Biased IP Technical Assistance, Judicial Independence, and Recusals - Novartis's attack on India Patent Act and Beyond

Date: 9 September 2011

Source: KEIonline.org

Although the mythology of pure judicial independence and arbitral neutrality can be exaggerated, it is appropriate that a Supreme Court judge in India recently recused himself from a pending appeal by Novartis against the denial of its patent application on Glivec/Gleevec. Following news stories of health activists' opposition to his hearing the Novartis appeal,[1] which was based on his attendance and a pro-IP presentation at international conferences of the industry-sponsored Intellectual Property Owners Association, Justice Dalveer Bhandari recused himself from the appeal, ordering that another judicial panel be constituted.[2] The decision by Justice Bhandari followed an earlier decision in 2009 by Justice Markandeya Katju to withdraw from the Norvartis appeal because of his earlier writings that medicines are too costly for the poor and that means should be found to make them more affordable. [3]

This decision by Justice Bhandari provides an occasion to explore dangerous efforts by major pharmaceutical companies, rich country technical assistance providers, and the World Intellectual Property Organization to undermine judicial independence and objectivity on the part of judges as a central component of a relentless campaign to maximize intellectual property rights and their enforcement. Although this brief account can by no means document the full range of relevant examples, it can outline the breadth and depth of the problem.

First, even with respect to the Novartis case itself, there have been concerted efforts by Novartis and its governmental and academic allies to help it argue its case in so-called IP training activities. Novartis has also liberally used claims of potential bias to secure arbitral advantages in its pending Glivec/Gleevec appeals. In 2007, when first appealing the adverse decision by the Patent Controller of Chennai and following the appointment of Mr. Chandrashekar as a technical member to hear the appeal at the Intellectual Property Appellate Board (IPAB), Novartis objected to that appointment based on the fact that Mr. Chandrashekar had previously filed an affidavit for the government and that he would be biased. Novartis thereafter approached both the Madras High Court and the Supreme Court of India where it ultimately won a replacement.

Meanwhile, Novartis, was simultaneously seeking forums in which to influence Indian judges on the merits of its Glivec/Gleevec appeal. Thus, in 2009 and 2010, Novartis co-sponsored an intellectual property summits in India along with other PhRMA, other IP industry representatives, the George Washington University India Project, and the US-India Business Council (a lobbying group that has directly campaigned against Section 3(d) of the Amended India Patents Act 2005). The summits have involved sitting judges and government officials from India. In one summit, the law firm representing Novartis in its pending appeal of the Glivec/Gleevec case gave a presentation arguing that Section 3(d) was TRIPS non-compliant and further arguing for the interpretation of Section 3(d) that it wanted the Indian Patent Office to adopt. [4,5,6] Based on its own efforts to bias judges in its favor and Novartis having benefitted on two occasions where decision-makers potentially biased against its appeal were removed, it is deeply ironic that attorneys representing Novartis now claim outrage that efforts to a recuse pro-IP judge was successful at the Supreme Court. [2]

However, the pro-IP indoctrination tactic encapsulated in the Novartis case is not unique. Transnational pharmaceutical companies, US and European Patent Offices, WIPO technical assistance, and background pressures from the US and EU have all been exerted to influence Indian and other developing country officials to adopt loose standards of patentability, to extend intellectual property rights, and to ramp up enforcement activities. Selected examples of such activities include:

* The United States repeatedly placing India on its Special 301 Priority Watch List because of alleged concerns about its strict standards of patentability, especially Section 3(d); [7]
* Dozens of training and educational events by the US Patent and Trademark Office including within the past year in India alone: Workshop on Recent Trends in IP Practice an Management in India, Oct. 5-6, 2010; Interactive Discussion Program with Indian IP Office in India, Oct. 8, 2010; IP Awareness Campaign in New Delhi, India, Feb. 11, 2011; International Conference Cum Workshop on IP Laws at New Delhi, India, March 13-14, 2011; Anti-Counterfeiting and Anti-Piracy Training for South Asia Customs Officials in India, April 14-16, 2011; Agricultural Biotechnology Program in India, July 26-27, 2011; Exchange of Best Practices in the Area of Examination and Cancellations in Trademarks in India, August 8-9, 2011; Exchange of Best Practices of Electronic and Computer Related Invention Patents in India, Aug. 11-12, 2011; Orientation Sessions with Enforcement Bodies on the Menace of Counterfeiting & Piracy in India, Aug. 15, 2011; Agricultural Biotechnology Program in India, Aug. 16, 2011; and Fifth International Conference on Counterfeiting and

