



Global & Regional Governance of Intellectual Property

Prof Yousuf Vawda

Presentation to PHM Cape Town

5 November 2019



A changing world order

- ▶ IP governance has a long and contested history.
- ▶ The focus of this presentation is not history, but evolution.
- ▶ Not about the status quo, but change.
- ▶ Not about protectionism but development.
- ▶ Phases:
 - ▶ 1870 -1880s – Paris Convention; Berne Convention
 - ▶ 1970s – NAM & New International Economic Order
 - ▶ 1980 - 1990s – TRIPS negotiations and adoption
 - ▶ Post 1990s – TRIPS era



Landmarks in IP Governance

- ▶ 1883 – Paris Convention for Protection of Industrial Property
- ▶ 1886 – Berne Convention for Protection of Literary and Artistic Works
- ▶ 1881 – 2013 – several Conventions, Treaties, Agreement on various aspects of IP (performers, producers, indications, symbols, integrated circuits, trade mark, copyright, patent, access for visually impaired etc)
- ▶ 1967 – WIPO Convention – establishing World Intellectual Property Organisation, agency for IP policy, services & cooperation (192 members).
- ▶ 1995 – formation of World Trade Organisation (WTO) – intergovernmental body regulating international trade between nations (164 members).
- ▶ 1995 – Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement – minimum standards for intellectual property protection.



WIPO System

- ▶ Objective of WIPO “to promote the protection of intellectual property throughout the world through cooperation among States.”
- ▶ Core activities:
 - ▶ Provision of global IP services
 - ▶ Technical assistance, infrastructure support, awareness building
 - ▶ International Work-sharing & Collaborative Activities for Search & Examinations
 - ▶ Sharing search & examination work products
 - ▶ Cooperation on use of search & examination capacity
 - ▶ Collaborative search & examination
 - ▶ Acceptance of equivalent search & examination by other offices



Patent Cooperation Treaty

- ▶ Patent Cooperation Treaty (PCT) – makes it possible to seek patent protection for an invention in several countries by filing a single ‘international;’ application instead of multiple applications. Note: the granting of patents remains under the control of national or regional patent offices.
- ▶ Procedure:
 - ▶ Filing an international application with a national/regional WIPO office
 - ▶ International Search by a major patent office (published documents, prior art)
 - ▶ International Publication (shortly after 18 months from filing the application)
 - ▶ Supplementary International Search (optional) by 2nd ISA.
 - ▶ International Preliminary Examination, carried out by an ISA, on request.
 - ▶ National Phase (usually after 30 months, pursued before national/regional office)



WIPO Development Agenda (1)

- Concerns raised by developing countries whether WIPO share the developmental approach founded on human rights & development.
- Balanced/nuanced approach taking account of country's socio-economic status and developmental goals, not 'one-size-fits-all'
- Development Agenda initiated by Argentina & Brazil, with African Group & others coming on board.
- After series of meetings, 45 recommendations adopted in 2007, in 6 clusters:
 - Technical assistance & capacity building
 - Norm-setting, flexibilities, public policy & public domain
 - Tech transfer, ICT & access to knowledge
 - Assessment, evaluation & impact studies
 - Institutional matters, mandate & governance
 - Other matters.



WIPO Development Agenda (2)

- Rejection of 'IP-centric view' is 'an attempted paradigm shift' at WIPO from furtherance of IP-centric goals to prioritisation of public policy aspects of IP.
- But another contested terrain, because of its diversity and complexity.
- For example, developing countries demanded inclusion of their concerns (protection for traditional knowledge, farmers' rights, prior & informed consent, and access & benefit-sharing).
- Rejected by US, resorted to forum-shifting eg ACTA etc.
- Ethos of the DA seems to have been sidelined in early PAIPO drafts (Africa)
- Tech assistance a key focus area of DA; formulation of IP policy toolkit
- Criticism of WIPO technical assistance on issue of use of flexibilities.



WTO System

- ▶ Makes rules of trade between nations; contained in WTO agreements:
 - ▶ General Agreement on Tariffs & Trade (GATT) for goods
 - ▶ General Agreement on Trade in Services (GATS) for services
 - ▶ TRIPS for IP rights
 - ▶ Extra agreements & annexes (special requirements for specific sectors)
 - ▶ Schedules of commitments (by individual countries allowing foreign products)
- ▶ But
 - ▶ Negotiated in environment of asymmetrical power
 - ▶ Powerful industries behind US, European, Japanese positions
 - ▶ Southern countries relatively disorganized, under-resourced, unprepared



TRIPS Features

(with some flexibilities highlighted)

- ▶ Preamble
 - ▶ Includes developmental objectives
- ▶ Part I: General Provisions & Basic Principles
 - ▶ Includes exhaustion; social & economic welfare; prevent abuse of IP
- ▶ Part II: Standards Concerning the Availability, Scope and Use of IPRs
 - ▶ Patents; exclusions; exceptions; CLs; govt use; data protection
- ▶ Part III: Enforcement of Intellectual Property Rights
- ▶ Part IV: Acquisition & Maintenance of IPRs, Related inter-Partes Procedures
- ▶ Part V: Dispute Prevention & Settlement
- ▶ Part VI: Transitional Arrangements
 - ▶ Special provisions for developing countries & LDCs.
- ▶ Part VII: Institutional Arrangements: Final Provisions



