WIPO and Developing Countries

The personal views of LES International delegate to WIPO meetings concerning developing nations

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It is generally known that the so-called developing countries are no longer satisfied to follow the well-known pattern of supplying raw material and importing manufactured consumer goods. They now want to manufacture goods themselves locally and preferably those for which they can use their own materials.

To achieve this aim, they need the technology of developed countries. But since many do not possess the skilled labor essential to today's sophisticated technology, they also must acquire the necessary men and capacities.

These countries are searching for technology which they feel is best suited for their special requirements. They want to make their own choices and decisions concerning the importation of technology and they do not want to have it imposed.

These problems have received special attention, mostly in Latin American countries, and have been the object of many studies. One of the most interesting which summarized the main problems many studies. One of the most interesting which summarizes the main problems, is written by Prof. Aracama Zorraquin.[1] These circumstances have already led some of these Latin American countries to enact laws regulating the transfer of technology.[2] They have also constituted governmental organizations, the missions of which are not only to seek the best technologies, but to approve contracts of transfer of technology, to control whether the conditions of the contracts are in line with specific laws, and to see whether the economic conditions of the contracts are acceptable. It is therefore quite understandable that international instances and more specially those which work under the auspices of the United Nations have, since quite a few years, been involved with these problems: UNIDO, UNCTAD[3], and WIPO[4] have tried to study the problems so as to give them a uniform approach. UNCTAD has, for example, studied an "International Code of Conduct on Transfer of Technology"[5], and has published, in collaboration with WIPO, a study on "The Role of the Patent System in Transfer of Technology"[6]. For many years, WIPO has taken initiatives in the specific field of legal problems concerning intellectual property to help developing countries. WIPO has organized seminars in developing countries, accepted trainees in Geneva, and sent experts to developing countries to help them set up legislation in the field of industrial property, etc.[7].

By organizing a "Permanent Legal-Technical Programme for the Acquisition by Developing Countries of Technology Related to Industrial Property", WIPO has given new impetus to helping developing countries. The purpose of the present paper is to analyse the different efforts WIPO has undertaken under the auspices of this new program. WIPO also has examined other problems related to Industrial Property in developing countries and more specifically inside the Paris Convention. A group of governmental experts on the revision of the Paris Convention met in Geneva on February 11 to 17, 1975. The group suggested a certain number of questions which should be considered in favor of the developing countries, i.e. the sections of the Paris Convention relating to the National Treatment, the independence of patents, the nonworking of patents, the priority rights, etc.[8]

GENERAL INFORMATION CONCERNING WIPO

WIPO[9] (World Intellectual Property Organization), which since 1970 succeeded to BIRPI, has existed for more than 80 years and is responsible for the promotion of intellectual property through the world. It is responsible for administration of seven intergovernmental Unions concerning intellectual property, mainly in the field of patents, trademarks, industrial designs and copyright. The most important of these conventions are:

- The Paris Convention for the Protection of Industrial Property (1883 - 80 Members)
- The .Madrid Arrangement Concerning International Registration of Marks (1891 - 23 Members)
- The Bern Convention for the Protection of Literary and Artistic Works (1886 - 60 Members)
- The forthcoming P.C.T. (Patent Cooperation Treaty) and the T.R.T. (Trademark Registration Treaty)

WIPO is editor of different reviews. The two most important are the "Industrial Property" (monthly), and the "Copyright" (monthly).

WIPO PERMANENT LEGAL-TECHNICAL PROGRAM FOR THE ACQUISITION BY DEVELOPING COUNTRIES OF TECHNOLOGY RELATED TO INDUSTRIAL PROPERTY.

Following a meeting in Geneva from October 30 to November 3, 1972, on a "Committee of Experts on a Patent Licensing Convention"[10], a provisional committee for the preparation of the "WIPO Legal-Technical Programme for the Acquisition by Developing Countries

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of Technology related to Industrial Property" met in Geneva from June 25 to 29, 1973[11]. These two meetings led to the formation of a so-called Permanent Committee to which all members-states of WIPO and of the Paris Convention were invited. According to the organizational rules [12], the objectives of the permanent program are the following:

". . . . to promote and facilitate . . . . the acquisition by developing countries, on fair and reasonable terms, and conditions, of technology related to industrial property.

