

This is a post-print version of:

Tvedt, Morten Walløe, 'The Path to One Universal Patent'  
*Environmental Policy and Law*, Vol 37, No 4, 2007, pp. 297-305

The definitive version is available at [www.iospress.nl](http://www.iospress.nl)

## The Path to One Universal Patent

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Patent law has become an environmental issue partly because of the expansion of the scope of patentability to cover biological and biotechnological inventions. Extensive patenting of biological material and genetic resources challenges the sovereign right to genetic resources according to the Convention on Biological Diversity (CBD). Harmonisation of patent law can be expected to create further pressure on the public domain of genetic resources,<sup>1</sup> and reduce the opportunity of achieving a fair and equitable benefit sharing under the CBD. Benefit sharing under the CBD is not only an objective and rational for the convention, but also a measure to provide founding of conservation and sustainable use of genetic resources and biological diversity. A World Patent System is likely to reduce the operating space for the CBD and thus challenge conservation of biological diversity.

This article takes a look at the current developments of the patent system to analyse whether one *Universal Patent* – or one *World Patent* is on its way.

### INTRODUCTION

A *World Patent* or *Universal Patent* describes an exclusive right granted to one individual company or person; by one centralised institution; which at once becomes legally binding for all citizens in all the countries subscribing to the system; and enforceable upon every private person and public institution globally. Currently, there is not one single coherent World Patent System, but rather a number of nation-specific systems tied together by international harmonisation and regional cooperation. A universal World Patent would be a huge benefit for multinational companies seeking worldwide exclusive (time-limited) monopolies. The cost of such a system would probably be public research (with less access to funding) and the poor people without power to pay monopoly prices for new products. A universal World Patent would also not stimulate local inventors as they seldom get to the global markets with their inventions. It has been concluded that further harmonisation of patent law would benefit the developed countries whereas it would be an obstacle for advanced developing countries and a hinder for the least developed ones.<sup>2</sup>

A system where the patent applicant could submit his application to one Universal Patent Office and have the patent granted by that office would change the current patent law system

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completely. It would break fundamentally with the principle of sovereignty of countries as we know it in international law today.<sup>3</sup> Currently, there are no supra-national legal systems at the global level that have the authority to alter the legal position between individuals.<sup>4</sup> Thus, a Worldwide Patent or Universal Patent will be a conceptual novelty in international law as it will have the competence to alter the legal positions between individuals under the jurisdiction of all countries without any act from each nation in single cases.

There are several processes of continuous harmonisation of patent law going on. In April 2006 the work in the Standing Committee of Patent Law in the WIPO broke down and decided that the member-states of WIPO were not even able to reach an agreement regarding the working plan of the Committee.<sup>5</sup> After this breakdown the harmonisation work has taken less formalised forms as working meetings among the developed countries (in the so-called B-Group) and work undertaken by the Trilateral Patent Offices (the European, US and Japanese Patent Offices).<sup>6</sup>

Since the Paris Convention in 1883 there has been international cooperation with the goal of harmonising the national patent systems.<sup>7</sup> During industrialisation the leading Western European countries and the US actively used law in general and intellectual property rights in particular as strategic tools to build domestic industry during.<sup>8</sup> The early steps of cooperation in the late nineteenth century did, however, not preclude or limit the industrialised countries from actively and strategically adapting their patent system to promote building national industry and create social welfare among their citizens.<sup>9</sup> A universal World Patent System would close such possibilities for developing countries.

Today there are a number of harmonised standards and worldwide fragments of cooperation between national states. It has been claimed that: “There is no excuse for maintaining parallel national patent systems in a world of international trade.”<sup>10</sup> This statement could be read either as a normative statement expressing the view that a World Patent should become in place or as a description of an observation that the most likely next step in a world of global trade is a World Patent. For the increasing number of multinational companies using the patent systems there are strong economic benefits in having a system for the grant of worldwide monopolies. For them a logical next step is to push for being granted a Universal Patent by one application to a global centralised Patent Office. Such a system would, however, limit or remove the discretion that the TRIPS Agreement leaves open for developing countries. There are, however, significant legal, ideological and economical differences among countries that turn into disagreement about whether to harmonise patent law further. The thesis of this article is that despite these disagreements a worldwide Universal Patent System is being established based on a narrow set of interests. Unpacking the processes leading to such a system is therefore crucial to generate an open global discussion about a worldwide Universal World Patent System. This article first identifies the steps that are lacking before a Universal World Patent System could be in place; and second it examines the fora where harmonisation of patent law is going on with a particular view to identifying where the missing pieces are being dealt with.

## **WHICH LEGAL AND INSTITUTIONAL MATTERS ARE NEEDED?**

International law is governed by the principle of sovereignty – each government enjoys full power within its territory and holds no power within the territory of other countries.<sup>11</sup> In patent law this is reflected into a principle of territoriality – a patent establishes an exclusive right in the country where granted; and establishes no exclusive rights outside that territory.<sup>12</sup> A Universal World Patent System would include challenging this fundamental principle of

international law, as the grant of the World Patent would be done by one Universal Bureau. The current international legal situation does not allow such Universal World Patents. The question is therefore which amendments of law and new institutions are needed for such a system to be in place. Depending upon the way of grouping them, one could say there are five elements that must be in place for a universal patent system to function:

1. An bureau or office with the competence to grant patents;
2. Standardised requirements to the patent application (formal criteria) and standards for the so called “pre-grant” substantive issues,<sup>13</sup> (*inter alia* invention, novelty, inventiveness and industrial application);
3. Scope of the exclusive right conferred by the patent;
4. System for enforcement of the patent upon other private (and public) parties;
5. Revocation or review of a granted patent.

