TRIPS, WTO and IPR: The Year 2009 in Retrospect

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In many ways, the year 2009 was one to forget not only due to the unprecedented economic melt down affecting global development goals, but also due to loss of public faith in what was thought to be well established institutions in both public and private sectors deemed to be responsible for providing equitable growth and benefits to society. The World Trade Organization (WTO) established in 1995 as the custodian of all matters related to global trade was no exception. The failure of the negotiations on various issues taken up during the year raised serious questions about the relevance of multilateralism represented by WTO, as a feasible instrument to establish uniform standards in the global trade arena. This is in spite of the fact that 95% of world trade is accounted for by members of the WTO. The available options are to resort once again to Preferential Trade Agreements (PTAs) and Regional and Bilateral Agreements which unfortunately as a rule, benefit few to the detriment of the majority and economically weak countries. Outside the UN, the WTO is the largest single body with 153 members which together aim to develop and implement a world trade order which will benefit all members through universally accepted rules.

As such, it is imperative that it succeeds. From the WTO perspective, the major issue confronting the members in 2009 was the closing of a fresh round of negotiations to finalize the Doha Development Round (DDR). While much was expected during the year, there has been very little (if any) progress at all. This was hardly surprising since the momentum of resistance by both developed and developing countries, NGOs, farmers’ organizations, workers’ unions etc to WTO’s handling of global trade which started since its establishment in 1995 has not abated.

Developing countries feel that any discussion on increasing market access to their markets should match various developmental issues affecting them. The erstwhile deadline of end 2009 for finalizing the DDR is now shifted to 2010. Pascal Lamy, the Director General in his statement on 10 June 2010, stated that while members are keen to bring the Round to a conclusion, a successful outcome cannot be achieved without a balanced package of benefits to all the members. How and when that will be achieved is the moot point. If the stalemate largely prompted by protectionist tendencies of the members continues, 2010 may very well be a repeat of 2009 as far as WTO and the various agreements it encompasses are concerned.

Nevertheless, if trade is directly related to economic recovery, there is every indication that 2010 will see a reversal in trends of the last three years since in the first quarter of 2010 global trade increased by 25% over the corresponding period in 2009. In addition, the increase in exports was the highest in African and Asian countries even though in absolute value terms the figures are none too impressive. Overall it has been estimated that global trade in 2010 will be higher by at least 10% over the year 2009.

TRIPS in 2009

Among all the instruments under TRIPS, the most discussed and debated are related to patents, geographical indications and to a lesser extent copyrights and trademarks. While all countries, except the least developed countries have implemented a TRIPS compliant patent system within the defined time frames, there still remains a number of ambiguities both at the legislative and implementation levels. While the flexibilities and safeguards allowed under the TRIPS Agreement have

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been interpreted and legalized by countries to meet their national interests, concerns have been raised in many quarters that some of the national legislations are strictly not fully TRIPS compliant. This has been largely with reference to drug patents since several countries consider non-affordability of life saving drugs a consequence of the patent system. As such there is increasing pressure to ensure that public health concerns should supersede private monopoles represented by IPR protection, much like the principles embodied in Para 6 of the Doha Declaration. On the other hand there is no unambiguous evidence that protection of IPR has any revenue generating potential for countries ill-equipped to carry on state-of-the-art innovation due to lack of skills or investments.

**Global Patenting Activity in 2009**

The procedure of filing first application under the PCT provisions is the favoured route for most of the WTO members, since it is not only more cost effective, but also establishes uniform standards matching the best international practices in the field of patent filing, searching and examination. Global patenting activity declined by 4.5% in 2009 over the year 2008. Thus filing under the PCT was 155,900 in 2009 compared to 169,000 in 2008. While the US and Japan continued to hold the first and second positions in the number of filings, the maximum decline in patent filings were in the US (-11.4%) and Germany (-11.2%). The fact that patent filings from developing countries which constitute 78% of the membership in the Patent Cooperation Treaty (PCT) (total memberships 142) filed only 14% of global applications clearly indicates very low level of investments in innovation in these countries, an index of their development *per se*.

That investment in R&D in China has seen a remarkable jump in recent years is evident from the fact that China has climbed to the 5th position in the total number of filings in 2009 and grew at 30% over the year 2008. India filed 761 applications which were higher than Brazil, but only half of Israel. While the decline in global filings may be related to the economic slump faced by most countries, another reason could very well be declining productivity in R & D as well as more discrimination in the filing of patents by the corporates which constitute the largest number of applicants.

