WIPO's Move toward a World Patent System: A Revolution in the Making?

By Genetic Resources Action International

Around the turn of this century, the World Intellectual Property Organisation (WIPO) started to put into place the pieces for a universal patent system, i.e. one bureau issuing 'world patents' automatically valid in all countries. Such a system would replace the current situation where each country has its own laws, patent office and courts – all of which must be dealt with separately if you want your patent to have effect in more than one country. The new system will take some time to complete, if indeed it pushes through. Should it do so, it would totally revolutionise intellectual property systems as we know them today.

The Building Blocks

WIPO's work currently focuses on the development of three primary building blocks for a new world patent system.

A uniform set of procedures

The first component was put into place in 2000, when WIPO member states adopted the Patent Law Treaty (PLT). This treaty harmonises the formalities that patent offices undertake to administer patent applications. The PLT is not yet in force, because 40 governments have not yet ratified it.

One of the controversies in the negotiation of the PLT was whether or not disclosure of the country of origin of genetic material or traditional knowledge, and proof of prior informed consent in their acquisition, would be required. These issues were brought into the discussion by developing countries, which are searching for means to implement the Convention on Biological Diversity (CBD) in the context of patent law.[1] Developed countries and industry defy most attempts to see this happen. They say that the CBD provisions should not be construed as criteria for patentability and would be an administrative burden. During the Patent Law Treaty negotiations, the industrialised countries rejected such proposals, arguing that they pertain to the substance of patent law, not procedure.

A single international search tool

The second building block is being pursued through the reform of the Patent Cooperation Treaty (PCT). The PCT was originally adopted in 1970. It provides a common facility to conduct international searches of prior art for patent applications.

While patents are national documents granted under national rules and procedures, the PCT allows patentees who want international protection to shortcut some of that process through a preliminary examination of the application. This system gives great leverage to patentees because it establishes the priority of a patent application at the international level. It also gives them a generous amount of time to assess the market potential of their patent in the different countries, and to rethink their strategy before proceeding with national filing.

The PCT is being reformed at present, ostensibly to streamline the process and make it a lot simpler. However, the reform process is an opening for the PCT to adjust to new policy objectives and needs of WIPO's overall harmonisation agenda. One of those is likely to be the incorporation of a database of traditional knowledge for international searches. A more speculative question is whether a revised PCT would extend WIPO's involvement to the full examination and grant of 'world' patents.

A uniform patent law

Once the PLT was finalised, the WIPO member states agreed to move on to harmonisation of the core rules of patenting. This will be achieved through the Substantive Patent Law Treaty (SPLT). A first attempt to harmonise substantive patent law floundered ten years ago because the US refused to give up the 'first-to-invent' principle in determining who has the right to a patent (most of the rest of the world uses a 'first-to-file' rule.) But the US has now indicated that it is ready to give up this principle if the rest of the negotiations look promising.

A world patent system would mean the end of patent policy as a tool for national development strategies. It is also likely to overtake TRIPs, both in form and in substance.

The SPLT is a serious concern, and could make the patent provisions of the World Trade Organisation's Agreement Trade-related Aspects of Intellectual Property Rights (TRIPs) obsolete. TRIPs 'only' spells out the minimum required elements of national patent laws. SPLT, by contrast, will spell out the top and the bottom line. It will be a fixed set of rules on what can be patented under what conditions: the political substance of a potential world patent system.

A first draft of the treaty was tabled by WIPO in November 2001. It is important to be aware that there are vested interests at play: the bulk of WIPO's finances comes from the private sector, which makes use of WIPO's external services. Building up a role for WIPO in actually administering patents, under a single world patent law, could be a key to the institution's future.

A few other elements are also at play in the current patent harmonisation process. For example, there is talk of revising the Budapest Treaty on the Deposit of Microorganisms for the purpose of patent protection, which is administered by WIPO. According to WIPO, there is a need to expand this treaty to the registration of DNA sequences in a central database to facilitate gene patenting. TRIPs makes no reference to the Budapest Treaty, but the United States and Europe both push accession to it through their bilateral trade agreements with developing countries. It may therefore earn an important function in any harmonised system.

What seems to be taking shape slowly, then, is a single world patent law relying on agreed procedures which could be readily administered by WIPO.

Core Controversies in the SPLT

As stated, the Substantive Patent Law Treaty is in its early stages of drafting and negotiation. The committee working on it is presently focusing on criteria for patentability and other issues that lead to the grant of a patent. The most contentious matters at this point include the following:

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The 'technology' factor

The TRIPs Agreement, like the European Patent Convention, states that patents shall be available for inventions 'in all fields of technology'. Will the SPLT retain this condition or not? This question hits an important point of discord between the US and Europe. In the US, business methods are patentable. In Europe they are not, because they are not considered to represent 'technical progress', but this does not prevent the US from issuing patents on business methods. US rights holders seek broader enforcement of such patents in order to expand their commercial opportunities. What was not achieved in TRIPs, the US would like to secure through WIPO by avoiding reference in the SPLT to 'all fields of technology.' The US has even stated that it will leave the negotiations if this matter is not settled in its favour. The EU, along with the European Patent Office, and Brazil are holding out against this.