All these elements, however, need not necessarily to be regulated at the international level—and they need not necessarily be regulated at a global level at the same point of time before the first World Patent can be granted. A Universal Patent System can refer certain topics to be dealt with under national law.<sup>14</sup> The aim of this section is to identify the issues under each of these elements that still lack international agreement for a Universal World Patent System to be possible.

### **The Institutional Structure Is in Place – the Political Decision Is Lacking**

#### *The WIPO as a Universal Patent Bureau*

A prerequisite for issuing patents is an authorised bureau that can receive, examine and grant the exclusive right. Here the principle of territoriality becomes evident: The patent authority of each country grants patents valid within its territory. Currently, there are regional patent offices that grant patents on behalf of their member countries.<sup>15</sup> These Regional Offices already have a partial supranational authority as the decision of, for example, the EPO shall have the same legal effects as the grant of a patent granted by the national patent office in the member countries.<sup>16</sup> Before the first Universal Patent could be granted a Universal Office or Universal Bureau needs to be appointed and authorised to grant such patents by the member countries.

The International Bureau of WIPO is already undertaking more comprehensive tasks than being only a secretariat for the member countries of the WIPO. The International Bureau of WIPO is also a service provider for the patent applicant that otherwise would be the task of the national patent offices.<sup>17</sup> The International Bureau receives patent applications in the system for International Applications and International Preliminary Examination.<sup>18</sup> It classifies the patent application (the patent claims) into the very detailed classification system of the Patent Co-Operation Treaty (PCT). The claims in the patent typically targets invention in different subclasses and will therefore contain a reference to more than one class. Based on the classification, the Bureau searches the selection of relevant sources for existing information – the so-called relevant *prior art*.

This work by the WIPO is today only a service provided to patent applicants to make the process of having a patent granted in multiple countries easier. The prior art search is a *fact finding part* of the examination of whether the patent application fulfils the patent criteria, the WIPO has presently no competence to apply these facts, the items of *prior art*, to grant or reject the patent application.

From the perspective of establishing a Worldwide Universal Patent System, the organisation of the International Bureau of the WIPO and these present services have a potential to be converted into a formal Universal Patent Bureau with the authority also to grant patents with legally binding effects for member countries. The technical solutions are already in place at the WIPO, so it is more of a political question whether to confer such authority to grant patents to WIPO (also remaining substantive issues must be harmonised, this is discussed in section B below). As the question of establishing a Universal Patent System is formally not on the agenda, it is an open question whether there is political will to convert WIPO into such a Universal Patent Bureau; and whether there is political will to give WIPO authority to grant or reject patent applications on behalf of the member countries.<sup>19</sup>

#### *The Tri-Lateral Offices as a Universal Patent Bureau*

The patent offices of the United States Patent and Trademark Office (USPTO), European Patent Organisation (EPO) and Japan Patent Office (JPO) grant a high percentage of the patents globally. They are often referred to as the *Trilateral Offices*. These three important patent offices have been cooperating over years.

There are already important links between the International Searching Authority under the WIPO and the national patent offices. One such link is embedded in PCT Article 16 where the International Searching Authority (under WIPO) can refer the international search for *prior art* to a national patent office.<sup>20</sup> The result from this search conducted by one designated national Patent Office then becomes the binding result from WIPO. Thus, already the work of one national patent office can be brought to the international level, as the results found by the national offices will be accepted in the international system; and thereafter brought back to the national level of all other countries than those eight appointed international searching authorities.<sup>21</sup> Thus, a universal Bureau might be organised with one central bureau (e.g. WIPO in Geneva) and regional specialised offices supplementing the global activities. The *Trilateral Offices* could easily be the backbone of the institutional structure of a Worldwide Universal Patent Office.

The institutional structure required before establishing a Worldwide Universal Patent System is mostly in place; there is a question of a decision by the member states to the WIPO whether to increase the competence of the International Bureau also to cover authority to grant Worldwide Patents; or the Tri-Lateral Offices could be appointed as the Universal Bureau. The division of competence between the Tri-Lateral Offices and a centralised International Bureau is perhaps going to be one of the key difficulties.

#### **Standardised Requirements to the Patent Application**

The fact-finders in the WIPO prior art search assume presently the task pre-examination of the patent criteria (novelty and inventiveness); whereas the competence to grant the patent rests with the national patent offices (or with the regional patent office for their member countries). To transform the *fact-finders* to become *decision-makers* based on the facts they are finding today could be done by altering their authorisation. Before such alteration of authority both formal and substantive issues need to be harmonised:

#### *Formal Aspects of the Patent Application*

A number of technical issues for granting patents are already in place by the Patent Law Treaty (PLT) of June 1, 2000 and in the Patent Cooperation Treaty (referred to above). The PLT provides for solutions to a number of technical questions that a Worldwide Patent System requires, such as determining the filing date,<sup>22</sup> the form and content of the

application<sup>23</sup> and rules about representatives<sup>24</sup>. These already present solutions make the path to the Worldwide Patent System less troublesome. The Patent Cooperation Treaty also regulates a number of core formal issues required by a Worldwide Patent System, for example, requirements to the description and the patent claims.<sup>25</sup> What we can learn from these two treaties is that they together regulate the formal aspects of the patent application, and leaves them harmonised at the global level.

