate the transfer

and diffusion of technology. However, unlike WIPO, TRIPS affords very limited attention in this direction.

Regarding the nature of leadership, the generally accepted phenomena at the WTO of usually appointing someone from a developed country as the Director-General is less applicable in the WIPO. The US exploited to the maximum the GATT through its American Director-General Arthur Dunkel to formulate measures for the IP protection in the world market. Under the WTO system, developing countries continue to be sidelined when it comes to defining areas of vital importance of their survival. Moreover, they are confined to a role of a passive spectator to the decisions adopted.

The WTO system has been used to discipline developing countries in areas like IPR, whereas, WIPO's one nation-one vote system gives equal power to all members. The sanctions of the dispute settlement body of the WTO hurt developing countries in other areas such as its export of primary produce. This possibility of 'cross sectoral retaliation' is used to get developing countries to conform to the policing objectives set by the North. WTO's dispute settlement mechanism is undemocratic and lacks transparency.

As a UN specialized agency, WIPO has proved beneficial for developing countries, which have more freedom here than at the WTO. Under WTO, the increased dependence of the South on the North is clearly visible, such as in the field of pharmaceutical patent, software patent etc. WTO has two 'sticks' to monitor and ensure compliance with TRIPS by all members i.e. TRIPS Council and Dispute Settlement Mechanism. Whereas, it is WIPO that has 'carrots' like enormous human and financial resources to assist the members. These carrots have proved more fruitful and useful than sticks. WIPO's membership and activities have increased in the post-TRIPS period and also its techno-legal cooperation activities have increased around TRIPS implementation.

WIPO is seen as a more neutral forum where different interest groups from both the private sector and governments, can discuss all points of view more objectively with

no pressures related to the linkage with market access on trade. In addition, discussions on new subjects can easily be launched in the WIPO because of the lack of the highly political bargaining process that takes place in WTO Ministerial Conferences.

Due to the lack of clear consensus at the time of the negotiations, TRIPS has shown loopholes and ambiguities in its provisions and others have emerged due to the rapidly changing IP field in the post- negotiation period. On the other hand, WIPO has stepped out to fill of these gaps relating to rapidly changing technologies. Thus, WIPO is likely to continue its role in evolving international consensus on norm setting on new IP issues.

IP is a term increasingly in use today, but still little understood. This is why WIPO is focusing increasingly on explaining why and how intellectual property is important for the every-day life of every society. Every one should widely accept and respect the concept of IP law and WIPO's goal is to show how IP plays a crucial role in the development of nations. This is an important step that has taken by WIPO, which will prove fruitful.

However, it is not entirely clear which inter-governmental organization will become the host for future negotiations on IPRs. While the TRIPS Council and DSB are two important instruments which show the importance of WTO-TRIPS, WIPO maintains various advantages in the context of IP i.e. mandate to strengthen IPR protection, enough human and financial resources, efficient techno-legal assistance, , provision of neutral forum without any external influences, lack of political bargaining etc. In sum, despite the existence of the TRIPS Agreement, it is likely that WIPO will play an increasingly important role as an 'organization of the future' in dealing with complex and technical issues related to the field of Intellectual Property.

ANNEXURE

TRIPS AGREEMENT

WTO-WIPO Cooperation Agreement

The text:

Agreement Between the World Intellectual Property Organization and the World Trade Organization

Preamble

The World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO),

Desiring to establish a mutually supportive relationship between them, and with a view to establishing appropriate arrangements for cooperation between them, Agree as follows:

Article 1

Abbreviated Expressions

For the purposes of this Agreement:

(i) "WIPO" means the World Intellectual Property Organization;

(ii) "WTO" means the World Trade Organization;

(iii) "International Bureau" means the International Bureau of WIPO;

(iv) "WTO Member" means a party to the Agreement Establishing the World Trade Organization;

(v) "the TRIPS Agreement" means the Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C to the Agreement Establishing the World Trade Organization;

(vi) "Paris Convention" means the Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised;

(vii) "Paris Convention (1967)" means the Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised at Stockholm on July 14, 1967;

(viii) "emblem" means, in the case of a WTO Member, any armorial bearing, flag and other State emblem of that WTO Member, or any official sign or hallmark indicating control and warranty adopted by it, and, in the case of an international intergovernmental organization, any armorial bearing, flag, other emblem, abbreviation or name of that organization.

Article 2

Laws and Regulations

1) [*Accessibility of Laws and Regulations in the WIPO Collection by WTO Members and Their Nationals*] The International Bureau shall, on request, furnish to WTO Members and to nationals of WTO Members copies of laws and regulations, and copies of translations thereof, that exist in its collection, on the same terms as apply to the Member States of WIPO and to nationals of the Member States of WIPO, respectively.

2) [*Accessibility of the Computerized Database*] WTO Members and nationals of WTO Members shall have access, on the same terms as apply to the Member States of WIPO and to nationals of the Member States of WIPO, respectively, to any computerized database of the International Bureau containing laws and regulations. The WTO Secretariat shall have access, free of any charge by WIPO, to any such database.

