INFORMATION NOTE NUMBER 7, AUGUST 2008

Post-mortem for the Geneva Mini-Ministerial: Where does TRIPS go from here?

UNCTAD–ICTSD Projects on IPRs and Sustainable Development

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Disagreement over TRIPS issues did not cause the "collapse" on July 29, 2008 of the Mini-Ministerial talks at the WTO. Because the talks foundered for other reasons, we do not know what "might have happened" on the TRIPS front had typical pressures associated with reaching a package conclusion been brought to bear. Continuing strong disagreement over the substantive issues in TRIPS channeled Mini-Ministerial talks on IP-related issues toward the "process" through which an agreement might be reached.

This focus on process is understandable. Delegations perceive themselves as winning or losing "concessions" in these TRIPS negotiations. Prospective "losers" are not expected to concede without the benefit of reciprocal concessions in other areas of negotiation. Prospective "winners" seek to assure that the TRIPS results are included as part of the "single undertaking" anticipated to conclude the Doha Development Round. TRIPS issues would form part of the endgame give-and-take that could justify concessions by delegations that do not otherwise perceive particular results in their national interest.

The Current State of Play

As far as TRIPS is concerned, it appears that the result of the Mini-Ministerial leaves matters more or less at the state they entered. This means, consistent with the Ministerial decision at the Hong Kong Ministerial, that results from negotiations regarding a multilateral register for wines and spirits should be completed within the same timeline as the Doha Round conclusion, while a determination regarding the process for decisions regarding the proposed extension of geographical indications (GIs) and on issues related to TRIPS and biodiversity remains to be made. This non-result does not take any of the three issues off the negotiating table, and as a practical matter probably does not make too much difference to the ultimate conclusion of the TRIPS negotiations. That conclusion will depend upon which coalitions make what demands, and at what level of intensity, if and when a concrete result for the Doha Round is in immediate sight. With this in mind, what are some of the key factors for moving forward in TRIPS?

The TRIPS issues under discussion by Ministers over the past ten days in Geneva have been "on the table" for quite some time. The GIs issues are holdovers from the Uruguay Round, and discussion of the relationship

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between the TRIPS Agreement and the Convention on Biological Diversity (CBD) was under way during and after the Rio Earth Summit negotiations in 1992. These are not "new issues", and the proposals and parameters for solutions are not new either, though the language of specific proposals has more recently been fleshed out. Among "technocrats", potential matrices of resolution on the TRIPS issues have been discussed extensively over a period of years. The difficult questions are the political ones. What solutions would be acceptable to a country's negotiating partners? And, perhaps more important, what solutions could be delivered as "success" to stakeholders back home?

There are two intertwined sets of TRIPS discussions. The first set concerns geographical indications and the second concerns patents and biodiversity.

Geographical Indications

The European Commission has repeatedly stated that agreement on GIs is a *sine qua non* of successfully concluding the Doha Development Round. The European Union has been actively lobbying governments around the world on GIs issues, and has been incorporating GIs provisions as an essential element of its bilateral trade negotiation program. At least partially as a consequence of that, the EU has now built-up a significant alliance on the GIs front. Still, there is strong resistance among a number of key country actors that will make it difficult for the EU to accomplish its more ambitious agenda of establishing a strong form of multilateral register of GIs and broad extension of GIs protection to other agricultural products. There is success within the EU's reach, but achieving it depends on how the Commission is willing to define success.

If the Commission can define success as agreement on establishment of a multilateral register for wines and spirits, it seems probable that the EU can succeed. There are several reasons for this. The most important from a political standpoint is this would have a reasonable expectation for acceptance by the U.S. Congress. Why? Because the United States already has registers of GIs for wines and spirits maintained by the Treasury Department through its labeling approval authority. Extending that internationally would not involve a significant change for the United States. And, perhaps more important, U.S. wine and spirit producers are not averse to higher levels of protection (provided that traditional wine designations remain grandfathered). U.S. wine growers have been making the case to foreign GIs registration authorities that Treasury Department designations should be accepted as evidence of GIs.