#### *Substantive Requirements to the Patent Application – The Pre-Grant Issues*

The single area of less harmonisation is the substantive patent criteria for granting a patent. The TRIPS Agreement Article 27, paragraph 1 provides that:

“patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application”

Thus, the TRIPS Agreement refers to the patent criteria as they are formulated in Europe, but in the footnote to the same paragraph it specifies that:

“For the purposes of this Article, the terms ‘inventive step’ and ‘capable of industrial application’ may be deemed by a Member to be synonymous with the terms ‘non-obvious’ and ‘useful’ respectively.”

The footnote opens for the US to maintain their current patent terms and practice for the grant of patents. Thus, the TRIPS Agreement does not set a strict standard for the choice of terms describing the patent criteria that must be met for a patent to be granted. There is also no attempt in the TRIPS Agreement to harmonise the content of these terms or the considerations that should be done when the patent office is to reject or grant the patent. This is a major challenge and perhaps the major obstacle for a Worldwide Patent System. Harmonisation in this respect is also decisive for having a legal basis for a Universal Patent Bureau to grant World Patents.

The latest work that the Standing Committee on Patent Law in the WIPO carried out was to attempt harmonisation of *inter alia* these pre-grant issues at the global level.<sup>26</sup> The draft Substantive Patent Law Treaty (SPLT) and supplementing draft Regulations and Guidelines are comprehensive and attempt to solve almost all un-harmonised questions and issues in patent law in one single negotiation.<sup>27</sup> The comprehensive scope of the draft is probably one important reason for the breakdown in the negotiations. There was also a fundamental disagreement between on the one hand the developed countries emphasising the need for further harmonisation of international patent law for the sake of reducing costs for patent applicants and workload for the patent offices.<sup>28</sup> On the other hand, Argentina and other countries stated a more reserved position on whether further harmonisation of patent law is in the interest of developing countries.<sup>29</sup> These major differences in the underlying realities and perceptions of whether more harmonisation is needed or not, is one important reason for the collapse of the negotiations in the Standing Committee.

Observing the harsh resistance from developing countries to further harmonisation it is striking that Japan put forward the following statement: “In the view of the United States of America, Japan and the EPO, these topics were non-controversial, non-political, purely technical, important to examination as to novelty and non-obviousness/inventive step, and would meet the needs of every applicant and every office.”<sup>30</sup> The debate in the Standing Committee on Law of the Patents shows that developing countries did not agree to these issues being *non-controversial* and *non-political*. This difference in opinions is also probably an explaining factor for why the Standing Committee did not agree on the future working agenda.

Another reason for the Committee not even agreeing on a consensus working agenda was that the B-Group (the developed countries) and a small number of other countries was insisting on singling out four topics, the so called “pre-grant issues” to be negotiated first disconnected to the more comprehensive list presented by the waste majority of developing countries.<sup>31</sup> The B-Group in the WIPO is the informal preparation group consisting of the developed countries. One reason for choosing these four issues to be harmonised first and leaving the other elements in the SPLT for later, can be the urgency of standardising these criteria before the first universal World Patents can be granted. If the pre-grant issues and including the patent criteria are harmonised there will be established a common legal ground for a Universal Bureau to grant World Patents. A fast track negotiation of the pre-grant issues would clear the ground for a worldwide Universal Patent System.

#### *Particular Disclosure Requirements Adopted to Special Fields of Innovation*

Disclosure of the invention is a basic criterion in patent law. The standard requirement is that the invention shall be explained by the use of text. Currently, there is one particular system that derogates from the general principle of written description. The Budapest Treaty prescribes and establishes an international system for the deposit of biological material which also includes genetic material.<sup>32</sup> The system under the Budapest Treaty opens a possibility for the patent applicant to provide for a less comprehensive written description of the invention by instead depositing a sample of the biological material relevant for the invention. This system makes it easier to meet the disclosure requirement for biological material from the point of view of the patent applicant.

The second disclosure requirement receives much more attention in the international negotiations. The disclosure of information of the origin, provider or legal accuracy to the biological material included in or being necessary for the invention. This issue is being discussed in the TRIPS Council of the WTO, in the Inter Governmental Committee (IGC)<sup>33</sup> of the WIPO and in the Convention on Biological Diversity (CBD). The loud call from the developing countries requiring openness from the patent applicant regarding the origin/source/legal provenance of biological material is equally strongly opposed by the industry and developed countries. The main reason for developing countries to suggest such a requirement in patent law is in the hope of this leading to benefit sharing as required in the Convention on Biological Diversity Article 15, paragraph 7 and the maintenance of the public domain and other rights to genetic resources and biological material. Despite the expectations that disclosure would lead to benefits sharing, one can express serious doubts regarding whether such a requirement would at all lead to increased benefit sharing.<sup>34</sup>

