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The 8th International Conference On Indonesia-Malaysia Relations

"Memperkuat Kemitraan Strategis Negara Serumpun"

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"Memperkuat Kemitraan Strategis Negara Serumpun"

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1. Agama 2. Budaya dan Agama 3. Ekonomi dan Pembangunan,
4. Hukum, Politik, dan Pembangunan 5. Sejarah dan hubungan Internasional

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SEKAPUR SIRIH

Prof. Dr. Syafrani, MSi
Rektor Universitas Lancang Kuning (Unilak)

Assalamu'alaikum wr. wb.

Dengan mengucap syukur kepada Allah Swt, Kami Universitas Lancang Kuning telah diberi kepercayaan menjadi tuan rumah Konferensi Internasional Hubungan Indonesia-Malaysia ke-8 (Pahmi8), pada tanggal 23-25 September 2014 dengan tema "Memperkuat Kemitraan Strategis Negara Serumpun", Tema yang diangkat oleh Panitia kali ini sangat menarik karena tema tersebut terkait dengan persiapan Indonesia-Malaysia dalam memasuki kancah persaingan global, yang didahului dengan pelaksanaan AFTA *(Asean Free Trade Area)* pada tahun 2015.

Dalam menyelenggarakan *The 8th International Conference Indonesia-Malaysia Relations* (Konferensi Internasional Hubungan Indonesia dan Malaysia ke-8) ini Universitas Lancang Kuning bekerja sama dengan *Faculty of Arts and Social Sciences, University of Malaya* dan acara tersebut akan diadakan di komplek Fakultas Hukum Universitas Lancang Kuning.

Momentum ini menjadi penting bagi kita karena sebagai perguruan tinggi yang menjadi salah satu pusat rujukan akademis yang juga memiliki tanggung jawab yang besar untuk menjawab tantangan globlisasi tersebut. Dengan seminar-seminar seperti ini mudah-mudahan muncul suatu metode, cara, model, teori atau hasil penelitian yang inovatif dalam mencapai tujuan konferensi ini yaitu untuk menjalin kerja sama akademik dalam bidang budaya, sastra dan ilmu sosial antara Universiti Malaya dan perguruan tinggi di Indonesia, mempererat hubungan antara Malaysia dan Indonesia yang sejak dulu memiliki hubungan sejarah, budaya, sosial, politik dan ekonomi, membangun pemahaman dalam aspek sosial dan budaya antara dua negara, bertukar pikiran dan pandangan dalam menangani berbagai isu yang terkait dengan hubungan Malaysia-Indonesia.

Saya mengucapkan terima kasih kepada donatur yang telah berpartisipasi dalam acara ini dan kepada Panitia yang telah bekerja keras untuk menyukseskan penyelenggaraan acara ini, sehingga dapat berjalan dengan lancar. Saya juga mohon dimaafkan apabila dalam penyelenggaraannya terdapat hal-hal yang tidak berkenan di hati Bapak /Ibu/ Saudara.

Kepada para peserta yang datang dari berbagai negara dan dari perguruan tinggi dalam negeri, kami mengucapkan ribuan terima kasih dan semoga Bapak/Ibu/saudara di sini tidak merasa asing. Kita bersaudara dan harus bersama-sama bertekad membangun kehidupan yang diridhoi Allah Swt. *"Sesungguhnya orang muslim itu bersaudara dan orang muslim dengan muslim seperti bangunan yang menguatkan sebagian dengan sebagian yang lainnya."*

Sekali lagi saya ucapkan selamat mengikuti seminar dan semoga amal usaha kita mendapat balasan pahala dari Allah swt.

KATA SAMBUTAN KETUA PANITIA

Dr. H. Eddy Asnawi, S.H., M.Hum

Assalamu'alaikum Wr.Wb

Kami mengucapkan selamat datang kepada tuan-tuan dan puan-puan di Pekanbaru Provinsi Riau di Kampus Universitas Lancang Kuning. Semoga Allah Swt memberikan curahan dan hidayah-Nya kepada kita semua. Amin.