For the United States, extending a stronger form of protection to "other agricultural products" (and non-agricultural products) is a much different matter. To begin with, there is no corollary Treasury Department designation for general agricultural GIs. More important, at American grocery chain stores there is common disregard of geographical "rights" claimed by overseas producers. Changing that would involve significant investment among a wide range of food product suppliers and retailers. Also, U.S. restaurants commonly use and advertise foreign geographic designations for their products. This industry would also find geographical extension a significant problem. The combination of agricultural producers, food processors, grocery chain stores and restaurants presents formidable opposition to GIs extension in the United States. Certainly at this stage, USTR does not have a mandate, and Congress would not likely give it one, to accept a major change on this subject.

The European Commission might yet overplay its hand, even with respect to a multilateral register for wines and spirits. Its formal proposals in the TRIPS Council include elements that would go beyond traditional expectations of IP protection. For example, registration of a wine or spirit GI on the multilateral register would create presumptions on certain important issues that could not be rebutted in national court or administrative proceedings. This would create, in effect, a "super-IP right", greater than that found in the field of trademarks. A number of delegations have already pointed out potentially excessive elements of the EU proposals. A negotiated registration system would presumably reflect a more conventional balance.

The "net" effect of these dynamics is that the United States has room to compromise on GIs when that becomes expedient. But, there are limits.

The second major reason a compromise on GIs seems possible is a shift in the view of the Chinese delegation. Until fairly recently, China was among the opponents of increased GI protection, presumably because China had limited "offensive" interests in GIs. Geographical designations for Chinese products were not well known outside China. Whether or not this "fact" has changed, China has decided to support extension of GIs protection, including beyond wines and spirits.

It is possible to view this change in China's position as a trade-off (for example with the European Union) in exchange for support of greater protection for biological resources originating in China. There is a great deal of Chinese investment in medicines based on its traditional plant-based remedies, and a significant level of patenting activity in and by China in this area. China would understandably want to

strengthen its control over commercially valuable resources originating within its territory. Though this has not been presented as a rationale for China's shift in position on GIs, it is a "plausible hypothesis" that China's real interest is on the other side of the TRIPS negotiations.

Argentina has been among the most entrenched in opposition to expanding GIs protection. Just whether and how Argentina could be brought into a consensus on GIs is not easy to foresee, but there are always elements to be traded at the end of WTO negotiations. Whether particular countries, like Argentina, would block a limited solution in the GIs area (if the United States is ultimately brought around) is difficult to predict.

The "net" on GIs is that if the EU can define "success" as agreement on a balanced multilateral register for wines and spirits, this is probably achievable as part of a Doha Development Round single undertaking. Much beyond that is likely a bridge too far. In the meantime the EU will presumably continue its bilateral negotiating strategy for GIs.

Patents and Biodiversity

The parameters for agreement regarding patents and biodiversity are (naturally) complicated. Again, the United States may be the key actor. This is not to suggest that the United States has the same type of bargaining power at the WTO that it had a decade ago. Its power in the patents and biodiversity negotiations is mainly negative. It still has the economic power and stamina to block a consensus.

Developing countries have demanded a multipronged framework with respect to the relationship between patents and genetic resources (as well as traditional knowledge). At the higher end of the demand spectrum the requirements of the CBD would essentially be incorporated into the patent system. A patent applicant would need to disclose the source and origin of biological resources as a way to assure the proper application of patentability standards by the patent office, and the patent applicant would also need to provide evidence of compliance with access and benefit sharing requirements of host countries. The penalty for noncompliance would include forfeiture of patent rights.

The United States has refused to ratify the CBD because of concerns about application of its intellectual property provisions. It has also so far refused to ratify the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR) for similar reasons. To this extent, refusal of the United States to seriously engage with the CBD-related proposals at the WTO is at least "consistent" with its past practice.

Moreover, there are some new elements that may be increasing U.S. sensitivity to enhancing protection of biological resources. First, there is considerable research and development activity worldwide with respect to marine biological resources, including beyond the exclusive economic zones controlled by coastal states. So far there has been little discussion in international forums about rights in marine biological resources, but adding biodiversity-related requirements in TRIPS may open up additional questions in this area. Second, negotiations at WHO regarding sharing of virus samples is bringing the issue of control over biological resources into a sharper practical focus. These WHO negotiations involve practical consequences of access and benefit sharing regimes and, at the least, are causing governments to study this area more closely. The results at WHO may tie-in to negotiations at WTO in ways not yet foreseeable.

