

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

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Today, our globalized economy can be understood as a 'Knowledge Economy' due to the increasing importance of the Intellectual Property (IP) regime at all levels—national, regional and international. IP can be understood as 'creation of the human mind' having following acknowledged forms: Patent, Trademark, Copyright, Geographical Indication etc. As far as governance of the Intellectual Property Right (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 World Trade Organization (WTO) through its Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) also regulates IP. 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. Since 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.

The reasons behind the origin of the WIPO and that of the TRIPS Agreement are different and because of this fact, there are differences between them in many aspects. WIPO was established through the incarnation of International Bureau known as BIRPI (United International Bureaus for the Protection of Intellectual Property) at Stockholm on 14th July 1967. The proposal to establish an organization came into existence due to the international agency status of BIRPI. WIPO became UN specialized agency in 1974 because BIRPI believed that working in the UN system would encourage more developing countries to join the organization and enable the internal administrations of the organization to benefit from the advantages available to UN agencies¹. The WIPO Convention is an administrative treaty only because the most important task of it is to provide administrative and

technical assistance in the field of IP.

On the other hand, rapid scientific and technological developments, breakdown of the attempts to revise the Paris Convention and the limitations of General Agreement on Trade and Tariffs (GATT) in addressing IPR issues were the factors that led the industrialized countries to bring IP issues under the framework of the GATT. 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 IP issues during Uruguay round in 1986 and consequently it came into the form of the TRIPS agreement under the framework of the WTO in 1994.

The entire TRIPS negotiating process represented a victory for the developed countries on the IPR issues. 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. 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. In the case of the WIPO, the developing countries had a bigger say during the negotiations. 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 and uniform their laws according to their TRIPS obligations like 20 years patent term for all contracting parties. If we equate the

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1967 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 had².

TRIPS Agreement links IP with trade in its objectives for the first time, 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 and EU 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. 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.

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 WTO³. 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, 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, where 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. 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. 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. Despite of the differences, the two institutions follow some common platform of working. Treaties administered by the WIPO such as Paris and Berne Convention, are also followed by the TRIPS Agreement.

The new development in the IP field was formalized through the adoption of the WIPO-WTO Cooperation agreement on March 1995, which 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 countries⁴. Developing countries need technical assistance to modernize their administrative infrastructure in order to comply with the TRIPS obligations. Due to this Agreement, International Bureau has carried out extensive activities related to the TRIPS Agreement since January 1996, which included legislative advice, awareness building and human resource development, institution building of the IP system and enforcement, and studies and publications. It enhances the importance of WIPO⁵. The International Bureau and WTO Secretariat always remain in contact to help each other and exchange non-confidential information.⁶ The human resource development program of WIPO has always been a central part of its cooperation for development program. 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 least developed countries in the area of IP⁷. 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 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 language⁸. Due to lack of a proper interpretation provision and awareness, developing countries do not get adequate benefits from flexibilities under the TRIPS Agreement.

DISPUTE SETTLEMENT MECHANISM-a comparison between WTO-TRIPS and WIPO-Under the WIPO, due to lack of enforcement mechanism, an interesting development took place in 1994 i.e. WIPO Arbitration and Mediation Centre (AMC). It represented a renewed interest in the WIPO and was an

attempt to move the centre of IPR gravity from WTO to WIPO. It offers three main dispute resolution procedures – mediation, arbitration and expedited arbitration. All are voluntary in nature. It would govern all treaties administered by WIPO and contains no sanctions or retaliatory remedies of any kind. US and other developed countries opposed this in order to exercise their coercive powers of trade retaliation against the developing countries⁹. The Geneva based AMC provides dispute resolution services relating to internet and electronic commerce. It is recognized as one of leading dispute resolution service provider for domain name disputes. On the other hand, WTO Dispute Settlement Body (DSB) provides enforceable and binding rules and procedures, which are being administered by the General Council. One of the important principles of the DSB is that a dispute can only be brought to DSB when efforts to settle it on a bilateral level have failed¹⁰.

WIPO's NEW PATENT AGENDA AND ITS IMPACT ON TRIPS-Recently, a new intellectual property standard – Substantive Patent Law Treaty (SPLT) –taking shape under the auspices of WIPO, aims to harmonize the patent rules. It will erode the flexibilities under TRIPS Agreement because much of the substantive provisions of it are drawn from the WIPO¹¹. The SPLT will create more advantages for the developed countries and undermine the position of the developing countries in critical areas such as public health because both have different priorities and interests. The adoption of such a system would also mean that most national patent offices would become superfluous. TRIPS spell out the minimum required elements of national patent laws. SPLT, by contrast, will spell out the top and bottom line and be a fixed set

of rules on what can be patented and under what conditions. Hence, the SPLT differs from TRIPS and goes beyond TRIPS. 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. In reply to this proposed draft treaty, developing countries like Argentina, India, Brazil and Bolivia, known as 'Group of Friends of Development', proposed a 'Development Agenda' at the WIPO Assembly in order to serve their development objectives¹². It emphasizes that WIPO should have a development oriented approach. 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. 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. Beside that, 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.

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