Suatu kebanggaan bagi kami semenjak diselenggarakan pertama kalinya di Universiti Malaya tahun 2007, Universitas Lancang Kuning diberi kepercayaan sebagai tuan rumah menyelenggarakan ***"The 8th International Conference Malaysia-Indonesia Relations"*** sebagai perguruan tinggi swasta pertama di Indonesia untuk menyelenggarakan kegiatan ini di tahun 2014 dengan tema **"Memperkuat Kemitraan Strategis Negara Serumpun"**. Kami mengucapkan terima kasih kepada semua pihak, khususnya Universiti Malaya atas kerja samanya yang baik untuk menyukseskan kegiatan konferensi ini di Universitas Lancang Kuning Pekanbaru 23-25 September 2014.

Konferensi Internasional ke 8 Malaysia-Indonesia, diikuti kurang lebih 200 pemakalah (presenter) dari berbagai perguruan tinggi di Indonesia dan Malaysia, yang terdiri dari 28 perguruan tinggi dari Indonesia dan 7 perguruan tinggi yang berasal dari Malaysia ditambah dari institusi lainnya sebanyak 5, dengan mendedah subtema dari berbagai disiplin ilmu, yakni; (1) Agama; (2) Budaya dan Media; (3) Ekonomi dan Pembangunan; (4) Hukum, Politik dan Pemerintahan; (5) Sejarah dan Hubungan Internasional; (6) Pendidikan, Bahasa dan Sastera; (7) Lingkungan; (8) Isu-isu Sosial dan Kemasyarakatan; dan (9) Sain dan Teknologi. Pembentangan dari Pemakalah ini diharapkan memberikan kontribusi terhadap perkembangan keilmuan dan penelitian di perguruan tinggi sekaligus menjadi ajang tukar menukar informasi bagi para dosen/pensyarah di kedua negara dengan melakukan interaksi baik secara individu maupun institusi untuk melakukan hubungan kerja sama dengan mendiskusikan peluang-peluang apa saja yang dapat membuka jalan mewujudkan kemitraan strategis di negara serumpun.

Permohonan maaf kami sampaikan, apabila dalam pelaksanaan konferensi hubungan Malaysia-Indonesia yang ke 8 di Universitas Lancang Kuning, tuan-tuan dan puan-puan merasa kurang nyaman atas pelayanan kami selama 3 hari berlangsungnya konferensi ini. Mudah-mudahan konferensi di Universitas Lancang Kuning di Tahun 2014 ini membawa kesan yang baik bagi tuan dan puan untuk di bawa pulang ke daerahnya masing-masing.

DAFTAR ISI

THE INTERNATIONAL DIMENSION OF TECHNOLOGY TRANSFER

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Abstract

This study aimed to analyses the role of international patent system for technology transfer, viz: Paris Convention, WIPO, and TRIPS. As we have indicated how the lack of robust and full protection of IP worldwide benefited exclusively the industrialized countries during the Paris Convention and under the WIPO, throughout the former GATT, and also on the TRIPS Agreement under the WTO too. Lastly, IP protection is crucial for scientific development and technology transfer as well as the economic and social welfare of a country or of a continent.

Keywords: Konvensi Paris , WIPO, TRIPS, and Technology Transfer

DIMENSI INTERNASIONAL ALIH TEKNOLOGI

Abstrak

Studi ini dimaksudkan untuk membahas upaya sistem paten internasional terhadap pemindahan teknlogi, seperti: Konvensi Paris, WIPO, dan TRIPS. Seperti telah kita lihat betapa kuat dan tingginya perlindungan atas HaKI secara luas dengan eksklusif menguntungkan negara-negara industri selama Konvensi Paris, dan di bawah WIPO, tersebar melalui GATT dulunya, dan juga Persetujuan TRIPS di bawah WTO. Akhirnya perlindungan HaKI adalah sangat penting untuk kemajuan pengetahuan dan pemindahan teknologi juga ekonomi dan kesejahteraan masyarakat dari suatu negara atau benua.