**Geographical Indications and Traditional Knowledge**

Extension of geographical indications beyond what is covered under Article 23 of TRIPS has been proposed by many members and is under debate in the TRIPS Council and other concerned agencies. Again there seems to be no consensus on this issue. Member Countries have been registering geographical indications in their territories; however it is not clear as to what protection is afforded for those appellations in other member countries.

The issue of developing and formalizing through appropriate legislation a protection system for traditional knowledge, practices cultural heritage and folklore has attracted considerable attention among many national and international agencies. No satisfactory solution has yet been found. So too are issues related to TRIPS and the Convention on Biodiversity, whether they are in conflict or they are independent of each other.

**Indian Patents Act 2005**

The amended Indian Patents Act 1970 (IPA 2005) has certain features which distinguishes it from the original TRIPS mandate. They include the Section 3(d) which prohibits patenting of inventions based on new derivatives of known or patented molecules unless they show significant improvements over prior art, disclosure of source requirements and provision for both pre-grant and post-grant opposition to patents under processing or already granted as the case may be. The provisions for grant of compulsory licenses for domestic use or for using third party compulsory licenses to export to those licensees under prescribed conditions are other features of IPA 2005. On the protection of plant varieties, India has opted for a *sui generis* system and on the question of patenting of microorganisms the law is silent leaving the determination of patentability to the patent office’s discretion as it were. A legislation much like the Bayh Dole Act of the US to authorize diligent patenting activity in the field of publically funded R&D activities is still pending. So too the decision on data protection (exclusivity), a topic which has been debated over the last several years.

Patent filings and patent grants in the post-2005 era continue to be dominated by the R&D based MNCs, particularly in the pharmaceuticals segment. Thus, of the 81 drug patents granted during the five year period 2005–09, 76 went to foreign pharmaceutical companies. There have been controversies based on
the interpretation and implementation of Section 3(d) of IPA 2005 dealing with the non-patentability of the so-called trivial innovations as in the case of Glivec (Novartis) leading to litigations. There have been requests from many MNCs that prices, patents and regulatory approvals for new drugs should not be mixed up. That awareness of the system and its utility in India has considerably increased and IPA 2005 meets the international norms of IPR protection is evident from the fact that in 2008 - 09, over 35,000 applications have been filed of which 25,706 have been under National phase filing from original PCT applications. The US led the list (8606) followed by Germany (2441) and Japan (1806). The Indian Patent Offices in the 2008-09 period received, 153 pre-grant oppositions of which only 39 were disposed off. Of the 71 post-grant oppositions only 7 were disposed off. These figures clearly indicate inadequacy of the infrastructure and human resources at the command of the Indian Patent Offices. Such a lacuna is not due to financial constraints (revenues in 2008-09 exceeded Rs 150 crores); rather it is due to shortage of skilled personnel and bureaucratic hurdles in getting the infrastructure in place to ensure operation of an effective system.

Indian innovation levels were dominated by the laboratories under the Council of Scientific & Industrial Research with 165 applications. Among the academic institutions, IITs had topped the list with 91 applications. Clearly innovation culture in India is only very slowly evolving and much needs to be done to improve levels of innovations among all sectors of academia and industry.

It is obvious that in spite of considerable improvements in R&D spending by public and private organizations and various departments of the Government during the last two decades, patenting activity in India is still at very low ebb. Several recommendations need to be considered to achieve higher levels of innovation and consequently of larger number of patent applications. The recommendations will depend on answers to several questions some of which are:

1. What incentives are required to be provided for increasing research outputs and patenting activities?
2. How are the incentives to be utilized and by whom?
3. How can university & academic institutions be encouraged to carry out patentable R&D efforts?
4. Could joint public-private partnerships be developed with equitable sharing of benefits?
5. Can the Government improve loan facilities as well as outright grants for R&D which can be recovered if and when commercial success is achieved?
6. Can a reasonable system for protection of traditional knowledge and practices with built in reward systems be evolved and implemented?
7. Can all departments involved with R&D and innovation set up IP think tanks responsible for evolving IP policies, monitoring systems, modernizing IP offices and streamlining more efficient prosecution of patents and other IP instruments?

Assuming that intellectual property creation is a valuable instrument to ensure economic development and the present system for their protection is appropriate and adequate, the imperative is to address these issues on a high priority basis if India is to achieve the targets she has set for herself in the coming decade.