Moreover, from the point of view of a Universal Patent System, it is not necessary to include such a disclosure requirement before the first World Patent is granted. Currently, patents are granted in a number of countries without such requirement. The draft SPLT suggested that only requirements in that treaty and two other WIPO treaties should be sources for legal formal requirements to a patent application.<sup>35</sup> If such a rule is accepted, the case would be closed for a binding disclosure requirement. It is not a necessary condition for a World Patent System that countries agree to such a requirement. If a Universal Patent System becomes in place the incentive for developed countries to undertake such an obligation will disappear. To break up the negotiations into one fast-track negotiation of the pre-grant issue and leaving the other issues behind would probably be the best manner for developed countries (and the industry) to escape such a requirement. If a World Patent System becomes in place without such a disclosure requirement, the chance for this to be included at a later stage is minimal.

One concern is that the heated debate about disclosure of origin distracts political attention of developing countries and NGOs away from the fora where the binding patent law and a World Patent System is developed.

### **The Exclusive Right Conferred by the Patent**

The acts that are under the exclusive right of the patentee are already fully harmonised in the TRIPS Agreement. According to TRIPS Article 28 the patent covers the exclusive rights to “making, using, offering for sale, selling, or importing”. Thus, there is no necessary need for further harmonising the scope of patent protection before a Worldwide Patent System can be in place.

When a patent is granted the *patent claims* defines the invention which is under the exclusive right. As the patent claims are written sources, they must be interpreted. Mostly, it is the patentee who enforces his right upon others who interprets and applies the patent claims. When a case appears before a court it is up to the court to interpret the width of the claims. There are considerable differences among countries in the principles of interpretation of the patent claims. Currently, there are no harmonised such principles in international law. The Standing Committee on the Law of the Patents came up with suggestions for harmonised principle of interpretation.<sup>36</sup>

If patent protection in a worldwide Universal Patent System shall be identical in all the countries these principles for interpretation must be harmonised at the global level. But, in the meantime it would be possible for a World Patent System to accept that national courts would interpret the patent claims differently. This is the situation in the European Patent Organisation; patents are granted for a number of European countries, whereas the enforcement and interpretation of the patent claims are left to the national courts. Surely, national variations leave the patentee with different exclusive rights in different countries, but the point for a World Patent is that a system for granting the rights could be in place without full harmonisation of the principles of interpretation. Harmonisation of these principles might be more difficult to reach.

The conclusion is that no more steps of harmonisation of the extension of the patent right is needed, since the TRIPS Agreement already harmonises the acts covered by the exclusive right and the principles of interpretation might be left to the nation level for the time being.

### **Enforcement of the Global Patent Is Better Done in National Legislation**

Enforcement of a World Patent is better dealt with in the various national patent systems than at the international level. The TRIPS Agreement already obliges all the WTO-members to provide for patent protection, including a system for enforcement of patents in national law. The obligation to ensure enforcement mechanisms is embedded in Article 1: “Members shall give effect to the provisions of this Agreement.” To *give effect* to a patent can mean to establish legal mechanisms for its enforcement. The enforcement of an exclusive right by the patentee upon another private (or public) person is in fact more effectively dealt with in national law than in international law. In international law nations are the primary subjects. Since the patent system is intended to grant a private person a right to prevent other private persons from using the invention, the patentee needs legal remedies (or means) to stop others from using the invention. International law does not provide international enforcement mechanisms that are available for conflicts between private parties. Such an enforcement mechanism does not, and in fact cannot, exist at the global level. Therefore, the obligation in the TRIPS Agreement is sufficient and probably also the most effective manner to enforce a

World Patent in national jurisdictions. The World Patent could be granted globally and enforced locally. National courts would become the place for enforcing the Worldwide Patent Regime.

### **A System for Revocation or Review of the Granted Patent**

The national and regional patent systems as we know them today embody systems for the review or revocation of a patent after it has been granted. For a Worldwide Patent System to become a complete system it would require an institutional structure for reviewing and revoking a patent which has been challenge for any reason. Ironically enough such a system for revoking a patent is not strictly needed before a Worldwide Patent Bureau could start granting patents. A system for reviewing and revoking a patent could theoretically be developed after the system for granting a Worldwide Patent is in place. Theoretically, this is also an element of the system that might be left to the national and regional level where such systems already exist. This would, however, introduce a level of uncertainty into the Worldwide Patent System. Therefore, for a Worldwide Patent System to become satisfactory harmonised, there is a need for an international system for board of appeal.

### **Concluding Observation**

The main concluding observation is that harmonisation of the patent criteria (the pre-grant issues) and the political decision to convert either the International Bureau under WIPO of the Trilateral Offices (or in combination) into a Universal Bureau are the two main issues that need to be harmonised before the first Global Patent can be granted. The question that arises is in which forum or fora the development of harmonisation is going on.

## **FORA WITH ON-GOING HARMONISATION OF PATENT LAW**

### **The breakdown in WIPO – An Emerging Consensus in the B-Group**

The Standing Committee on Law of the Patents (SCP) was the core multilateral body for further harmonisation of patent law. The SCP developed a draft Substantive Patent Law Treaty (SPLT) which, as we have seen, includes suggestions for harmonisation of more than all remaining topics for a Worldwide Patent System to come in place.