Kata kunci: Konvensi Paris, WIPO, TRIPS, dan Transfer Teknologi

Introduction

The protection of intellectual property rights (IPRs) in developing countries has been problematic since the genesis of the international system in the nineteenth century[1]. From the moment a select group

[1]See Ruth L. Okediji (2003), 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in The Global Intellectual Property System', Singapore Journal of International & Comparative Law, 7, p. 315. Here he stipulates: The two principal international treaties for IP protection were concluded in 1883 and 1886 respectively. Although bilateral relations between countries secured a degree of international protection for authors, the network of bilateral agreements was often discriminatory and provided a limited scope of protection. The Paris Convention and the Berne Convention established a comprehensive system for patent and copyright protection respectively. Despite limited membership by developed countries, the colonies and foreign territories controlled by a few European sovereign made the geographic scope of the treaties significant. European colonial expansion started in the fifteenth century in the Americas, and then turned to Asia. By the late eighteenth century, India had become a British colony although France had earlier appropriated parts of that country. As the United States, and latter South America, became independent European expansion turned to Africa while simultaneously deepening its hold in Asia. As a result of the Berlin Conference in 1884 – 1885, Africa was divided among European countries most notably Britain, France, Portugal, Germany and Belgium. Consequently, just as the major international agreements for patents and copyright were being negotiated or concluded, considerable changes were also taking place in world political geography, which affected participation and membership in these agreements. For more detailed see Sam Ricketson, 'The Berne Convention for the Protection of Literary and Artistic Works: 1886 – 1986 (Centre for Commercial Law Studies, Kluwer, 1987) at 79 (noting that the vast colonial holdings of France, Germany, Italy, Belgium, Spain and the UK effectively extended the Berne Convention worldwide). The French and British

of European countries concluded a multilateral agreement for the protection of IP in 1883[2], non-Western societies, principally in Africa and Asia, were swept under the aegis of the international IP system through the agency of colonial rule. Within three years, an international agreement for copyright was also concluded[3]. Between these two premier accords – the Paris and Berne Conventions – the framework for the modern global system was firmly secured, such that these two treaties remain integral components of the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)[4].

During the second half of the 19th century, more and more countries recognized the value of the IP system as a tool for technological and economic development. Consequently, many of them established a system for the protection of inventions at the national level. The industrial revolution stimulated a more internationally oriented exchange of technology and an increase in international trade flows, which lead to the increased need to obtain IP protection in foreign countries. Since no global international convention in the field of IP existed at that time, it was rather difficult to obtain protection for industrial property rights in various countries of the world due to the differences in national laws. In particular, there was no guarantee that foreign applicants could enjoy the same protection on the same conditions as national applicants. Moreover, patent applications had to be filed roughly at the same time in all countries in order to avoid that a publication in one country destroyed the novelty of the invention in the other countries.

Objective of Study

1. Whether Paris Convention is effective for the transfer of technology?;
2. The role of WIPO for the transfer of technology;
3. The role of WTO/TRIPS Agreement for the transfer of technology (TT).

Research Methodology

The research methodology employed in this study is predominantly library research. Relevant articles, books, local and international law reports, reviews, conference and seminar papers constituted the main source of information for this study.

1. Paris Convention

The provisions of the Paris Convention can be classified into following four categories:

a. Provisions which deal with rules of substantive law which guarantee the basic right to national treatment[5] i.e. equal treatment in all member States without discrimination. It guarantees not only that the foreigners will be protected at part with its own nationals but also prevent the discrimination against the foreigners in any way;
b. Provisions which provide the right of priority i.e. on the basis of a regular first application filed in one of the member States, the applicant can apply for protection of his invention in any of the member States within a period of 6 months for industrial designs and trade mark and 12 months for patent, inventor's certificates and utility models and these applications will be regarded as if they had been filed on the same date as the first application;

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governments formally declared that their accession would extend to all their colonies and 'foreign possessions' such as protectorates. Id. With respect to British, the consent of so called self-governing colonies, such as India, was sought before including them in the accession. Id. At 791. At the time of its ratification, the Spanish government held that the Convention would extend to 'all territories dependent on the Spanish Crown.' Id. At 790. Similarly, Germany, Portugal and other European powers extended the Convention to the various territories under their control. See generally, Id. At 787-810. Nonetheless, international protection for IP remained a patchwork system of disparate norms, rules, levels of protection and overlapping membership of a variety of multilateral instruments.