Such means shall include in particular :

1. the promotion of contacts between potential partners in license agreements,
2. the study and recommendation of means designed to facilitate the conclusion of license agreements,
3. the organization, the assistance in the organization, of easier access appropriated to the needs of developing countries . . . .
4. . . . . publication of demands and offers for licensing concerning technology of interest to developing countries,
5. . . . . establishment . . . . of general guidelines and model provisions for license agreements appropriate to the needs of developing countries . . . .
6. assistance and training of qualified personnel. . . .
7. the drafting of model provisions for national industrial property laws of developing countries" . . . .

As a result of this new committee[13], the following meetings were organized to which LES delegates[14] were invited and effectively assisted:

- Licensing Seminar (for specialists from developing countries), Geneva, November 18 to 22, 1974[15].
- Working Group on the Model Law for Developing Countries on Invention and Know-How
  a) First Session: Geneva November 25 to 29, 1974[16]
  b) Second Session: Geneva May 26 to 30, 1975
  c) Third Session to be held in Geneva from November 10 to 14, 1975
- Group of Editorial Consultants: Geneva January 22 to 24, 1975

Furthermore, WIPO paid the expenses of a number of specialists from developing countries to assist at a Symposium in Moscow October 7 to 11, 1974, on "The Role of Patent Information, Research and Development"[17]. Finally, WIPO organized a "Training Course on the Use of the International Patent Classification"(I.P.C.) in Geneva May 5 to 9, 1975.

The main efforts of WIPO therefore have been made in three directions:

1. Training of specialists from developing countries in industrial property and more specially in matters relating to licensing.

2. Feasibility of publication of licensing opportunities specially directed to developing countries.

3. Revision of the "Model Law on Inventions for Developing Countries".

SEMINAR ON LICENSING

Geneva, November 18 to 22, 1974[18]

This seminar, dedicated to specialists coming from developing countries, attracted approximately 50 participants. Lectures were given at the seminar by experts nominated by governments and by international nongovernmental organizations. LES Representative, C.G. Wickham of LES U.K., had the honor of starting the debates on the "Technology Licensing to the Developing Countries: an Approach".

Other subjects of interest were "Legal Aspects of License Agreements", "Negotiating and Drafting License Agreements","State Intervention in Transfer of Technology Agreements with particular reference to Latin America", "The Role of Patents in License Agreements, with Special Emphasis on Recent Legislative Changes in Developing Countries", etc. Discussions also concerned the preparation of draft guidelines and model provisions for license agreements for developing countries and also the revision of WIPO guide to "Legal Aspects of License Agreements in the Field of Patents, Trademarks and Know-How", which was published in 1972 by WIPO, following a request made by UNIDO[19].

GROUP OF EDITORIAL CONSULTANTS

First Session: Geneva, January 22 to 24, 1975[20]

The purpose of this group was to study the feasibility and interest of a publication, providing information on offers and demands for licensing opportunities, specially for developing countries.

In view of this meeting, WIPO prepared a questionnaire which was sent to developing countries asking them to indicate which sectors of the technology (arranged on basis of international patent classification - I.P.C.) they would be most interested in. Eighteen developing countries replied. Although the international patent classification may not be the best way to divide the technology for the special purpose of licensing, the sectors of technology which were the most demanded were:

- chemistry (sector 15) paint . . . . petroleum . . . . animal and vegetable oil . . . .
- foodstuffs and tobacco (sector 2)
- chemistry (sector 12) inorganic chemistry, treating water . . . . glass . . . . manufacture of fertilizers . . . .
- building (sector 20)
- etc.

After examination of these results and after general discussions, the group suggested these conclusions and recommendations:

- the publication of license opportunities for facilitating the transfer of technology to developing countries should form a part of wider services and facilities.
- a draft list of all information which should appear in such publication.
- recommendation of the feasibility of a specialized publication was at this stage premature.
- WIPO was asked to make a general survey of all existing publications in the field of publication of licensing opportunities and also to revise and complete the list of institutions and publications which publicize opportunities for the sale of licensing of patented or unpatented technology, which was set up by WIPO in 1972[21].

WORKING GROUP ON THE MODEL LAW FOR DEVELOPING COUNTRIES ON INVENTION AND KNOW-HOW

The Working Group met twice in Geneva, from November 25 to 29, 1974 and from May 26 to 30, 1975. A third session is planned in Geneva from November 10 to 14 this year.

In 1965, WIPO (at that time BIRPI) published under its own responsibility a "Model Law for developing countries on invention"[22].The purpose of this Model Law and its explanatory statements are to suggest some guidelines and even some specific texts (and sometimes alternatives) for enacting or improving the laws of developing countries in the field of patents and know-how. Important sections of this model law are dedicated to problems in relation to licensing (sections 24 to 45-52-56).

