EXPLORING OPTIONS AND MODALITIES TO MOVE THE IP DEVELOPMENT AGENDA FORWARD

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I. Introductory remarks

The Development Agenda proposed to the World Intellectual Property Organization (WIPO) General Assembly by Brazil and Argentina in 2004 is fragile, as it reflects, at the outset, the needs and perspectives of developing and least developed countries, that ended in clashes that, if not solved will lead to no changes in the multilateral regime for the protection of Intellectual Property Rights (IPRs). The proposed Agenda, if not restructured, may become a mere political fact, like the Indian proposition of 1967 purporting to trigger access to copyrighted assets, the episode known as the "copyright crisis", which had no practical effects on developing countries.

So far, industrialized countries are not used to widely discussing the negative impacts from IPRs on their economies and on their human and social development. This is due to the fact that those countries are still able to bear the burden imposed by IPRs' holders, and also because their civil society, generally speaking, simply do not realize the relation between the high prices paid for medicines, entertainment, culture and the abuses arising out of intellectual monopolies. We deem this last element as the key to move the Development Agenda forward to a concrete and efficient level.

In order to turn the Development Agenda into a consistent, plausible and acceptable idea to all players of the trade scenario it is not enough to set up discussions among developing and developed countries: a typical discussion, like that of the 1970´s, that leads, as usual, the former ones to design strategies to dismantle the activism of the latter. To make the Development Agenda effective we deem it essential that it mirrors the common development needs of the international community. This means that it shall necessarily deal with the needs and social and economic conflicts faced by developed countries; conflicts and needs that, in their turn, are the result of an ever-expanding regime of Intellectual Property (IP) protection.

It is always noteworthy to recall that the TRIPS agreement, strategically, was not an idea initially designed and pursued by policy makers of industrialized countries. Instead, it was designed by a very small group of American corporations that identified a set of issues (piracy practiced by developing countries, lack of enforcement of IP regimes etc.). Based on the identification of those issues, the group planned a national and international-encompassing strategy as follows: companies interested in the US, Europe, Canada and Japan created an efficient network by means of which they convinced their governments to adopt a strict intellectual property policy to govern international commercial transactions.

Such a network became so influential that it was virtually impossible for governments of industrialized countries to resist the idea of inserting IP into the international trade negotiations.

Accordingly, what may be seen from the TRIPS´ experience is that the American corporate groups (followed and supported by Canadian, Japanese and European corporate groups) was not simply reactive in regards to piracy and lack of enforcement of IPRs overseas, but essentially "proactive".

II. From traditional re-activism to concerted and effective pro-activism

By thoroughly analyzing the international activism as regards IPRs, we perceive with few exceptions the adoption of a reactive stance not articulated by the productive sectors, and sometimes excessively judgmental. Reactive activism is rarely able to design and present a proposal to attract wide approval by the population and the productive sectors. What we intend to propose, aiming at boosting the Development Agenda, is to adjust some strategies that successfully led to the inclusion of IP into the agenda Uruguay Round of GATT and to create the proper conditions to develop a pro-active strategy in addition to the conventional and academic activism. In other words: the strategy of concerted and effective proactivism shall not replace the other types of activism – but, rather, be added thereto, so as to catalyze the activities performed by the traditional reactive activism.

Based on the premise that to bring the Development Agenda closer to the developed world is of the utmost importance, the strategy herein proposed shall focus simultaneously on the developed as well as on the developing world, considering that IP controversies are usually symmetrical in all countries.

If, on one hand, the stance adopted by industrialized countries in international forums mirrors undoubtedly the greedy needs of IPRs holders, the counterpoint to those needs lays in consumers groups, in the industry of generic pharmaceuticals, in the small and medium farmers that face hardships to deal with an IP regime that restricts the free flow of germplasm, in the Traditional Knowledge holders as well as in countries that hold an important biological heritage. At the outset, all those needs seem pure interests of developing and least developed countries, yet they are also common interests shared with developed countries. It is undeniable that North and South share concerns, interests and sometimes priorities.