The negotiations in the Standing Committee on Law of the Patents (SCP) included three separate and comprehensive legal documents: the draft Substantive Patent Law Treaty (draft Treaty), the draft Regulations under the Substantive Patent Law Treaty, and the draft Practical Guidelines. Only the draft Treaty would have been legally binding in the classic sense of international law, while the Regulations and Practical Guidelines would not have had treaty status and would not have be subject to ratification by the parliaments of the contracting parties. Even though these two instruments are not treaties, they would have had normative effects. Understanding the total effect of these three legal documents read in conjunction is a complex issue.<sup>37</sup>

During the last years the work of the SCP has been in a deadlock, and in April 2006 the negotiations finally broke down as the SCP did not even agree upon an agenda for its further work. The so-called *Trilateral Offices*, the Patent Offices of US, Japan and the European Patent Organisation, suggested over several meetings to break up the agenda into one first-track four issues to be dealt with rapidly.<sup>38</sup> These topics were identified as the *pre-grant* issues which are identified above (in this article) as the main obstacles for the first World Patent to be granted. After a number of different strategies to have the members of the WIPO to accept such a fast-track negotiation of these issues and leaving all other questions for a next

round developing countries refused to accept such a short-list agenda.<sup>39</sup> Instead, developing countries presented a more comprehensive list of issues,<sup>40</sup> including development perspectives and argued the need for discussing the totality of the patent system before further harmonisation of single items was carried out. The problem of accepting to go along with such a fast-track negotiations of those pre-grant issues would be fragmentising the totality of the harmonisation efforts. The breakdown in WIPO leaves the negotiations out of the multilateral arena where all countries are represented and bring them over to less participatory arenas.

### **Cooperation among the Trilateral Offices**

The cooperation among the three largest patent offices, the USPTO, JPO and EPO is probably one of the most important semi-formal arenas for discussions of harmonisation of the pre-grant issues. The Trilateral Offices have met in a Trilateral Conference since 1982. Several statements from the *Trilateral Offices* give the clear impression that they are working towards a common procedure for granting patents universal for the three territories where they have authority:

“The Trilateral Offices share the goals of the SCP in reducing the workload on applicants and patent offices and improving patent quality by harmonizing the substantive aspects of patent law governing the grant of a patent.”<sup>41</sup>

The report from the Trilateral Conference in 2006 uses the term as for example “enhanced work-sharing” and “re-use of work results” both indicating that the Trilateral Offices are aiming for increasing the use of the work carried out by the other offices.<sup>42</sup> This overall goal formulated by the Trilateral Offices could be observed as a confirmation from the three of them working towards a universal Patent System for granting patents commonly for the three territories. Thus the substantive discussions between these three bureaus become extremely important for the future development of harmonisation of patent law. The fact that all the three participants to these discussions are patent bureaus exposes their talks of being less concerned about patent law in a social context and mostly influenced by the internal patent law perspective.

### **Emerging Consensus in an Enlarged B-Group**

The so-called ‘B-Group’ in the WIPO is the informal preparation group of the industrialised countries. The B-Group is initially a group for coordination of standpoints in the formal negotiations in WIPO in *inter alia* the SCP. Before the agenda meeting in the SCP in April 2006 an *Enlarged B-Group* met in Singapore. The topic on the agenda was to discuss harmonisation of the topics dealt with in the SPLT and how to bring the negotiations in the SCP forward. In November 2006 the *Enlarged B-Group* now called *B+group* met again in Tokyo and discussed a chairs text with draft articles.<sup>43</sup> The draft treaty text suggests rules for harmonisation of substantive patent criteria – notably the pre-grant issues. This draft from the *Enlarged B-Group* or *B+Group* builds largely upon the draft SPLT developed in the SCP. At a previous meeting the B-Group has discussed and concluded on the topics on which they agree. This signals that the pre-grant issues are going to be negotiated further and probably agreed to in this small group of developed countries outside the WIPO. The lack of formal status of such a group pre-meeting makes it particularly difficult to follow these negotiations.

A possible next step towards a Worldwide Patent System could be an agreement on the pre-grant issues in the *Enlarged B-Group*. If the *Enlarged B-Group* had reached such a consensus, it would clear the way for harmonisation among the three largest patent systems of the world, the USPTO, JPO and EPO and some of the countries with economy in transition. If reaching consensus in the *Enlarged B-Group*, such consensus could be transformed into a formalised multilateral agreement signed and in force in the countries of the *Enlarged B-Group* but kept

open for other countries to become members. This could prepare the ground for an intermediate “*Enlarged B-Group*” or “Trilateral” Universal Patent System, which eventually could become a worldwide Universal Patent System. Therefore, consensus on the pre-grant issues in the *Enlarged B-Group* would imply a long step towards a Worldwide Patent System.