3) [*Accessibility of Laws and Regulations in the WIPO Collection by the WTO Secretariat and the Council for TRIPS*]

a) Where, on the date of its initial notification of a law or regulation under Article 63.2 of the TRIPS Agreement, a WTO Member has already communicated that law or regulation, or a translation thereof, to the International Bureau and that WTO Member has sent to the WTO Secretariat a statement to that effect, and that law, regulation or translation actually exists in the collection of the International Bureau, the International Bureau shall, on request of the WTO Secretariat, give, free of charge, a copy of the said law, regulation or translation to the WTO Secretariat.

b) Furthermore, if, for the purposes of carrying out its obligations under Article 68 of the TRIPS Agreement, such as monitoring the operation of the TRIPS

Agreement or providing assistance in the context of dispute settlement procedures, the Council for TRIPS of the WTO requires a copy of a law or regulation, or a copy of a translation thereof, which had not previously been given to the WTO Secretariat under subparagraph (a), and which exists in the collection of the International Bureau, the International Bureau shall, upon request of either the Council for TRIPS or the WTO Secretariat, give to the WTO Secretariat, free of charge, the requested copy.

c) The International Bureau shall, on request, furnish to the WTO Secretariat on the same terms as apply to Member States of WIPO any additional copies of the laws, regulations and translations given under subparagraph (a) or (b), as well as copies of any other laws and regulations, and copies of translations thereof, which exist in the collection of the International Bureau.

d) The International Bureau shall not put any restriction on the use that the WTO Secretariat may make of the copies of laws, regulations and translations transmitted under subparagraph (a), (b) or (c).

4) [*Laws and Regulations Received by the WTO Secretariat from WTO Members*]

a) The WTO Secretariat shall transmit to the International Bureau, free of charge, a copy of the laws and regulations received by the WTO Secretariat from WTO Members under Article 63.2 of the TRIPS Agreement in the language or languages and in the form or forms in which they were received, and the Internatio nal Bureau shall place such copies in its collection.

b) The WTO Secretariat shall not put any restriction on the further use that the International Bureau may make of the copies of the laws and regulations transmitted under subparagraph (a).

5) [*Translation of Laws and Regulations*] The International Bureau shall make available to developing country WTO Members, which are not Member States of WIPO the same assistance for translation of laws and regulations for the purposes of Article 63.2 of the TRIPS Agreement as it makes available to Members of WIPO, which are developing countries.

Article 3

Implementation of Article 6ter of the Paris Convention for the Purposes of the TRIPS Agreement

1) [*General*]

a) The procedures relating to communication of emblems and transmittal of objections under the TRIPS Agreement shall be administered by the International Bureau in accordance with the procedures applicable under Article *6ter* of the Paris Convention (1967).

b) The International Bureau shall not recommunicate to a State party to the Paris Convention which is a WTO Member an emblem which had already been communicated to it by the International Bureau under Article *6ter* of the Paris Convention prior to January 1, 1996, or, where that State became a WTO Member after January 1, 1996, prior to the date on which it became a WTO Member, and the International Bureau shall not transmit any objection received from the said WTO Member concerning the said emblem if the objection is received by the International Bureau more than 12 months after receipt of the communication of the said emblem under Article *6ter* of the Paris Convention by the said State.

2) [*Objections*] Notwithstanding paragraph (1)(a), any objection received by the International Bureau from a WTO Member which concerns an emblem that had been communicated to the International Bureau by another WTO Member where at least one of the said WTO Members is not party to the Paris Convention, and any objection which concerns an emblem of an international intergovernmental organization and which is received by the International Bureau from a WTO Member not party to the Paris Convention or not bound under the Paris Convention to protect emblems of international intergovernmental organizations, shall be transmitted by the International Bureau to the WTO Member or international intergovernmental organization concerned regardless of the date on which the objection had been received by the International Bureau. The provisions of the preceding sentence shall not affect the time limit of 12 months for the lodging of an objection.

3) [*Information to Be Provided to the WTO Secretariat*] The International Bureau shall provide to the WTO Secretariat information relating to any emblem

communicated by a WTO Member to the International Bureau or communicated by the International Bureau to a WTO Member.

Article 4

Legal-Technical Assistance and Technical Cooperation

1) [*Availability of Legal-Technical Assistance and Technical Cooperation*] The International Bureau shall make available to developing country WTO Members which are not Member States of WIPO the same legal- technical assistance relating to the TRIPS Agreement as it makes available to Member States of WIPO which are developing countries. The WTO Secretariat shall make available to Member States of WIPO which are developing countries and are not WTO Members the same technical cooperation relating to the TRIPS Agreement as it makes available to developing country WTO Members.

2) [*Cooperation Between the International Bureau and the WTO Secretariat*] The International Bureau and the WTO Secretariat shall enhance cooperation in their legal- technical assistance and technical cooperation activities relating to the TRIPS Agreement for developing countries, so as to maximize the usefulness of those activities and ensure their mutually supportive nature.

3) [*Exchange of Information*] For the purposes of paragraphs (1) and (2), the International Bureau and the WTO Secretariat shall keep in regular contact and exchange non-confidential information.

Article 5

Final Clauses

1) [*Entry into Force of this Agreement*] This Agreement shall enter into force on January 1, 1996.

2) [*Amendment of this Agreement*] This Agreement may be amended by common agreement of the parties to this Agreement.

3) [*Termination of this Agreement*] If one of the parties to this Agreement gives the other party written notice to terminate this Agreement, this Agreement shall

terminate one year after receipt of the notice by the other party, unless a longer period is specified in the notice or unless both parties agree on a longer or a shorter period.

Done in Geneva on 22 December 1995.

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