[2]See Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 13 U.S.T. 2, 828 U.N.T.S. 107, as last revised at the Stockholm Revision Conference, July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 303; and was amended on 28 September 1979 [hereinafter Paris Convention]. 38 See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention].

c. Provisions which defines certain common rules in the field of substantive law which deal either with the rules regarding the rights and obligations of natural persons and legal entities or rules requiring of permitting the member States to enact legislation in their own national laws;
d. Provisions concerning the administrative frame work.

Further, as far as national treatment is concerned, Bodenhausen[6] pointed out as follows:

"The provisions of the Paris Convention regarding the national treatment applies to nationals of the countries of the Union. In deciding the question who are such nationals, account has to be taken of the fact that the Convention can also apply to legal persons or entities, so that a distinction must be made between the nationality of natural and legal person respectively. With respect to national persons, nationality is a quality accorded or withdraw by the legislation of the State whose nationality is claimed. Therefore, it is only the legislation of that State which can define the said nationality and which must be applied also in other countries where it is invoked. With respect to the legal persons, the question is more complicated because generally no nationality as such is granted to legal persons by existing legislations. Where these persons, States themselves, or State enterprises, or other bodies of public status, are involved, it would be logical to accord to them the nationality of their country."

According to Article 2 (1), the national treatment rule applies to all advantages that the various national laws grant to nationals. This means that the national law, as it is applied to the nationals of a particular member country, must also applies to the nationals of other member countries. On this respect, the national treatment rule excludes any possibility of discrimination to the detriment of national of other member countries.

With regard to the effect of the right of priority is regulated by Article 4 B. One can summarize this effect by saying that, as a consequence of the priority claim, the later application must be treated as if it had been filed already at the time of the filing, in another member country. By virtue of the right of priority, all the acts accomplished during the time between the filing date of the first and later applications, the so called priority period, cannot destroy the rights which are the subject of the later application.

In terms of concrete examples, this means a patent application for the same invention filed by a third party during the priority period will not give a prior right, although it was filed before the later application. Likewise, a publication or public use of the invention, which is the subject of the later application, during the priority period would not destroy the novelty or inventive character of that invention. It is significant for that purpose whether the applications is made by the applicant or the inventor himself or by a third party[7]. For the purpose of determining the length of the priority period, the Convention had

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[3]See Marrakesh Agreement Establishing the World Trade Organization, Annex IC: Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, 1869 U.N.T.S. 299, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement].

[4]See WIPO Intellectual Property Handbook (WIPO Publication No. 489). The text of the Paris Convention is available at: (http://www.wipo.int/treaties/en/index.html), accessed 19 May 2005.. According to some of the Paris Convention clauses mentioned: "The countries of the Union are bound to ensure that their nationals have effective protection against unfair competition". "They are also bound to ensure that nationals of other countries of the Union have appropriate legal remedies to effectively repress all acts of unfair competition and infringement". Further, "the countries of the Union shall also undertake to provide measures to permit federations and associations representing interested industrialists, producers, or merchant – provided that the existence of such federations and associations is not contrary to the laws of their countries – to take action in the courts or before the administrative authorities, with a view to the repression of the acts of unfair competition and infringement 'in so far as the law of the country in which protection is claimed allows such action' by federations and associations of that country". Furthermore, "the Paris Convention states that the countries of the Union shall 'in conformity with their domestic legislation' grant temporary protection to patentable inventions, utility models, industrial designs and trademarks, in respect of goods exhibited at official or officially recognized international exhibitions held in the territory of any of them". See (Articles: 10bis (1), 10 (1), 10ter (2), 11 (1)) of the Paris Convention.

[5]See Articles 2 and 3 of the Paris Convention.

[6]See G.H.C. Bodenhausen, "Guide to the Application of the Paris Convention for the Protection of Industrial Property as Revised at Stockholm in 1967", BIRPI, 1968, pp. 27-28.

[7]P. S. Sangal & Kishore Singh, (Ed.) (1987), "Indian Patent System and Paris Convention: Legal Perspectives", p. 37.

to take into account the conflicting interest of the applicants and the third parties[8]. The priority period now prescribed by the Convention seems to strike an adequate balance between these conflicting interests.