It is a major problem for developing countries if these harmonisation negotiations are being held in a less formal ambient outside the WIPO where they are not represented. Thence they are without any possibility to state their opinion. This exposes them to suddenly be presented a compromise among the countries of the *Enlarged B-Group* as a *fait-a-complit* – take it or leave it – for how the substantive patent law is going to be harmonised globally. And as Dutfield has noted: “And as recent history shows, what the US, EU and Japan agree upon, the world will surely have to accept.”<sup>44</sup>

In fact, such a negotiation pattern is not very different from what happened in the negotiations of the TRIPS Agreement in the Uruguay Round of the GATTs. The text of the TRIPS Agreement was negotiated and brought forward in a small group of countries for thence to be presented to the whole group late in the consensus-building process.<sup>45</sup> There is a good chance for the history to repeat itself in this round of harmonisation of patent law. If the *Enlarged B-Group* reaches consensus it will be very hard – if at all possible – for developing countries to alter the agreed rules for the pre-grant issues. This draws a pretty sad picture for developing countries. The question is why should developing countries bother – could they decide not to become members to an *Enlarged B-Group* Universal Patent System? There are three features that indicate that this might become difficult:

### **Bilateral and Regional Trade Agreements**

In addition to the multilateral level, there are ongoing bilateral and regional trade negotiations. These arenas are foremost trade negotiations, but they might become important for establishing a Worldwide Patent System. In the time after the TRIPS Agreement entered into force the world have seen examples on single developing countries and groups of developing countries entering into bilateral trade agreements where they accept stricter intellectual property rights standards than they are obliged to by the TRIPS Agreement. Harmonisation of patent law has been brought into the negotiations of a general bilateral trade agreement (so called TRIPS Plus).

Often, too, bilateral trade agreements include an obligation to become member to other international agreements, e.g. South Korea is obliged by bilateral trade agreements with the US to become members to the UPOV-convention of 1991 on intellectual property protection of plant varieties. These experiences could be used to oblige countries to become members to a universal semi-global patent system. Bilateral trade agreements could be a future tool to get more developing countries to agree on harmonisation of the patent criteria or even to oblige developing countries to become members to a Universal Patent System. This could prove to become a useful political-legal tool to promote membership to a Worldwide Patent System. Lack of compliance with a bilateral trade-agreement will typically be regulated in the agreement and be sanctioned bilaterally and thus efficiently enforced.

### **Regional Patent Offices**

There are already regional patent offices with the authority to grant patents with direct effect on behalf of their member countries.<sup>46</sup> The idea of universal patent bureaus with authority to grant patents valid for more than one nation-state has matured over time, so it is not a completely new or strange idea to grant patents at a supranational level with direct effect in a

number of national jurisdictions. These regional patent offices could easily become part of an semi-global World Patent System, increasing the number of developing country members to a universal World Patent System.

### **The Potential of the TRIPS-Council in Promoting a Worldwide Patent System**

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) obliges all members to the WTO to provide patent protection for all fields of technology (save some narrow exemptions). The principle of sovereignty in international law ensures each country the formal right to determine independently whether to ratify and become a member to a worldwide Universal Patent System. This will also be the formal point of departure if the *Enlarged B-Group* reaches some degree of consensus to establish a semi-universal Patent System.

This formal sovereignty including the freedom for developing countries not to subscribe to such a semi-universal Patent System could come under pressure from the already existing obligations according to the TRIPS Agreement. According to TRIPS Article 27, "... patents shall be available for any inventions ...". All member countries are obliged to provide for patent protection in their jurisdiction. The obligation is neutral whether a country shall fulfil the obligation by having a country-specific patent system or by subscribing to a Universal World Patent System. To establish and maintain a patent system requires funding and human capacity. Several of the least developed countries have been granted a later deadline for meeting the obligation of having a patent system.<sup>47</sup> If a semi-universal system for the grant of World Patents is in place when this obligation is to be enforced, membership to that system could appear as an easy manner for the least developed countries to meet the obligation according to the TRIPS Agreement. Efficiency could thus become a political argument for developing countries to rather become a member to a World Patent System than spending resources on maintaining a national patent system. Thus, the combination of legally binding obligations (the TRIPS Agreement) and political pressure might prove to become effective tools in respect of increasing the number of developing countries that subscribe to a Universal Patent System.

### **CONCLUDING REMARKS**

Based on these analyses I have identified the following four steps as the ones required before a Worldwide Patent Bureau can grant the first World Patent:

- Changing the authorisation of the WIPO Bureau from being a fact finding bureau to one with the competence also to grant patents (or agreeing that the Trilateral Offices are to share the role as a Universal Bureau);
- Harmonisation of the *pre-grant* issues, as prior art, novelty, inventiveness, industrial application, grace period and the right owner of the patent;
- National decisions recognising and accepting the Universal World Patent granted by the Worldwide Patent Bureau (ratification or membership);
- Preferably establish a system for reviewing and revoking a patent after it has been granted (although not immediate necessary for granting patents).

These are the core elements that are yet to be harmonised or in place before a Worldwide Universal Patent System can start to grant Universal Patents.

The combination of granting the World Patents globally and enforcing them locally would be the genius of a universal World Patent System. Currently, there exist no other legal mechanisms where a global bureau can alter the legal situation among the private and public

parties without doing it thru individual acts of each nation-state. The General Assembly of the United Nations or its Security Council does not have such an authority. Even not the human right boards of appeal or the International Criminal Court have such competence. A Universal World Patent Bureau would change the legal position between private or governmental parties in a manner which today is only known thru national public authorities – the executive branch of the national governments.

