TRIPS, WTO and IPR: Prevailing Issues and Emerging Trends

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As part of the GATT Agreement which led to the formation of WTO in 1995, all the 153 members of WTO were/are to implement the terms of the Agreement on Trade-Related Intellectual Property Rights (TRIPS) on or before the dates prescribed in the Agreement for each of the members. These dates vary according to the developmental status of the members and their classification as developed, developing and least developed. While all the member countries have been working actively during the last decade to meet these deadlines, many issues which impinge on the proper implementation of all the provisions under TRIPS by the members are still unresolved. As we enter the second decade of the new millennium, it is prudent to take stock of the prevailing issues and the emerging trends in the implementation of the TRIPS and related agreements by the members of WTO.

Global Economic Scenario

During the last two years, 2008 and 2009, the world has seen one of the worst economic downturns in its history. Two of the major indices for assessing state of the economy are those related to GDP growth and global trade. During 2009, World GDP declined by 2.3% while the Indian GDP, unlike that of many developed countries grew by 5.4%. Global exports came down by 12.2% and imports by 12.9% while exports from India declined by only 6% and imports declined by 4.4%. According to the WTO’s press release of 26 March 2010, the year 2009 saw decline of 12.2% in global trade by volume, the largest since 1965. The major losers have been the US-13.9%, the European Union-14.8% and Japan-24.9%. The Asian countries lost trade to the tune of 11.1%, the oil rich Middle East countries, 4.9% and African nations, 5.6%. Reduction in consumer demand, reduced investments particularly in the manufacturing sector, unemployment, non availability of finance required for growth oriented projects are the reasons attributed to such a dismal economic scene. The figures reported are in volume terms since value terms give a distorted picture due to currency fluctuations, changes in commodity prices and tariff structures. In fact in value terms, at current $ rates, the decline in world trade in 2009 was even lower at -23%. This is in spite of the fact that in 2009 there have been very few changes in the tariff structures of WTO member countries and there were no fresh trade barriers imposed.

Economists believe that the worst is over and that 2010 will see an increase in world trade by around +9.5% and unless fresh protectionist measures from the major trading countries are brought in through unilateral action by the bigger economies, return to pre- 2008 levels of growth are being forecast given consistent growth for at least two years.

Global Trade and IPR

The issue regarding any direct relationship between the creation and exploitation of intellectual property and trade as depicted under TRIPS was debated even at the time of negotiations for the GATT. Even after over 15 years of signing the GATT in 1994 and the establishment of WTO in January 1995, the issue is still being discussed. There are those who still believe that there is not even any empirical evidence that matters related to IPR protection indeed influence and increase global trade. Some even opine that the IPR protection system in fact stifles free trade in view of the monopolistic character of the system, however limited it is with respect to time frame. While all the member countries of WTO (except the least developed countries which have time till 2016) have enacted national legislations to implement a TRIPS compliant patent system, there are some real or perceived distortions and deficiencies in the patent systems practiced by some of the member countries.

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And these are not restricted to developing countries. Protectionist measures including provisions under the guise of safeguard measures such as under the 301 and Super 301 laws in the US are still operative. In addition, the US continues the practice of ‘first to invent’ against ‘first to file’ principle mandated under TRIPS for establishing priority.

**Issues Facing the WTO**

Apart from monitoring the progress in the implementation of the provisions and dictates of the TRIPS Agreement in all member countries, the WTO is faced with the problem of finalizing the Doha Round mooted in 2001 at the Inter Ministerial Conference at Doha. As against the eight years (1986-994) for finalizing the Uruguay Round, already nine years have passed since the initiation of the Doha Round. The current target is 2010; but it will indeed be a miracle if the new deadline can be met. While some progress has been made since 2008, the gaps faced by the Trade Negotiations Committee particularly in the areas of free market access, agriculture and tariff rationalization, are indeed very wide. Even though members are in general agreement on the need for an early closure of the Doha Round, there does not seem to be any hope of any ready agreement for resolution of the pending issues.

The safeguard measures included in the TRIPS Agreement presumably to benefit the economically weaker countries, e.g., the general principles under Articles 7 & 8, compulsory licenses provision under Articles 30 and 31 and later developments under Para 6 of the Doha Declaration on IPR & public health have hardly been used to benefit those who need them, primarily due to procedural difficulties and lack of clarity and expertise to exploit the provisions.