With regard to the Common Rules of Substantive Law according to the Paris Convention, can be classified into four categories i.e. principle of independent of patent, right of the inventor to be mentioned in the patent, importation of the patent product and, failure to work and compulsory licenses.

a. Principle of Independence of Patent

According to the principle of independence of patent, no Contracting State is bound to grant a patent for invention for which it has been granted in any other Contracting State. The independence of patent rule is applicable only to the patent obtained for the same invention. Thus, patent obtained for different invention cannot be put under the purview of the independence. The Contracting State are under obligation to consider their patents independent of other patents for the same invention, even if such patents are granted in non Member State.

Article 4 bis (5) requires that a patent granted on an application which claimed the priority of one or more foreign applications must be given the same duration which it would have according to the national law if no priority had been claimed. In other words, it is not permitted to deduct the priority from the term of a patent invoking the priority or a first application. For instance, a provision in a national law starting the term of the patent for invention from the (foreign) priority date, and not from the filling date of the application in the country, would be in violation of this rule[9].

b. Right of the Inventor to be Mentioned in the Patent

Article 4 ter of the Convention provides that the inventor will have the right to be mentioned as such in the patent for invention. This right of an inventor is generally called as moral right of the inventor to be named as such in the patents granted for invention in all the Member States of the Paris Convention. The Contracting States have been given power to implement in their national laws the procedure regarding exercise of this right of inventor.

National laws have implemented this provisions in several ways. Some give the inventor only the right for civil action against the application or owner in order to obtain the inclusion of his name in the patent for invention. Others enforce the naming of the inventor during the procedure for the grant of a patent for invention on an ex officio basis. In some countries, for instance the United States of America, it is even required that the applicant for a patent be the inventor himself.[10]

c. Importation of the Patent Product

Article 5A of the Paris Convention applies to patentees who are entitled to benefit from the Convention and who, having a patent in one of the Contracting State, import to that country patented product which were manufactured in another Contracting State. In such a case, the patent granted in the country of importation may not be forfeited as a sanction for such importation[11]. In this regard the word 'patentee' includes the representative of the patentee, or any person who effects the importation in the name such patentee.

The provision stipulates only that the importation as indicated shall not entail forfeiture of the patent. However, the expression forfeiture is not use in all countries of the Union. In view of the purpose of the provision, it must apply to all measures terminating a patent on the ground of importation of

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[8]In the original text of the Convention of 1883 these periods were six months for patents and three months for industrial design and trademarks, with an extra month in any of these case for applications coming from overseas countries. No further regulation of the priority period was then the provide for in the Convention so that the computation of these periods was left to the member states. Gradually, in the subsequent revision conferences, the periods of the duration of the priority right were extended and further rules were given. See Guide to the Application of the Paris Convention …. supra note, 6, p. 43.

[9]See supra *note*. 6, p. 112.

[10]*Ibid.*

[11]See Article 5A (1).

patented articles by the patentee, independently of the question whether such measures are called forfeiture, repeal, revocation, or termination.[12]

Here it is necessary to mention that for the purpose of the importation of patented product it would be sufficient if the goods are being manufactured in one of the Member State of the Union. Therefore, the fact that after manufacturing the patented article in a Contracting State and it is distributed through other country and incidently such goods are imported for non – Member Country, cannot make this provision inapplicable. Thus, it can be said that though the goods are imported from a non-Member State yet it is manufactured in the country which is a Member of the Union, such a situation would not make the provision inapplicable.

d. Failure to Work and Compulsory Licenses

The provisions of Article 5A also empowers the Contracting States to legislate against the abuse which might result from the exercise of the exclusive rights conferred by the patent, for instance, failure to work, but these provision can be enacted on the conditions as prescribed in paragraph (3) and (4) of Article 5A. Thus, a compulsory license may only be given in pursuant of an application filed after 3 or 4 years of failure to work or insufficient working of the patented invention in the States.[13]

Paragraph (2) of Article 5A provides that the Contracting States are free to take analogous or different measures to prevent the abuses of patent rights in the case, other than those provided for in paragraph (4), were the public interest is deemed to require such measures. These case may include the patents in the field or military security, public health or in the case of so called dependent patent etc.

