

New International Relations In Intellectual Property

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The appreciation of the impact of Intellectual Property and Technology Transfer on the economy of any given country, is coming under scrutiny from the lesser developed countries. Those who do not understand the reasons for the views being expressed will find it more and more difficult over time to open up new markets for their IP-based businesses.

A proposal made by Brazil and Argentina for the establishment of a development agenda for WIPO (World Intellectual Property Organization) during its General Assembly's 31st session held from September 27 to October 05, 2004, has raised a good deal of discussion and, as expected, has immediately resulted in polarizing opinions—developed countries on one side and developing and underdeveloped countries on the other.

The proposal can be summarized in a single phrase: *The level of protection of IP rights in a given country should be proportional to its level of development.*

The complete text of the proposal can be found in the WIPO Web site, under document number WO/GA/31/11 (August 27, 2004) and its main points are the following:

1. As a member of the UN system, WIPO should be fully guided by the broad development goals that the UN has set for itself (see list below) and, accordingly, development concerns should be fully incorporated in all WIPO activities.

2. A call upon the WIPO General Assembly to take immediate action in providing for the incorporation of a "Development Agenda" in the Organization's working program.

3. Provisions on "objectives and principles" reflecting the content of articles 7 and 8 of the TRIPS, should be included in the Substantive Patent Law Treaty (SPLT) and other treaties under discussion in WIPO.

4. The provisions of any treaties relating to the digital environment (including technological protection measures) to be balanced and clearly take on board the interests of consumers and the public at large. For instance, the proposal states: "While access to information and knowledge sharing are regarded as essential elements in fostering innovation and creativity in the information economy, adding new layers of IP protection to the digital environment would obstruct the free flow of information and scuttle efforts to set up new arrangements to promoting innovation and creativity, through initiatives such as the 'Creative Commons.'"

5. The transfer of technology should be supportive of and not run counter to economic development, as stated in articles 7 and 8 of the TRIPS Agreement.

6. A new subsidiary body within WIPO could be established to look at what measures within the IP system could be undertaken to ensure effective technology transfer to developing countries; similar to what has already been done in other fora such as the WTO and UNCTAD.

7. As one of those measures, the Proposal includes the possible access by developing countries to the results of publicly funded research in developed countries, in the form of a "Treaty on Access to Knowledge and Technology."

8. Inclusion of clear provisions

on transfer of technology in the treaties currently under negotiation in WIPO.

While there are other points of relevance in the Proposal, those listed above may be considered as the core of the Proposal.

This proposal, which has been endorsed by other developing and underdeveloped countries, is based on:

1. The "Millennium Development Goals," adopted by the United Nations in the year 2000 (www.developmentgoals.org/UNDG%20document_final.pdf);

2. The philosophy behind the "Doha Declaration on the TRIPS Agreement and Public Health" adopted at the WTO in November 2001 and through which, member states agreed that TRIPS should not prevent a member from taking measures to protect public health or ensuring that the populace has access to medicines;

3. The "Program of Action for Least Developed Countries for the decade 2001-2010," adopted by the United Nations General Assembly at the Third United Nations Conference on the Least Developed Countries, held in Brussels-Belgium, on 20 May, 2001;

4. The United Nations Resolution designated as the "Monterrey

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Consensus,” adopted in the International Conference on Financing for Development held in Monterrey-Mexico from 18-22 March 2002;

5. The “Johannesburg Declaration on Sustainable Development” adopted at the World Summit on Sustainable Development, held in Johannesburg-South Africa from 2-4 September 2002;

6. The “Plan of Implementation” established at the World Summit on Sustainable Development;

7. The “Declaration of Principles and Plan of Action of the World Summit on the Information Society” held in Geneva in 2003; and

8. The recent “Consensus” adopted in the São Paulo-Brazil meeting of UNCTAD from 13-18 June 2004.

One thing that cannot be ignored is that the text of the Proposal makes a point in listing all the above International events and entities, so as to let it be clear that the time for discussion is over and that it is now time for the implementation of the principles and objectives already agreed in the listed documents.

Another fact which has to be taken into consideration is that, like it or not, developing and underdeveloped countries are more and more discussing these issues between themselves and adopting block positions for the purpose of international discussions. In view of this, proposals like this one should be taken seriously as a failure to do so might stall discussions of international treaties in different areas.