WIPO also published, but at later dates, Draft Model Laws for Developing Countries, concerning Trademarks, Commercial Names, Unfair Competition, Industrial Designs, and Appellation of Origin and Indication of Sort.

Due to new requirements of developing countries, to the rapid evolution of the technology, and to the recent laws in the transfer of technology in Latin American countries, many sections of the existing Model Law are outdated, and important provisions are missing.

WIPO has therefore decided, under the auspices of the Permanent Technical Juridical Programme, to constitute a working group to advise how to draft a new Model Law for developing countries.

In view of the meetings, WIPO has each time suggested some new sections or proposals of modifications, drafted by themselves or drafted by any interested governmental body. Governmental and nongovernmental experts are invited, before or during the meetings, to discuss and to make comments and to give their suggestions to WIPO. As a result of these meetings, WIPO will draft a new Model Law probably in 1976.

The meetings resulted in brainstorming, unanimity was rarely achieved, and conclusions were rarely drawn, so it is very difficult to summarize the debates. Each expert had the opportunity to give his own advice.

The reports will therefore be divided in two parts - the first one giving general remarks, and the second explaining the most important items and suggestions which were made by WIPO, plus comments made by experts.

GENERAL REMARKS

1. As usual with WIPO, the meetings were beautifully organized and each expert, whether representing a country or an international private organization, had a full opportunity to express his complete views on each problem. The debates were usually very interesting. They gave a good opportunity to better understand on one side the needs of developing countries and on the other side the demand for just remuneration and security for the transfer of technology from developed countries.

2. Unanimity was naturally very seldom achieved, but compromise was often reached.

3. As expected, there was a general tendency of greater interference of governmental bodies in contracts of transfer of technology. This, according to developing countries, has this great advantage: after having been accepted, the contracts have a greater validity.

4. Developing countries wanted to obtain a maximum of written information on all aspects of the technology to be transferred.

5. Developing countries had a great reluctance about problems related to secrecy and wanted to keep the period of secrecy to a minimum possible.

6. On some very important issues there was a difference of approach among the developing countries: on one side were those who already dispose of technicians, skilled laborers, such as many Latin American countries, and on the other side were those who do not have the facilities, such as Central African Countries. This shows emphatically that the needs of developing countries are quite different: requirements of Kuwait can certainly not be compared with those of Bangladesh.

7. Quite a few harsh propositions were smoothed out. For instance, when it was provided that the existence of certain specific provisions would render a contract invalid per se, it was afterwards suggested that such provision could possibly be deleted or even maintained under special circumstances which would have to be justified.

8. Many proposals were largely inspired by the new laws of Latin America (Cartagena Agreement, laws of Argentina, Mexico, Brazil, etc. . . .). It therefore appeared that these countries played a very important role in the new projects. For instance, the President of the first meeting of the Permanent Committee was a Mexican, while the President of the second meeting was from Cuba.

9. As it very often happens in such meetings, multinationals were much criticized by developing countries. On the other hand, the attention was drawn to the fact that legislation concerning transfer of technology is becoming so difficult that middle-sized companies have been too dissatisfied to transfer their technology to Latin American countries. This causes middle-size companies, which should be the priviledged partners for developing countries, to stay away. Developing countries will therefore have as partners only multinationals, which they so much criticize.

SPECIAL COMMENTS

Headlines of the sections which were discussed during the two sessions in Geneva.

First Session

A. Model Provisions on two new Types of Patents[23]
   a) Transfer of Technology Patent (T.T.P.)
   b) Industrial Development Patent (I.D.P.)
B. Model Provisions on Contractual Licenses, Know-How, and the State-Control of License Contracts, Know-How Contracts and Contracts Assigning Patents or Patent Applications[24]

PART I - Patents
- Chapter VII: Contractual Licenses (sections 28 to 33)

PART II - Know-How
- Chapter I: General Provisions (sections 53 to 55)
- Chapter II: Know-How Contracts (sections 56 to 57)

PART III - State Control of License Contracts, Know-How Contracts and Contracts Assigning Patents or Patents Applications (sections 60 to 66)

Second Session

Model Provisions on Patentability, the Rights to the Patents, the Rights under the Patents, the Duration and Compulsory Licenses[25].