III. From non-concerted work to organized lobby groups

Europe holds a prominent farmers community; China – one of the most important trade players – holds an impressive traditional knowledge heritage applicable to medicinal purposes; Australia, New Zealand, Canada also retain Traditional Knowledge heritage;

Canada is developing an industry of generics; European and American consumers are already victims of the expansion of Copyrights to consumers relations, among other examples. In brief, it is possible to identify important groups in the developed world that may lobby against the expansion of traditional IPRs holders' interests.

Those lobby groups exist, but, undoubtedly, are somewhat articulate (in a very optimistic perspective) and do not engage in any dialogue with their Canadian, European, American, Japanese, Chinese counterparts. Thus, firstly, we have to identify — in the developed countries and with the help of local experts — the groups that are against further expansion of the IPRs and to organize an effective and articulate unified group that may influence local congressmen (in key industrialized countries), with the purpose of making the local stringent IP policies more flexible.

The strategy shall take place, simultaneously, in every single industrialized country and in key developing countries, and may use workshops, seminars, colloquiums, media, and academia as tools to publicize the discussions, criticisms and proposals of the group. Nevertheless, it is important to bear in mind that this strategy shall necessarily include not only consumers groups, but also the productive sector, in order to keep tight bounds between the Development Agenda and the economical needs of the States.

On the first phase of the strategy the potential economic and social benefits of setting up, expanding and strengthening the network in the country and overseas will be presented to possible supporters of the campaign, in such a way as to make it easier to convince congressmen and trade negotiators of the socio-economic need and importance to support such IP policies before domestic governmental agencies and international trading forums.

The second phase of the strategy will focus on the "judicialization" of IP conflicts in the developed as well as in developing countries. This phase aims at shifting the discussions about the controversial trend of expansion of IPRs and the conflict among IPRs and fundamental rights and competition from the merely academic and activist sphere to the Courts. The judiciary – independent, impartial and to a certain degree less subject to external interferences from lobbyists – offers the potential of recognizing – more easily – the latent conflicts between IPRs and other more relevant interests.

However, the mere "judicialization" of the conflicts is not enough yet.

It is indispensable that the conflicts between IPRs and fundamental rights/competition are understood not as individual litigations, but instead, as collective litigations that reach the interests of society as a whole. What has to be done, thus, is to widen the impacts and consequences arising out of those litigations. For that, lawsuits shall be filed by organizations representative of specific sectors of the entrepreneurial/civil society and, last but not least, by the District Attorneys Offices. Given that IPRs are traditionally considered as individual private rights and of interest of big economic groups, for the present proposal to become concrete it will require:

i) The initial kick-off: the formation of a working group comprising legal advisors from developing and developed countries. The first task will be the identification of legal cases that present an alleged abuse of IPRs in a way that impacts fundamental human rights/competition. Ideally this will involve the identification of cases that present transboundary effects, such as the well-known Microsoft case, or cases identified in the developed world that have parallel versions in developing countries. This approach points out the international nature of the IP as well as the need of a joint North-South solution for the issue of limitless expansion of IPRs. Finally, this working group will present the identified "potential cases" to "victim-groups" of the abuse, seeking to persuade them to take judicial measures against the abusers.

ii) Whenever it is not possible for those "victim-groups" to bear the burden resulting from the lawsuits, it will also be necessary for the international legal working group to offer pro bono legal services. The "*Public Interest Intellectual Property Advisors"*, for instance, is a North-American organization that provides organizations and governments from developing countries with legal services on a pro bono basis in cases related to biodiversity and bio-piracy.