TRIPS Concerns

- ▶ Powerful mechanism for transplanting US & European law; device that drives economic neo-colonialism.
- ▶ One of arguments for uniform standards is to prevent 'free-riding' – taking the benefits of an economic activity without contributing to its costs.
- ▶ Free-riding is not the swear word it's made out to be – provides an important function by diffusing information, making markets competitive.
- ▶ Free-riding or copying has been rampant throughout economic history – it's how today's advanced economies were built; now it's not okay for developing countries to do the same ('pushing away the ladder').
- ▶ Transfer of international public goods (eg medicines) made more difficult by expansion of IPRs; by placing a premium on public goods through patent-protected monopoly pricing, it's making developing countries poorer –wealth transfer from poor to richer countries, increasing inequality.



WHO

- ▶ Since 1947, directing & coordinating international health in the UN system.
- ▶ Main areas: health systems; health through the life-course; non-communicable/communicable diseases; preparedness, surveillance etc.
- ▶ Essential medicines and health products (EMPH) works with countries to access quality/safe/effective medicines, vaccines, diagnostics & devices.
- ▶ Activities include:
 - ▶ technical support on request to members on public health related aspects of IP
 - ▶ Training & capacity building on impact of trade agreements & to manage IP
 - ▶ Research relationship of innovation, IP & access to medical products
 - ▶ Facilitate access to patent information
 - ▶ Collaboration with WTO, WIPO and other international/regional organisations



Regional Patent Offices

- ▶ Countries in some regions have created regional patent offices for filing, search & examination of regional patents.
- ▶ The following regional offices are listed on the WIPO site:
 - ▶ African Intellectual Property Organization (OAPI)
 - ▶ African Regional Intellectual Property Organization (ARIPO)
 - ▶ Eurasian Patent Organization (EAPO)
 - ▶ European Patent Organisation (EPO)
 - ▶ Patent Office of the Cooperation Council for the Arab States of the Gulf (GCC Patent office)

A decorative graphic on the left side of the slide. It features a dark blue vertical bar on the far left. A black arrow points to the right from the top of this bar. Below the arrow, several thin, light blue lines curve downwards and to the right, creating a sense of movement and depth.

Variations Between Regional Offices

- ▶ OAPI (Francophone countries) – uniform system; share same body of IP laws; thus OAPI approved patents applicable to all member countries.
- ▶ ARIPO (Anglophone countries) – harmonisation system; each country has its own IP laws; ARIPO Protocols do not have direct application and have to be domesticated by party states; once informed of the grant of an ARIPO patent, countries have six months to indicate if they reject the patent.
- ▶ EPO – independent legal system granting European patents; however not a unitary right but nationally-enforceable, nationally-revocable patents; and includes a time-limited opposition procedure.
- ▶ EAPO – legal system under which Eurasian patents are granted; makes provision for post-grant opposition within 6 months of grant



Regional Offices & Access

- ▶ ARIPO
 - ▶ Presently does not facilitate the successful use of TRIPS flexibilities to facilitate access to medicines.
 - ▶ Erects patent barriers to importation & local production of affordable medicines
 - ▶ Harare Protocol does not exempt LDCs from granting pharmaceutical patents
 - ▶ Countries have 6 months to opt-out, many adopt patents by default.
 - ▶ Limited examination capacity; lax patenting standards; limited disclosure requirements; lack of pre- and post-grant opposition.
 - ▶ OAPI – 12 of 17 members are LDCs, yet OAPI patents are automatically enforceable in them
- ▶ OAPI – 12 of 17 members are LDCs, yet OAPI patents are automatically enforceable in them
- ▶ PAIPO – Pan African IP Organisation – consolidation of OAPI & ARIPO ++ proposed by the AU, but deferred after objections.



Non-state actors

- ▶ Critical role in the access to medicines (and other) movements; not only NGOs (national & international), also patient groups & social movements
- ▶ How have they contributed:
 - ▶ Framing IP as an issue of social justice & human rights
 - ▶ Coalition-building between NGOs and developing countries - counterweight to traditionally close relationship between developed countries & industry.
- ▶ Some successes:
 - ▶ International civil society mobilization defeated PMA in case against South Africa
 - ▶ Alliances between non-state actors and Africa Group and other developing country blocs forced the hands of the WTO (Doha Declaration 2001) and the WIPO (WIPO Development Agenda 2007).



Conclusion



- ▶ Global governance of IP is driven by the IP-centric institutions and developed countries, as well as by pro-public health coalitions and developing countries.
- ▶ IP has been a terrain of global contestation:
 - ▶ IP maximalists won the first round with the adoption of TRIPS.
 - ▶ The Development Agenda won the next with Doha Declaration.
 - ▶ IP maximalists won further rounds with IP-centric agreements in bilateral & regional trade negotiations (TRIPS+ standards).
- ▶ **a luta continua!** The struggle continues!