For the purpose of the grant of the patent in the above mentioned fields the provisions of paragraph (3) and (4) will not applicable and the Contracting States shall have freedom to legislate.

Despite the failure to work the patented invention which also include insufficient working, other kinds of abuses may also exist in the case when the owner of the patent right refuses to grant license on reasonable terms conditions which hampers industrial development or patentee is not able to meet the demand of the national market or charges excessive price for such products. In such circumstances the Contracting States are also free to define these or any other abuses as the Contracting States wish.

Normally, working a patent is understood to mean working in industrially, namely, by manufacture of the patented product, or industrial application of a patented process. Thus, importation or sale of the patented article or of the article manufactured by a patented process, are normally regarded as 'working' the patent.[14]

The working of a patented invention in a particular country is required to promote the industrialization of the country and not to block the working the invention in the country or to monopolize importation of the patented article by the patentee. Therefore, the patented invention should be used to introduce the use of new technology into the country. Generally, the working of the patented invention in all countries is not economical and it is also recognized that the immediate working in all countries is impossible. Therefore, Article 5A is a step to strike balance between these conflicting interest of the country and the patentee.

The compulsory license for non-working of insufficient working must be a non-exclusive license and can only be transferred together with the part of the enterprise benefiting from the compulsory license. The patent owner must retain the right to grant other non-exclusive licenses and to work the invention himself. Moreover, as the compulsory license has been granted to a particular enterprise on the basis of its known capacities, it is bound to that enterprise and cannot be transferred separately from that enterprise. These limitations are intended to prevent a compulsory license from obtaining a stronger position on the market that is warranted by the purpose of the compulsory license, namely, so ensure sufficient working of the invention in the country.[15]

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[12]See "Background Reading Material on Intellectual Property", (WIPO Publication No. 65 (E) 1998), p. 49.

[13]Three years from the date of grant of the patent and four years from the date of filing of the patent application, whichever period expires last.

[14]See, supra *note*, 6, p. 71.

[15]*Ibid.*

Article 5A also provides that a compulsory license can be refused if the patentee justifies his enaction by legitimate reasons. These reasons may be grounded on the existed of legal, economical or technical hurdles to exploitation of the patent in the country.

2. World International Property Organization (WIPO)[16]

Objective of WIPO

"WIPO works to assist all nations, particularly developing and least developed countries, to use the intellectual property (IP) system to promote economic, social and cultural development. WIPO's extensive activities in support of development goals are guided by the strategic goals and objectives agreed by Member States in the Program and Budget document. The regional bureaus of the Technical Assistance and Capacity Building Sector work closely with the divisions of the more recently established Office for the Strategic Use of IP for Development (OSUIPD) to respond to increased demand from Member States for assistance in optimizing the economic value of IP, and in integrating IP into national development policies[17]."

The objectives mentioned above are mandated by the Convention Establishing the World Intellectual Property Organization, Article 3 of which clearly states:

"(i) to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization,

(ii) to ensure administrative cooperation among the Unions."

The 21st Century is a century of many challenges- including bridging the widening knowledge divide, the reduction of poverty, and the attainment of prosperity for all. The success of a country in meeting these challenges will depend upon its ability to develop, utilize and protect its national creativity and innovation. An effective intellectual property (IP) system allied to pro-active policy-making and focused strategic planning, will help such a nation promote and protect its intellectual assets, driving economic growth and wealth creation.

In this context, there is a widely recognized need to enhance and develop the objectives stated in the WIPO Convention in order to enable the Organization to better assist Member States in meeting the challenges of the changing world. Basically there are five principal WIPO's activities to the next medium-term plan, for 2006 to 2009, viz:

a. Intellectual property norm-setting:

Some of the activities in the technical committees of the WIPO regarding norm-setting, if approved, would force developing countries and least-developed countries to 'agree to IP protection standards that largely exceed existing obligations under the WTO's TRIPS Agreement while these countries are still struggling with the costly process of implementing TRIPS itself. Especially regarding the discussions within the Standing Committee on the Law of Patents on a draft Substantive Patent Law Treaty (SPLT). 'The proposed Treaty would considerably raise patent protection standards, creating new obligations that developing countries will hardly be able to implement', and the addition of 'new layers of IP protection to the digital environment would obstruct the free flow of information and scuttle efforts to set up new arrangements for promoting innovation and creativity, through initiatives such as the Creative Commons'.

b. Transfer of Technology (TT)

'Many of the developing countries and LDCs that have taken up higher IP obligations in recent years simply lack the necessary infrastructure and institutional capacity to absorb such technology. Even in developing countries that may have a degree of absorptive technological capacity, higher standards of IP protection have failed to foster the TT through foreign direct investment and licensing'.