Such a supra-national system would break radically with the present system of international law. The basic principle in international is that states are the subjects of law. Private persons are not automatically bound by international treaties. An international agreement must be transferred into national legislation to alter the legal situation between private parties. If a World Patent Bureau is authorised to grant patents, this will break with the current system in international law in direction of establishing a law-level above the nation-state, it will become *supra-national*. Clearly, the entry into force of such a Universal World Patent System would require the consent and ratification by the countries subscribing to the system. Thus, the entry into force of the Universal Patent System will look like a regular type of international treaty, but it will function in a far more dynamic manner. From the perspective of the CBD, it would probably reduce the possibility for the CBD to achieve fair and equitable benefit sharing as a measure for conservation and sustainable use of biological diversity.

Dutfield has noted that: “The world is definitely not ready for harmonising substantive patent law.”<sup>48</sup> He concludes this from an analysis of history and comparing the growth in five European countries at their time of rapid industrialisation. He compares their need for flexibility thru their phase of development with the need for national priorities taken by developing countries.

A Universal World Patent System is not formally on the agenda. However, from time to time references are being made to such a Universal World Patent System, as for example James E. Rogan, Director of the USPTO stated that: “foundation for an international patent system exists in the Patent Cooperation Treaty ... and the Patent Law Treaty ... and the TRIPS Agreement”.<sup>49</sup> I have identified tendencies in the global patent discussions and negotiations pointing towards this as a logical next step in patent law harmonisation and globalisation of law. If such a system is designed in a small group, as for example by the *Trilateral Offices* or in the *Enlarged B-Group*, there is a good chance of a Universal World Patent System being developed to suit a narrow set of interests, foremost those of the multinational companies, rather than taking all types of private and public innovation and all levels of economic development into account. There is a need for an open global debate of whether a *supranational* Universal World Patent System should be the next step of globalisation of law.

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## Notes

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<sup>1</sup> Tvedt 2005.

<sup>2</sup> Dutfield 2005, at page 247–249.

<sup>3</sup> Akehurst 1997 pp. 17–18, Brownlie 2003 pp. 287–289, chapter 14 and 15, Cassese 2001 pp. 88–91, Shaw 2003 Chapter 12 and 13.

<sup>4</sup> The European Union has certain features that indicate such a supra-national competence, but these rules do not apply globally, only for member-states.

<sup>5</sup> Document WIPO/SCP/11/5.

<sup>6</sup> The document is available on <http://www.ip-watch.org/files/Group B+ Chair's Draft Nov.doc>. See also [http://www.jpo.go.jp/torikumi\\_e/kokusai\\_e/splt\\_meeting\\_0603.htm](http://www.jpo.go.jp/torikumi_e/kokusai_e/splt_meeting_0603.htm).

<sup>7</sup> Dutfield 2005, at p. 228—232.

<sup>8</sup> Chisum *et al.* 1998.

<sup>9</sup> Dutfield 2005, at p. 247—249.

<sup>10</sup> Barton 2003.

<sup>11</sup> Akehurst 1997 pp. 17–18, Brownlie 2003 pp. 287–289, chapter 14 and 15, Cassese 2001 pp. 88–91, Shaw 2003 Chapter 12 and 13.

<sup>12</sup> The TRIPS Agreement Article 29, however, specifies that import of the relevant invention is covered by the exclusive right. This introduces an international element of the scope of the patent right in the current system. Also a granted patent in one country could preclude the grant of an invention to the same invention in another country.

<sup>13</sup> This terminology is used in the Standing Committee on Patent Law in the WIPO.

<sup>14</sup> For example in Europe, the European Patent is granted by the EPO, whereas the patent is enforced under the national patent systems and patent offices.

<sup>15</sup> See their web pages: the European Patent Organisation (EPO) [http://www.european-patent-office.org/new\\_off\\_comm/index.en.php](http://www.european-patent-office.org/new_off_comm/index.en.php), the African Intellectual Property Organisation (OAPI) [http://www.oapi.wipo.net/doc/en/bangui\\_agreement.pdf](http://www.oapi.wipo.net/doc/en/bangui_agreement.pdf), the African Regional Intellectual Property Organisation (ARIPO) <http://www.aripo.org/>, the Eurasian Patent Organisation (EAPO) <http://www.eapo.org/eng/news/index.html>.

<sup>16</sup> See for example the European Patent Convention (EPC) Article 2, paragraph 2: “The European patent shall, in each of the Contracting States for which it is granted, have the effect of and be subject to the same conditions as a national patent granted by that State, unless otherwise provided in this Convention.”

<sup>17</sup> Patent Cooperation Treaty Article 1 establishes a Union for: “filing, searching, and examination, of applications for the protection of inventions, and for rendering special technical services.”

<sup>18</sup> Patent Cooperation Treaty of June 19, 1970, last modified October 3, 2001, with the supplementing Regulations under the Patent Cooperation Treaty of January 1, 2004.

<sup>19</sup> Since the WIPO is a member organisation countries must agree or at least accept such a step of expanding the authority of WIPO. All members to the WIPO do not necessarily need to sign in for such a global system. WIPO already administers treaties that not all the member countries have ratified, and could very well grant partially-universal patents in an interim époque.