iii) In order to stimulate the D.A. offices (public prosecution offices) to act in the IP field, it shall be necessary to prepare high-quality primers and workshops that substantiate the social and economical impact of IPRs. Aiming at making the approach to the D.A. offices more efficient, we identified a few activities that may trigger the interest in the IP field: a) identification of potential local cases with which the D.A. may deal; b) identification of international cases in which the conflict between IPRs, fundamental and competition rights were involved, and how the foreign civil society and prosecutors dealt with the cases. The State of New York v. GlaxoSmithKline case corroborates the importance of the D.A. offices as a very efficient tool to restrict IPRs abuses. In this case, the D.A. office of the State of New York brought a lawsuit against fraudulent acts performed by pharmaceutical companies that artificially inflated the prices of anticancer drugs in the US.

iv) Striving for stimulating the civil society and entrepreneurial groups to bring lawsuits will depend upon, once again, the elaboration of primers that very clearly explains what IPRs are, their important function and the potential damages that may arise when they are used to secure dominant market position by IP holders against competitors, and the impacts that may arise out of those acts on research, prices, access, etc. Once again, to elucidate the contents of the primer we consider it essential to identify local cases that the target audience necessarily will be aware of and that allegedly relates to abuses of IPRs.

A disregarded and critical feature that may determine the success of the whole strategy is the language used: it is mandatory to suspend the use of technical jargons, so that non-experts are smoothly introduced to the complex world of IP.

v) In order to highlight the conflict between IP and competition/fundamental rights, we believe that it is also essential to prepare technical support materials to public prosecutors, NGOs and entrepreneurial groups´ attorneys, stressing the benefits of using external rules to the IP framework to restrict the latter. IPRs have expanded so much that they are widely deemed as absolute rights and as a segregated part of the general legal framework. For those reasons, we shall intensify the discussions regarding the need of limitation of IPRs by the use of external rules to the IP framework, especially fundamental rights and competition law. In the cases *Societè Esso v. Association Greenpeace France, Danone v. Réseau Voltaire et al.,* in France; *Aventis Pharma AG v. Instituto Nacional de Propriedade Industrial et al*., in Brazil, and State of New York v. GlaxoSmithKline, in the US, the courts recognized the use of external rules to the IP framework to restrict their application. So, a trend of creative use of the law by the courts is coming up, but in order to expand and deepen this trend the adoption of the mentioned legal approach by lawyers and public prosecutors is mandatory.

vi) Approaching the Media: in the same way that we frequently come across news on the destructive potential of piracy on the interests of IP holders in industrialized countries, it is also relevant to the media to present news on the negative potential resulting from the IP-related negotiations that are taking place in multilateral, regional and bilateral forums, and how those negotiations may negatively interfere with the interests of a set of entrepreneurial groups and citizens of developed countries.

The IP Watch Agency plays an important role because it focuses on the IP negotiations, in an efficient way, and brings them to the screen of any person wherever he/she is. Nevertheless, it is also necessary to recognize that, under a pragmatic and realistic perspective, only people involved with the IP field specifically seek this source of information, and the publication of news only in English restricts the reach of the information even more. So, we think that the publication of news related to IP negotiations in high profile newspapers and magazines in developing and developed countries is essential. Last but not least, as already mentioned, language is a feature of the utmost importance for the success of the present proposal. The language has to be suitable to the target audience: average people, not experienced in IP. If the news is drafted in a technical and unclear manner to an average person, no one will ever face the task of reading and understanding it. Just a couple of recent examples that point out the potential of the media in the struggle for an IP limiting policy:

- On July 23, 2005, the Editorial of the New York Times published an article “Brazil´s right to save lives”, at the moment when American and Brazilian newspapers and magazines raised negative concerns regarding the intention of the Brazilian government of issuing a compulsory license for ARV´s drugs.
- Recently, New York Times again, in an article of July 12, 2005, highlighted the abuses by pharmaceutical companies regarding the overpricing of anticancer treatments in the US. Unfortunately the article did not conclude that the primary cause of the abuse was IPRs, maybe due to the lack of information on that issue, but what

matters is that serious journalists are open to draw attention to this kind of issue, in a critical way.