Exclusions from patentability

Patent laws usually indicate what is considered an invention and what is considered patentable. They also usually state what is excluded from patentability as a matter of policy. TRIPs, for example, says that members may stop patents from being granted if commercialisation of the invention would offend morality or public order. TRIPs also allows countries to exclude plants and animals from patentability as a matter of policy.

The SPLT was drafted with no real proposal on this matter. All WIPO did was to suggest, in a footnote somewhere, that countries may wish to incorporate the provisions of TRIPs Articles 27.2 and 27.3 or make some kind of reference to them. The US position is that there should be no exclusions to patentability in the SPLT. They are supported on this by corporate bodies such as the Biotechnology Industry Organisation. Europe and the developing countries, on the other hand, are arguing to at least retain the exclusions offered in TRIPs.

No further conditions allowed

As presently drafted, countries which sign the treaty will not be allowed to make any further demands on patent applicants than those found in the treaty. This has become a major bone of contention between industrialised and developing countries around the table. Brazil, the Dominican Republic and Peru, among others, are adamant that disclosure of country of origin of genetic materials, and proof of prior informed consent in their acquisition, must be enforced. As mentioned earlier, the whole question is whether or not international patent law will allow developing countries to secure financial benefits from access to genetic resources as prescribed by the CBD. The developed countries,however, vainly insist that implementing the CBD should be dealt with under the CBD, not under the SPLT.

What Is at Stake?

The setting up of a world patent system has huge implications. It means the end of patent policy as a tool for national development strategies. It is also likely to overtake TRIPs, both in form and in substance. Any deviation from its rules would be subject to some kind of sanction: it would be the final word.

The negotiation of the SPLT is largely a debate between the US and Europe. The first draft of the treaty singularly reflected US patent law, and the US has made it clear that it is willing to go as far as it can to secure the adoption of this new treaty. The Americans' big negotiable is the first-to-invent principle, and the related matter of grace period. Their big non-negotiables appear to be business methods and biotechnology. Europe is so far defending the *status quo* of TRIPs, with Japan following its line. The developing countries are hardly in the discussion at all, with a few exceptions led by Brazil. In the words of one developing country negotiator:

> 'The ones harmonising are the US and Europe. We developing countries would be fine if things stayed the way they presently are. But if they make a harmonised patent law, there is no way that they can avoid the need to be coherent and respect the sovereign rights of states over biodiversity. This means that they must include provisions to require proof that genetic resources were not acquired illicitly. And this must be accomplished through disclosure of country of origin of genetic resources and proof of prior informed consent as conditions for patent grant.'

Parties to the SPTL would not be allowed to make any further demands on patent applicants than those found in the treaty.

While the disclosure issue is clearly an important fight for developing countries, this position suggests a defeatist attitude towards patents on life. For it presumes that the SPLT – and developing countries participating in the negotiations – will cede to the 'no exclusions to what is patentable' approach of the United States. TRIPs leaves it to each country to decide, as far as plants and animals are concerned.

If the SPLT moves forward on its present course, it is bound to run into the waters of the WTO and its TRIPs Agreement. Whether the two can co-exist or will conflict is a question mark. We may even see critics turn around and defend TRIPs, as it may suddenly appear a lesser threat compared to what WIPO comes up with. The SPLT will also run into the waters of another corner of WIPO itself: the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore. It is not known if SPLT will act upon this Committee's considerations and eventual agreements or not. Further still, it is unknown whether WIPO's overall trajectory toward patent harmonisation will cross paths with the potential outcome of the Hague Convention negotiations on jurisdiction of court decisions.

All of these issues – and many more – make the road to a uniform world patent system fraught with dangers and unknowns. But there is no doubt that what appeared until recently as something of a pipe dream is starting to take on real proportions.

Genetic Resources Action International (GRAIN) is based in Barcelona, Spain. The authors adopted this article for Bridges from a longer paper entitled 'WIPO Moves Toward World Patent System', available at http://www.grain.org/publications/wipo-patent-2002-en.cfm

ENDNOTE

[1] The CBD is a legally binding international treaty which came into force in 1993. It says that genetic resources are national sovereignty, making access to them subject to several conditions. One is that countries should grant access to biological material through prior informed consent. Another is that access must give rise to benefit-sharing. Developing countries now demand that compliance with these rules form part of the patent grant process.