Chapter I: Patentability (sections 1 to 5bis)
Chapter II: Right to Patent; Naming of Inventor (section 8 to 11)
Chapter IV: Rights under Patents (sections 21 to 24)
Chapter V: Duration of Patents and Annual Fees (section 25 and 25 bis)
Chapter VIII: Compulsory Licenses (sections 34 to 42)

DRAFT MODEL PROVISIONS ON TWO NEW TYPES OF PATENTS

To prepare for discussions, WIPO sent a questionnaire to governments and to interested parties[26]. Many answers were received by them, including one from LES. However, due to lack of time, the printed documents which were discussed during the meeting did not take into account the answers received by WIPO.

The Transfer of Technology Patent (T.T.P.) which was suggested by WIPO, can be characterized by the following:

- It is intended to protect the working of technology in a developing country when invention can no longer be protected by ordinary patents (for instance after the priority date has lapsed).
- The T.T.P. will not exclude the possibility of obtaining the usual patent with or without priority or the inventor certificate.
- It is based on the effective cooperation between the owner of the foreign technology and the domestic company and consequently, such patent will be granted jointly to two parties.
- The patent would only be granted if there exists a corresponding granted patent in a foreign country.
- The patent would only be granted after the existence of a registered contract for exploiting the invention between the owner of the foreign technology and the domestic company.
- The patent is obtainable even many years after the original application has been completed in the foreign country, on the condition that the patent has not been exploited in the developing country.
- The duration would be of five years after the registration, with possible extension if the patent has been worked.
- Although the basic idea of WIPO was that the T.T.P. would be able to exist within the Paris Convention as it stands today, after general discussions, this seems to be questionable.

It can be generally said that the new type of patent received a favorable response of all experts.

The Industrial Development Patent (I.D.P.) was proposed by the delegation from Brazil. Most of the above-described characteristics apply to the I.D.P.; however there is one great difference. This patent can be obtained, on basis of the patent already granted abroad, only by the domestic company in the developing country, without any provisions concerning the indemnification of the owner of the foreign patent. The provisions concerning I.D.P. were not discussed because according to the delegate of Brazil, there was a lack of understanding of the exact meanings and purposes of the I.D.P. Consequently, they volunteered to draft a new project with further explanations, which would be discussed during the forthcoming meeting.

DRAFT MODEL PROVISIONS ON CONTRACTUAL LICENSES, KNOW-HOW AND THE STATE CONTROL OF LICENSE CONTRACTS, KNOW-HOW CONTRACTS AND CONTRACTS ASSIGNING PATENTS OR PATENT APPLICATIONS

Part I: Patent Licenses

Receiving little attention were sections relating to definitions, the fact that the license contracts must be in writing and registered, the rights of the licensees and the licensors and the repayment of the royalties to the licensees if the patent is declared nul and if the licensors do not effectively profit from the patents of the licensees.

Part II: Know-How Licenses

As usual, some difficulties were encountered in defining what is Know-How, secret Know-How, Know-How in the public domain, etc. Developing countries insisted on obtaining a maximum of written information on Know-How and many discussions went on to determine at what time secret Know-How was to be opened to public inspection.

Part II bis: State Control

As expected, these sections led to very lively debates. Developing countries want not only to obtain the best possible technologies, which correspond to their necessities, but they also want to be sure that they get these technologies at the best possible conditions, and that no excessive burden would be put on the licensees.

A very long list of prohibited stipulations were set forth (sections 62 (2)) which were discussed in detail. However, it was generally agreed to propose that the existence of such prohibited stipulations in a contract would not per se render it unregisterable. They would be considered as "suspicious stipulations" which would need justification through very sound reasoning to become acceptable.

DRAFT MODEL PROVISIONS ON PATENTABILITY, RIGHTS TO THE PATENTS, RIGHTS UNDER THE PATENT, DURATION, AND COMPULSORY LICENSES

Chapter I concerning Patentability is very much in line with provisions in the Strasbourg Convention and which are found in the European Patent and in the French Patent Law. They deal more specially with definitions of patents, novelty (absolute) inventive steps, and industrial applications. However, WIPO has additionally tried to define the concept of "inventions". Rights to the Patent (first to find and usurpation) did not lead to much discussion. The problem of inventions made by employees were scrutinized and more specially by a delegate from I.L.O. (International Labour Office) of Geneva. Rights under patents which are stated in Chapter IV, have been practically taken over word by word from the existing BIRPI Model Law.

Concerning the duration of the Patents, WIPO has introduced the new concept that after 10 years, the patent

can only be extended if it is worked. Important and new sections relating to compulsory licenses have been introduced.

Compulsory license from nonworking, for reasons of public interest and due to interdependency of patents, are suggested. However, quite a few criticisms and suggestions were made by the experts so that most probably this chapter will be thoroughly reconstrued by WIPO.