Piracy in India, Aug. 25, 2011. There were dozens of other trainings and workshops in developing countries. [8]

* The Trade Policy Forum between the US and India, where the US promotes a "Framework for Cooperation in Trade and Investment" and seeks to renew and extend a bilateral IPR Memorandum of Understanding. [9]

* Similarly , India has signed a Memorandum of Understanding with the European Patent Office on staff training, capacity building, and IP public awareness programs. [10]

* The "Coalition for Healthy India" sponsored by the Confederation of Indian Industry and the U.S.-India Business Council which, among other goals, aims to expedite access to new [patented] medicines in India. [11]

* Diplomatic efforts by the US to articulate a revised IPR strategy for India, documented in Cable Reference ID: #08NEWDELHI1683. [12]

Pro-pharma efforts are not limited to trying to influence IP policy and judicial independence in India, there are comparable efforts in many other developing countries, including:

* The United States' sponsorship of multiple pro-IP training programs and conferences in developing countries including: (a) A Regional Workshop for Legislators, Judges, Government Representatives on Intellectual Property Law and Strategic Management for Sustainable Economic Development, Amman, Jordan, Feb. 7-0, 2011; (b) US Government Delegation Meets Lebanese Government Officials and Intellectual Property Rights Stakeholders, July 22-24, 2010, Beirut, Lebanon; (c) East Africa Regional Seminar on Copyright Enforcement in the Internet Age, May 19-21, 2009; (d) Regional IP Law & Policy Program in Jordan, Nov. 5-8, 2007; (e) Regional IP Law & Policy Program in South Africa, July 27-29, 2007. [13]

* The United States Global Intellectual Property Academy offering "capacity building" on US methods for protecting the IP rights of business owners to patent, trademark and copyright officials, judges, prosecutors, police, customs officials, foreign policy makers, examiners, and rights owners. [14]

* US contributions to technical assistance by the World Trade Organization to provide training to developing countries to enhance their ability to participate in trade negotiations. [15]

* US Patent Prosecution Highway agreement with Brazil and 16 other countries to expedite patent examinations by providing search results from the US Patent Office, which threatens to harmonize patent examinations down to the US's lax standards. [16]

* WIPO spends tens of millions of dollars a year on technical assistance with little transparency or

accountability. Historically, much of it has been IP-maximizing and only recently has it even begun to turn its attention to tailoring its TA to its development agenda. [17]

This is by no means a complete catalogue of the enormous effort by Big Pharma and its government supporters to influence judicial and other government policy-makers in India and other developing countries. However, this effort constitutes a major impediment to realizing the rights to health and to access to essential medicines, and ultimately to the rule of law itself. Make no mistake, there has been a long-term and concerted campaign to win the hearts and minds of IP offices, legislators, judges, and other policy-makers to IP fundamentalism where more IPR protection is always better.

Fortunately, efforts to maintain some minimum degree of judicial objectivity in the Novartis case has prevailed, at least temporarily, but vigilance must be maintained. India must stand firm in its defense of strict patenting standards at it Patent Office, in its courts, and in its Parliament. A major UNDP study has recently found troubling signs that India's strict patent standards are not being uniformly and consistently enforced either by the India Patent Office or the courts. [18] Accordingly, cases like Novartis's must be followed closely and pro-health activists should continue to make demands that Novartis drop its strident attack on Section 3(d) and that India maintains its role as the pharmacy of the poor both in India and abroad.

Keywords: Biased / IP / Novartis / India / Patent Act