**Global Patent Scenario**

The multi national corporations account for two thirds of world trade and industrialized countries file and receive over 95% of all patents. Even in developing countries, which have opened the doors for patenting of inventions under a harmonized system dictated by TRIPS, 80% of the patentees are from the developed countries. Until innovation culture, skills, capabilities, resources and infrastructure are available to the developing countries both IPR activities and trade will continue to be dominated by the industrialized countries. Even though transfer of technology and fruits of innovation from the developed to developing countries have been spelt out by WTO as one of its important missions, very little has happened in that direction during the last two decades.

**Dispute Settlement**

In spite of the operational complexities, one of the important instruments under the WTO, the Dispute Settlement Board has functioned well since its inception. To date there have been 400 disputes (both bilateral and multilateral) referred to the Board of which half have been settled through negotiations without going into litigations. 169 have been subject of the panel and were appealed, before the appellate body, 17 are currently in adjudication and the rest under active consultations. The majority of disputes have been between the super powers, the USA and European Union. Developing countries all together have been complainants in 45% of the cases and have been respondents in 42%. India had lodged 18 complaints and has been a respondent in 20 cases so far.

**The Indian Scene**

For all practical purposes, the Indian Patents Act 2005 is operating as per the provisions of TRIPS with minor changes in interpretation of certain provisions to meet the Indian requirements. Three areas where India has included TRIPS plus provisions are Section 3(d) on patentability, obligatory disclosure of source of natural resources and provisions for pre-grant opposition. There is no evidence that India has defaulted on any of her obligations under the TRIPS Agreement.

India has provided facilities for filing applications under PCT and has facilities for depositing patented microorganisms in a depository as required under the Budapest Treaty. There has been a dramatic increase in filing of applications as well as grant of patents. The number of examiners has gone up to 180, even though it is far below the requirements estimated to be over 300. Infrastructure facilities are gradually being built up and the information system is being streamlined and computerized.

The number of applications for all inventions in all sectors was 35,218 in 2007-2008, an all-time high, of which pharmaceuticals accounted only for 4267. US applicants topped the list with 8606 applications followed by Germany and Japan. Number of patents in force was 29,688 of which drugs sector had only 1469. In 2007-2008, 11,751 patent applications were examined and number of patents granted that year was
15,261. Thus while the numbers are still far below those of Western countries or even China, the sudden spurt indicates that patenting has been accepted as an important instrument for encouraging investments in research.

The coming into force of Indian Patents Act (IPA) 2005 has resulted in a number of litigations. Expectedly most of them were related to Section 3(d) of IPA 2005 which prohibited patenting of so-called trivial inventions. The most conspicuous ones in recent times have been the patent applications on Glivec by Novartis, Tarceva of Roche and the CIPLA’s generic Sorafenib tosylate of Bayers drug. Questions have been raised on the justifications for linking patents with market approvals by the Drug Controller General of India and pharmaco economic considerations while granting patents or during litigations involving infringement suits by the Patent Office, the appellate court or the formal judicial systems. Issues on labeling as counterfeit of certain generic drugs by foreign customs agencies also raised important issues for the generic manufacturers. Closer home, disputes between the powers of the State against those of the Central Government’s CDSCO has also created confusions and uncertainties.

Other issues which beg for resolution through legal or administrative procedures are connected with provisions for protection of data (data exclusivity), anti-competition practices, parallel imports, protection of traditional knowledge through appropriate protection systems, simplification of compulsory licenses, geographical indication to extend rights beyond wines and spirits, implementation of the provisions under the Biodiversity Act (not a TRIPS issue), exploitation of publically funded research through Bolar like provisions and handling of pre-grant and post-grant opposition cases expeditiously. Development of adequate infrastructure, skilled human resources and spreading awareness of the need for establishing a reward system for intellectual property creation through IPR protection are other areas of high priority.

Overall, the year 2009 has witnessed major activities at the national and international levels on all these matters. Many problems remain unsolved and the coming years will hopefully provide the answers which will satisfy most of the stakeholders in a fair and equitable manner.