GENERAL CONCLUSIONS

1. It is absolutely certain that it is necessary to study the problems of transfer of technology in the light of developing countries.

2. There are mainly three United Nations organizations and agencies, namely UNCTAD, UNIDO and WIPO which deal with the matters of industrial property concerning developing countries. It must be hoped that each will deal with its own specific speciality and there will be a good synchronization and not too much overlapping. In this direction, it is WIPO which is the most competent in dealing with all legal problems in the field of industrial property in relation to developing countries. This is not only due to the very high qualification of its staff, but also to its very long and unique practice in the field of industrial property.

3. There are many different grades between developing countries. Kuwait which has per capita the highest revenue in the world for example, certainly can not be compared with Bangladesh. There is consequently no uniform approach to solve the problem of developing countries. It could therefore be suggested that different solutions would be set forth in the Model Law according to the different categories of degree of development and the specific needs and requirements of these countries.

Notes

(1) "New Trends In Latin-America Concerning the Transfer of Technology" - Industrial Property January 1973 - pages 33 to 44.

(2) Mexico - December 28, 1972 (Industrial Property May 1973 - pages 145 to 147)
Argentina - September 13, 1971 (Industrial Property May 1972 - pages 125 to 127)
ANDINPACT - Cartagena Agreement - December 1970, which has already become Law in Bolivia, Chile, Columbia, Ecuador, and Peru (Industrial Property December 1974 - page 437)

(3) UNIDO stands for "United Nations Industrial Development Organization" (headquarters in Vienna) and UNCTAD stands for "United Nations Conference on Trade and Development" (headquarters in Geneva)

(4) WIPO stands for "World Intellectual Property Organization", which, since December 17, 1974, has become a specialized agency with the United Nations (Industrial Property 1974 - page 463 and January 1975 - pages 3 to 6, 16 and 17) - Said Organization is located in Geneva. For explanations concerning its activities, see further on.

(5) UNCTAD Document TD/B/C.6/AC.1/2 and following, 1975. This problem will be studied in the forthcoming LES International Conference which is to be held in Basle (Switzerland) from September 22 to 24, 1975.

(6) UNCTAD Document TD/B/AC.11/19, 1974. Further study of this problem will be made during a meeting organized by UNCTAD in Geneva from September 1 to 12, 1975, to which LES has been invited.

(7) Industrial Property January 1975 - pages 12 to 18

(8) Industrial Property March 1975 - pages 84 to 86 - "The Paris Convention and the Latin American countries" - Prof. Aracama Zorraquin (Industrial Property March 1975 - pages 90 to 99)

(9) WIPO-BIRPI Publication General Information No. 400 (2)
Geneva Address: 32, Chemin des Colombettes
CH - 1211 GENEVA 20 (Switzerland)
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Telex number: 22376

(10) Industrial Property - January 1973 - pages 28 to 30 LES Delegates: Messrs. M. Finnegan and C. Wickham

(11) Industrial Property - July 1973 - pages 199 to 200 LES Delegate: Mr. C. Wickham

(12) WIPO Conference on November 27, 1973: Document BI/95 Article 1

(13) The Permanent Committee itself has met twice: - Geneva from March 18 to 22, 1974 (Industrial Property April 1974 - pages 175 and 176
- Geneva from arch 17 to 21, 1975 (Industrial Property May 1975 - pages 141 to 143

(14) The different LES Delegates: Messrs. C. Wickham, J. Froment, J. Gaudin and F. Gevers.

(15) Industrial Property 1975 - pages 58 and 59

(16) Industrial Property January 1975 - pages 49 and 50

(17) Industrial Property December 1974 - page 478

(18) WIPO Document AT/LS/5 February 1975

(19) WIPO Document 1972 PJ/92

(20) WIPO Document AT/LOP/I/1 to 7

(21) Transfer of Technology and Licensing Opportunities - WIPO Document PJ/79/Rev./2 1972

(22) BIRPI publication No. 801 (E) fourth print December 1968.

(23) WIPO Document WG/ML/INV/I/3, September 10, 1974 - Sections 201 to 210 and 301 to 310

(24) WIPO Document WG/ML/INV/I/2, September 5, 1974 - Sections 28 to 33, 53 to 57ter and 60 to 66
Previous sections in existing Model Law (1965) 28 to 45 and 56

(25) WIPO Document WG/ML/INV/II/1, February 24, 1975
The numbering of the Chapters are the same as in the existing Model Law (1965)

(26) WIPO Document WG/ML/INV/I/4