The presentation to the media of IP-related questions that impact not only the far away Africa or the exotic Brazil, but also every local citizen, will certainly arise great interest to divulge the issue.

In summary, the strategies herein proposed to move forward the Development Agenda are based on the following pillars:

- identification of lobbies (consumers, corporations, farmers), in developing and developed countries, that oppose the expansion of IPRs. Articulation among national members and foreign counterparts. The rationale of this proposal is that countries that have different levels of development identify common concerns that justify a "concerted" strategy in the international arena;
- simultaneous pressure, from the North-South network, on congressmen and trade negotiators of developed and developing countries, with view of fostering a concerted approach between North and South;
- use of the judiciary, D.A. offices, and class actions as a way of collectivizing the nature of IP litigations;
- intensive use of external rules to the IP framework in collective litigations;
- recourse to the high level and profile media;
- "de-bureaucratization" of the IP-related articles disclosed in the media; the change of "highly technical" (IP Watch) to an accessible language (New York Times' standard).

IV. Final remarks

Upon execution of the TRIPS agreement, the developing and least developed countries truly believed that that would be highest standard to be accorded in the international arena. However, minimum standards are not synonymous with optimum standards for developed countries. TRIPS symbolizes the inauguration of the global phase of protection of IPRs, which is characterized by the definitive connection between trade and IP, making the latter omnipresent in international trade relations.

In the current expansion of the global phase, industrialized countries are trying to raise the standards of protection of IPRs via bilateral and regional negotiations that take advantage of the asymmetries of power that stand out and via the Most Favored Nation clause of TRIPS, which automatically socializes the new "negotiated" standards to all WTO member states".

Within this context of unlimited expansion of IPRs, and the parallel weakening of the exceptions to those rights, a diffuse critical movement to this trend is emerging. A first

answer to this crisis within the international arena is the Doha Declaration on TRIPS and Public Health, but the referred TRIPS-plus negotiations are dismantling the constructive approach led by Doha.

Seeking to pose a counterpoint to the TRIPS-plus and TRIPS-extra trend, in every multilateral, regional and bilateral negotiation, a small group of developing countries – especially Brazil, Argentina and India – submit proposals aiming at including development-oriented clauses in the negotiated agreements, but, without exception, those noisy proposals are simply overcome by industrialized countries.

The proposal of the Development Agenda submitted by Brazil and Argentina in the 31st Session of the WIPO General Assembly seeks the definitive and permanent inclusion of development-oriented policies in the working agenda of WIPO. This initiative revives the resolution draft presented by Brazil and Bolivia to the UN General Assembly, in 1961[1], when it was brought to discussion the perverse effects generated by the patent system on the development of underdeveloped countries. Akin to such a resolution, the Development Agenda envisages to impede further TRIPS-plus and TRIPS-extra negotiations. However, unlike the 1960´s resolution, the present Agenda is by far more comprehensive and is not limited to patent-related issues.

The pillars of the Development Agenda of 2004 are not innovative and simply reflect the need of reviving the principles that mirror the goals of the IP system and recall the right of States to implementing exceptions to the IPRs necessary to adjust the IP framework to local peculiarities and needs. In brief, the Development Agenda aims at fostering the technology transfer from North to South in an easy basis and to expand the Doha Declaration beyond to public health issues.

After a short analysis of the programmatic content of the Development Agenda, we note there is nothing innovative in the proposal, and the traditional North-South clash will not lead to any successful outcome. That is the reason why it is fundamental to seek concrete alternatives to promote the Development Agenda based on a joint North-South approach. If the Development Agenda is kept away from the needs of the industrialized countries, the new version of the Brazilian 1961 resolution will be doomed once again to failure.

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[1] Document n.º A/C.2/L.565/Add.1 Document available at http://www.uni-bielefeld.de/iwt/gk/Kollegiaten/AndreaMenescal/draftresolution.htm