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[16]See WIPO's Website, at: (www.wipo.org), accessed 19 May 2005.

[17]*Ibid.*

c. Enforcement

The Advisory Committee on Enforcement (ACE) 'cannot approach the issue of enforcement exclusively from the perspective of right holders, nor have its discussions focus narrowly on curbing the infringement of IP rights'.

d. Technical Assistance cannot be other than 'neutral, impartial and demand driven'.

e. NGO participation within the WIPO

In this connection, Andrea Koury Menescal[18] pointed out:

"Indeed, the WIPO's attitude is rather inconsistent with its mission as a UN organization. It is perhaps no overstatement to say that since 1974, the WIPO has consistently failed to act as a body responsible 'for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development'. This begs the question if the transformation of BIRPI/WIPO into a UN agency was not just another strategy of those IP experts defending private interests in order to legitimize and continue almost a century's work of strengthening IP protection under the cloak of a credible and supposedly neutral UN organization".

By introducing the proposal before the WIPO General Assembly, the Brazilian representative highlighted[19] the proposal's global character:

"The development agenda is not only in the interest of developing countries, it is essentially a global interest, in fact it is the most important global requirement, one which irradiates positively on all other agendas. An adequate and balanced system of intellectual property for our time, one that promotes innovation, creativity and the wide dissemination of knowledge, is inclusive of all peoples and fully services the public interest, is of crucial importance to peoples both in the developed and developing worlds. It would therefore be erroneous to see the establishment of a Development Agenda for WIPO as an attempt to polarize debate in this institution[20]".

The ensuring discussions of the WIPO's General Assembly on 30 September and 1 October 2004 took place in a generally positive atmosphere, although the positions of developing countries and developed countries' representatives differed sharply. Developing countries in their majority supported the proposal, while developed countries mainly defended the WIPO's long-standing record of assisting and supporting developing countries.

3. The TRIPS Agreement

Objective of the TRIPS

The principal objective of the TRIPS Agreement is to strengthen and harmonize Western IP standards around the world; as DCs and LDCs countries need enough time to assimilate the Agreement and translate its language and obligations for instance into Indonesia laws, regulations and procedures. Rules pertaining to IP protection reflect cultural values, which are connected to national, and hence cultural, identities[21]. Therefore, the transitional period of five or ten years, even with the possibility of renewal, is not sufficient at all. Extending this period would be a very good opportunity for DCs and LDCs, to build a sound and viable technological base, to undertake and achieve a proper structural reform of their IP system. In order

[18]Andrea Koury Menescal, "Changing WIPO's Ways (The 2004 Development Agenda in Historical Perspective)", The Journal of World Intellectual Property, Vol. 8, No. 6, Nov. 2005, pp. 786-787.

[19]Roberto Jaguaribe, the current Director of the National Institute of Industrial Property (INPI), spoke on behalf of Brazil.

[20]Statement by the Delegation of Brazil, 40th Series of the Assemblies of the Member States of WIPO. Item12 Proposal for the Establishment of a Development Agenda for WIPO, 30 September 2004; availableat:(www.cptech.org/ip/wipo/brazil09302004.html) and www.twnside.org.sg/title2/twr171e.html), accessed 20 May 2005.

[21]See Mary E. Footer and Christopher Beat Graber (2000), 'Trade Liberalization and Cultural Policy.' The Journal of International Economic Law. Vol. 3 No. 1, March, p. 126.

to reach this goal, the key which will open the 'gates' of a sound and viable technological or industrial base to DCs and LDCs in general and to African countries in particular is their awareness of the importance of full and robust IP protection.