As in any new approach to a long standing and crystallized problem, this one also defies traditional and orthodox views which, as is well known, are hard to break.

One thing that emerges from all the above mentioned fora, consensus, documents and plans is the recognition that international legislation like, for example, the TRIPS Agreement, should be an instrument to bring about innovation, progress and development in all countries. Moreover, the weakness of developing and underdeveloped economies has been exhaustively recognized in those discussions, not

only for humanitarian reasons, but also, and probably, mainly, in view of the huge potential market represented by all of those countries.

This is the environment in which any international discussion of intellectual property related matters takes place today; be it before the WTO and WIPO, at a regional level, such as the Mercosur/EU discussions or the FTAA discussions between the Nafta countries and South American countries. The Brazil/ Argentina Proposal at WIPO has to be considered seriously and within the new context in which international commerce takes place. It is not merely another battle between first and third world countries and, even less, is not a mere request for assistance from poorer countries. This would be a simplistic and definitely wrong way of looking at the issue.

Defining a way of implementing the Brazil/ Argentina Proposal can and should be the next step of international commerce. Mechanisms must be created to make feasible not only the transfer of leading technologies but also the development of technologies in countries which are considered today only as importers of technology, suppliers of basic products without any added technology or mere suppliers of raw material.

Most South American countries have islands of excellence in R&D in several different areas of science and technology. Those islands now have to be connected to the “mainland,” where both industry and markets are located. Interaction and cooperation between academia and industry is an urgent matter and one means of bridging this gap.

The potential for contributions which can be made by the international community and particularly developed countries to the development of the lesser developed countries exists in several areas, but Intellectual Property is one of the most important areas. The Proposal for a Development Agenda could be a good beginning, provided that it is not just another forum for discussion, but rather an

occasion for implementation of principles which have been recognized internationally.

The perceived concern which is causing earthquakes in the international IP community is the fear that this proposal will simply result in the reduction of IP protection in developing and underdeveloped countries to the detriment of intellectual property rights emanating from the developed countries.

From the point of view of developed countries and their large corporations, there are benefits which would flow from this initiative. One is that the global market would be enlarged. This would be done by bringing southern hemisphere countries to levels of development (and, therefore, consumption) close to or exceeding those of the developed countries and regions, with obvious benefits to all.

Referring now to some particular and more sensitive points of the Proposal, I would first mention the open door existing in the Paris Convention, reiterated in the TRIPS Agreement and reinforced at the Doha Declaration. I refer to the freedom given to countries to adopt any measure they think appropriate to deal with situations of national emergency and public health.

While this is somewhat an academic “permission,” since it touches the sensitive nerve of sovereignty, the definitions of “public health” and “national emergency” could be argued to be broad enough to encompass some of the serious public health and development issues confronting the lesser developed countries. Taking the opportunity, it is never too much to mention that the vast majority of dictionaries, in any language, define the words “agreement” or “negotiation” as something that comes from respect being given to the opinions and wishes of all the parties involved, aiming to achieve a win-win situation.

Another important aspect of the Proposal is that it gives recognition to recent international treaties which have required higher standards of intellectual property protection to be implemented but which higher

standards have “failed to foster the transfer of technology through foreign direct investment and licensing.”

This is one of the disappointing results or absence of results that have motivated the Proposal. There is no benefit in blindly trying to educate developing economies about how good it is to engage in a licensing program for intellectual property or to have universities and Industry to cooperate in technology transfer, if the average entrepreneur (not to mention the average citizen) does not have the basic knowledge and understanding of IP protection. In order to be able to transform IP into a valuable commodity such an understanding is necessary. It is only then that one is able to commercialize it through licensing.

The Brazil/Argentina Proposal is not intended to weaken patent protection in poorer countries as an easy way out to allow free utilization of developed countries’ IP, but rather, is intended as a first step in a complex process of implementing everything that has been discussed (and agreed) within the UN entities over the past few years regarding the use of IP to foster economic development. This is the current vision. It is also the only way to solve the problem created with the introduction of Intellectual Property into what was originally a trading agreement between nations through TRIPS. The basic problem is that TRIPS requires homogeneous treatment of Intellectual Property in heterogeneous countries.