<sup>20</sup> PCT Article 16 reads: “The International Searching Authority (1) International search shall be carried out by an International Searching Authority, which may be either a national Office or an intergovernmental organization, such as the International Patent Institute, whose tasks include the establishing of documentary search reports on prior art with respect to inventions which are the subject of applications.”

<sup>21</sup> According to an agreement document PCT/MIA/VI/8 the patent offices of Austria, Australia, China, the European Patent Organisation, Spain, Japan, Russia, Sweden and the US are international searching authorities. The agreement is to be renewed in 2007.

<sup>22</sup> PLT Article 5.

<sup>23</sup> PLT Article 6.

<sup>24</sup> PLT Article 7.

<sup>25</sup> PCT Article 5 and 6, with detailed supplementing regulation in the Regulations to the PCT rules 5 and 6.

<sup>26</sup> Draft Substantive Patent Law Treaty, latest version in WIPO document SCP/10/2.

<sup>27</sup> For an analysis of the relationship between the draft SPLT and the public domain to genetic resources, see Tvedt 2005, at pp 311–344.

<sup>28</sup> See the Summary by the Chair, in WIPO document SCP/11/5, paragraphs 10 (Italy on behalf of the B-Group) and 12 (Singapore).

<sup>29</sup> Summary by the Chair, in WIPO document SCP/11/5, paragraphs 9 (Argentina with the support of other countries) and 20 by Venezuela, see also paragraphs 11, 13, 14 and 15. For a complete summary of the discussions see the final report which is pending approval by the member countries.

<sup>30</sup> Report from SCP, WIPO document SCP/10/11, paragraph 19.

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<sup>31</sup> See for example WIPO document SCP/11/3, listing the four topics: prior art, grace period, novelty and inventive step, as to be discussed in the SCP in a first round of negotiation. See for example the point made by Argentina in WIPO document SCP/10/11, paragraph 32, and by other developing countries in the same document.

<sup>32</sup> Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, Budapest on April 28, 1977, and amended on September 26, 1980.

<sup>33</sup> [http://www.wipo.int/edocs/prdocs/en/2006/wipo\\_pr\\_2006\\_470.html](http://www.wipo.int/edocs/prdocs/en/2006/wipo_pr_2006_470.html) .

<sup>34</sup> Tvedt 2006 and Tvedt and Young 2007.

<sup>35</sup> The draft SPLT suggested that: “[1] [*Requirements Concerning Parts of Application*] (a) Except where otherwise provided for by this Treaty and the Regulations or the Patent Law Treaty, no Contracting Party shall require compliance with any requirement relating to the request, description, claims, drawings or abstract of an application different from or additional to the requirements relating to the request, description, claims, drawings or abstract which are provided for under the Patent Cooperation Treaty in respect of international applications.”, Article 5 (1) (a) Draft SPLT, SCP/10/4 p. 10.

<sup>36</sup> Article 11 (1) – (4) Draft SPLT, SCP/10/4 p. 21 and Rule 12 (2) Draft SPLT Regulation, SCP/10/5 p. 22 and Rule 13 (1) – (2) Draft SPLT Regulation, SCP/10/5 p. 23. For a more detailed discussion of these suggestions and their effect for genetic resources, see Tvedt 2005, at p. 336–339.

<sup>37</sup> See Tvedt 2005, at page 311—344.

<sup>38</sup> Suggested in *inter alia* WIPO documents SCP/11/3, WO/GA/31/10 (document presented to the WIPO General Assembly) and SCP/10/9 by the Trilateral Offices.

<sup>39</sup> The almost identical suggestion has been proposed a number of times. The last time this suggestion was put forward in the SCP was the informal meeting in April 10.–12. 2006 in the informal session set up by the General Assembly to bring the negotiations forward. It was also attempted brought into consensus thru an informal intersessional meeting in Casablanca with a small group of countries. All these attempts to get developing countries to agree to fragmentise the agenda failed.

<sup>40</sup> See for example WIPO document SCP/11/4 and SCP/11/5, paragraph 9 referring to the statement of *inter alia* Argentina.

<sup>41</sup> SCP/10/9, Proposal from the United States of America, Japan and the European Patent Office regarding the Substantive Patent Law Treaty (SPLT). See also the introduction to the Summary of the 24th Trilateral Conference Tokyo, 17 November 2006.

<sup>42</sup> Summary of the 24th Trilateral Conference Tokyo, 17 November 2006.

<sup>43</sup> About his work see [http://www.ip-watch.org/weblog/index\\_test.php?p=448](http://www.ip-watch.org/weblog/index_test.php?p=448), document B+/PL/3/2.

<sup>44</sup> Dutfield 2005, at page 230.

<sup>45</sup> For a profound discussion of this negotiation process, see Matthews 2002.

<sup>46</sup> For the member countries of the European Patent Organisation, a patent can be granted for several countries at the same time. There is a similar system administered by the OAPI, the African Organisation for Intellectual Property, which grants patents that are valid in 16 mainly francophone West African countries.

<sup>47</sup> TRIPS Agreement Article 66 supplemented by *inter alia* the decision of 27 June 2002, by the Council for TRIPS supplementing the transition period for certain branches.

<sup>48</sup> Dutfield 2005, p. 249.

<sup>49</sup> Rogan 2002, quoted by Drahos 2005, at p. 6.