Many scholars from the Third-World countries affirm that IP must serve the economic and social development of the whole society, and not the egoistic interests of private individuals and multinationals. Without entering into a fierce debate on this issue, it is important to affirm objectively that IP serves both the economic and social development of the whole society. All depends on the moment when the conflict between the two interests appears. Obviously, the conflict between the protection of IPRs and the access of the whole society to the scientific progress and its applications generally appears only at the starting point, at the innovation stage of the property. By the time an IPR emerges, especially a patent, it is obvious that its monopolistic protection during a given time-period is opposed to the right of competitors and the whole community to freely access the new invention and its applications. During that time, all non-right holders have to pay for permission to reproduce or to use the object of the patent. But when the patent protection expires, competitors and the whole community greatly benefit, at a low price, from such scientific progress and its diverse applications.

At the time a patent emerges, limitations of the patent by governments are considered only as tiny advantages, while the exclusive rights conferred to the patentee or the right holder constitute a broad and individual benefit. Nevertheless, when the protection finishes, the limitations and the exceptions will turn into a broad advantage for the whole society, while the exclusivity of the rights granted to a single patentee will, in its turn, be reduced to a tiny profit. In other words, limitations to the exclusive rights by governments will be general and 'absolute'. At the end, limited exceptions will become a 'general rule' while the exclusivity of rights conferred to a patentee (general rule) will turn into a mere exception. Ultimately, the inventor, the competitors and the whole society will be treated at the same level. That is why, in exchange for patent protection, patentees must disclose their inventions in a manner sufficiently clear and complete for the inventions to be carried out by the public[22]. Thus, the patent system is a means of granting, for a limited period of time, adequate compensation for the investment made by those who, with their money and physical efforts, strive for the improvement of the living conditions of humanity. They have to be paid back first for the fruit of their private efforts. Then, their invention, at the termination of the protection, will be at the disposal of the whole society for ever. A system which does not recognize, protect and reward private initiatives is condemned to collapse.

Conclusion

No doubt, the high proportion of patents granted by developing countries to nationals of developed countries reflects the unequal economic and technological strengths of developed and developing countries. The provisions on compulsory licensing and revocation have, in the absence of technological capacity in the developing countries, proved largely ineffective as remedial measures against non-use. Instead of being used in production, an overwhelming majority of patents granted to foreigners through national laws of developing countries have been used to secure import monopolies.

On the other hand, the role of Paris Convention, WTO have been found to be very insignificant in technology transfer transactions. In the technology transfer and investment decisions, enterprises have more important considerations than the existence of a patent system, viz., the investment climate, economic, political and other considerations, such as taxation laws, foreign exchange control regarding repatriation of profits, guarantees against expropriation and foreign investment laws in general. Technology at times is transferred without reference to the patent system.

As far as technology transfer is concerned, indeed, Paris Convention, the WIPO's attitude is rather inconsistent with its mission as a UN organization. It is perhaps no overstatement to say that since 1974, the WIPO has consistently failed to act as a body responsible 'for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development'. This begs the question if the transformation of BIRPI/WIPO into a UN agency was not just another strategy of those IP experts defending

[22]See Article 29 TRIPS.

private interests in order to legitimize and continue almost a century's work of strengthening IP protection under the cloak of a credible and supposedly neutral UN organization.

Suggestions

For this purpose there is an urgent need to reframe the existing legal and judicial framework through the revision of international patent and trademarks systems embodied in the Paris Convention for the protection of Industrial Property, WIPO, as well as WTO, and the establishment of international regulatory system, which is to be adopted in the form of Code of Conduct on the transfer of technology. The basic idea behind the inclusion of these practices in the technology transfer agreements are to enjoy a dominant position in the international market. Such practices virtually make the recipient dependent on the supplying party and leave no room for recipient to take decisions favorable to their progress. The Code must be adopted in the form of legally binding rules of universal application, so that the developing countries could be saved from the exploitation of developed countries in the field of transfer of technology, and especially in license agreement. the recipient dependent on the supplying party and leave no room for recipient to take decisions favorable to their progress. Consequently, such practices hinder the technological, social and economic progress of the recipient country.

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