USTR has been subject to intense negative lobbying on the patent and biodiversity issue originating from its biotechnology industries. Major US industry groups are supporting the biotech industry position even though most US industry sectors have virtually no concrete stake in the outcome. The latter may be the "weak link" in the U.S. position. There is only a small segment of U.S. IP-dependent industry that has a genuine stake in the outcome, and "solidarity" among industry sectors may not be as valuable a commodity as its proponents would like to believe. Still, it is going to be very difficult as a domestic political matter for USTR to move on this issue.

The EU has taken a more flexible approach, understanding that there are elements of a compromise that would likely have very little tangible impact on its biotechnology industry. But, the European Commission has often been willing to let the United States take the heat on controversial IP issues while harboring its own strongly rooted views. In the end, though, it seems reasonable to take the Commission at face value that, in exchange for an acceptable result on GIs, it will offer some accommodation on patents and disclosure.

This puts the key decisions in the hands of Brazil, India, Peru, Kenya and other strong advocates of the patent-CBD proposals, including China. Will these countries be willing to accept a "soft" TRIPS patent-disclosure solution with a promise of further discussion in other forums (CBD, WIPO, etc.)? Are any of these governments prepared to block an otherwise satisfactory result of the Doha Round of negotiations to extract a "hard form" of the solution? If they are prepared to block a single undertaking conclusion of the Doha Round, we may be in for a long negotiating season. It is unlikely that the political constellation in the United States will change so dramatically as to allow not only a disclosure requirement

to be accepted, but also to incorporate a requirement to provide evidence of prior informed consent and benefit sharing (in light of the US refusal to ratify the CBD or ITPGR). On the other hand, though this is perhaps the most difficult "call" among the TRIPS elements, the United States may be able accept a soft disclosure requirement - because this truly would provide patent examiners with useful information. Biotechnology lobbyists in the United States have some considerable power, but not so much as to cause the Doha Round to collapse because of an "irrational prejudice" against the disclosure of relevant and useful information.

Looking Ahead

It is comparably easy to foresee incorporation of a successful result on the question of a multilateral register for wines and spirits as part of a single undertaking conclusion of the DDR. It is more difficult to foresee the path to success on GIs extension and TRIPS and biodiversity. Operating within current parameters, it is not so difficult to foresee a result on TRIPS and biodiversity centering on a disclosure requirement in relatively "soft" form. That would be an accomplishment for the developing and emerging countries, but it is not clear whether it will be considered "enough". Extension of GIs protection beyond the establishment of a multilateral register could be resolved by agreement on further negotiations, or by agreement on some very soft form of extension. That is not the kind of solution that the EU says it is seeking. A hard form of GIs extension is going to be a very tough sell in the United States. Again, negotiating governments will need to decide how they are willing to define success.

Viewed over a longer time horizon, perspectives on issues such as evidence of prior informed consent and benefit sharing may change, even in the United States. The TRIPS issues under discussion in the DDR should be considered not only from the perspective of whether to reach a compromise -- and virtually all negotiations, by definition, involve compromise -- but whether any given compromise will provide a solid foundation for achieving longer-term objectives. In some circumstances it may be useful to define concrete timelines for further negotiations, looking at the historical precedent of the GATT 1947. There is also a case to be made for impatience. The foregoing discussion of the interplay between substantive issues and potential trade-offs helps to explain why the issue of "process" on TRIPS was given such significant attention by delegations at the Mini-Ministerial.

As a final note, the results of changes to intellectual property rules are sometimes not easy to predict. It should not be too surprising if, over the longer term, the current "winners" and "losers" from the TRIPS changes under negotiation are not those claiming these mantles.

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The International Centre for Trade and Sustainable Development (ICTSD) has been active in the field of intellectual property since 1997, amongst others, through its Programme on Intellectual Property Rights (IPRs) and Sustainable Development. One central objective of the Programme has been to facilitate the emergence of a critical mass of well informed stakeholders in developing countries including decision makers, negotiators as also the private sector and civil society who will be able to define their own sustainable human development objectives in the field of IPRs and effectively advance them at the national and international levels.

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ISSN 1684 9825.