5 TRIPs in DDA – Personal Perspective of a Developing Country Negotiator

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A Big Stake Business

Representatives of developing countries, whether diplomats, lawyers or officials from ministries of trade, will find it particularly difficult to handle negotiations on intellectual property rights (IPRs) that take place in Geneva. They must be aware of the pitfalls when dealing with one of the most challenging and arguably one of the most important of the negotiating dossiers.

The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) provided enough critical mass for the Uruguay Round to follow its course to a final conclusion. It made the Uruguay Round's "single undertaking" appealing enough for the big IPR-reliant corporations of the developed world to support its adoption as a package in 1994.

Some would claim that the absence of substantive potential outputs for IPRs, apart from geographical indications (GIs) of interest to Europe and a TRIPs disclosure of origin requirement (of interest to many developing countries), explains the protracted nature of the Doha Round process. According to this view, there would be a lack of interest in a final deal from the more powerful intellectual property (IP) constituencies.

Many IP-dependent corporations strongly influence policy formulation within their home governments. Because of this, one could consider that a multilateral round will probably not be brought to a close without their agreement or consent.

Big Pharma has its own Permanent Mission in Geneva, at the Place des Nations. It is many times bigger than most Missions from developing countries, and its role is simply

to monitor all that goes on in the Swiss town that can remotely affect their unlimited drive for legally enforceable proprietary rights.

It has come to light on different occasions that members of that Mission have privileged access to information.

A confidential draft final report of the World Health Organisation (WHO) Commission on Intellectual Property Rights, Innovation and Public Health (CIPIH) was circulated among commission members with substantive amendments and editorial changes authored (in still visible "track-changes") by an International Federation of Pharmaceutical Manufacturers & Associations (IFPMA) official who evidently benefited from prior knowledge of the document's content. The fact that a former Head of State chaired the CIPIH did not prevent the leak from happening. And yet another leak occurred with respect to confidential documents of the WHO Expert Working Group on innovative financing for research and development. Incidents such as these tend to be dismissed as anecdotal. Nevertheless, they have been exposed in the specialised media and illustrate the non-level playing field delegates from developing countries have to operate in.

IPR negotiations are a big stake business, with money at the core. Royalties have flowed at higher rates from the LDCs of the South to the richer countries of the North, thanks to the global extension of proprietary rights facilitated by TRIPs.

Lowering the cost of critical medicines and health treatment in the South, as well as expediting marketing of alternative less-expensive generics became a bigger challenge for health ministries in needy nations thanks to the tighter standards of protection afforded to patent holders in developing markets.

TRIPs broadened patent coverage for the subject matter (making process and product pharmaceutical patents mandatory for all, rich and poor, developed and developing), and extended the duration of the corresponding economic monopoly associated with it to a minimum of 20 years. In addition, more patent prolonging devices and gimmicks were adopted at a practical level. Some immediately come to mind, and have been widely written about, such as evergreening, test data protection, patent linkages, second-use patents, polymorphs, protection for products lacking in inventive step, recounting of patent term in third countries through pipeline patents, outlawing of parallel imports, and so forth.

Parallel Tracks, Forum Shopping and the Path of Least Resistance

In other words, IPRs are very important for the big holders, and the push for more protection and stronger rights will continue. To further their agenda, big holders will opportunistically exploit the path of least resistance to treaty making, overstepping the boundaries set out by negotiating mandates agreed to by developing countries, and ignoring the specific nature of different negotiating fora, if necessary.

Even general principles of diplomatic ethics, gentlemanliness and transparency can be set-aside for the greater cause of stronger and more enforceable global monopolies, as can attest delegates from developing countries who have wandered off the beaten track

with respect to the "conventional wisdom" at the WTO, World Intellectual Property Organisation (WIPO), the WCO or the WHO.

If tasked to represent their country's interest in the TRIPs Council or if drawn into the protracted Doha Round, under an IPR-related mandate, developing country delegates must be aware that theirs is not a single-track affair.

As one confronts an attempt by members of the EU and the US to impose IP-enforcement in the agenda of the TRIPs Council, one must be aware that a group of EU-US like-minded countries are secretly making strides outside the formal multilateral framework on an Anti-Counterfeiting Trade Agreement (ACTA), much of it (or of what has been leaked of it) of dubious TRIPs consistency, and no part of it falling within the Doha Work Programme. In April 2010, participating countries disclosed the negotiating text under great pressure from civil society groups in Australia, Canada, the EU and the US. In October, a final text with few brackets was made public. In December 2010, participants announced the conclusion of negotiations and stated that the signing of the treaty was imminent. On the question of ACTA´s compatibility with the TRIPs Agreement, interesting information can be found on Canadian Professor Michael Geist´s Internet blog.

The International Medical Products Anti-Counterfeiting Taskforce (IMPACT) is another initiative to be mindful of at the WHO. Launched in 2006 by a coalition of Big Pharma companies, its stated goal was to combat all forms of production and trade in fake or substandard medicines. In practice, however, this group has paved the way for Big Pharma representatives to directly steer discussions within the WHO (though it is claimed that IMPACT is not a WHO forum as such, but an industry established group meeting within the WHO structure). Meetings are held on issues of IP enforcement that are extraneous to the UN specialised agency. For instance, there is a push for interpretations of the term "counterfeiting" (of drugs and medicines) that go beyond the TRIPs Agreement, which defines it as a trademark violation only – not a patent violation. The group also has shown a tendency to associate more affordable generic drugs with substandard medicines, thereby promoting the idea that more expensive proprietary drugs are "safe" while generic versions are "risky."

The experience of a developing country delegate indicates that one should always be mindful of parallel negotiations on the IPR agenda, which could have the effect of circumventing developing country's greater unity and knowledge of the issues in Geneva[1].

Dealing with multiple negotiating fronts at the same time is a real challenge for the less resourceful developing country negotiators, Missions and governments.

Developed countries, along with their supporting corporate constituencies, know it, and that is one reason they resort to such tactics.

The IPR agenda, thus, moves along, simultaneously at the WTO, WIPO, WHO and WCO; within bilateral free trade agreements (FTAs) negotiated with developing countries by the US or the EU (Economic Partnership Agreements - EPAs); nationally, through

bilateral cooperation or lobbying of domestic political forces; or even outside the formal multilateral framework, as a moving target convened in different cities world over, which was the strategy adopted for the secret ACTA negotiations.

Therefore, developing country delegates need to follow the full IPR agenda and not just the specific issues or committees to which they are assigned. Their political Missions in Geneva, often in charge of WIPO and WHO, must coordinate with their trade Missions in Geneva, in charge of the WTO; as well as with their home-based IPR desks. It is also useful for the Geneva Missions to consult different national constituencies, both governmental and non-governmental, and across different postings within their foreign affairs network that can inform them of bilateral IPR negotiations involving the respective host countries.

Often, it will come as a surprise to a delegate from a developing country that an entrenched position sustained in Geneva with great effort has fallen prey to a bilateral free trade agreement involving another developing country. There are a number of examples, but the objective of this paper is to alert delegates to real-life negotiation strategies, not to point fingers at particular countries that have fallen prey to them. These tactics are meant to advance the global corporate IPR agenda. Those who promote it are aware that it undermines the potential for stronger convergence among developing countries in Geneva.

IPRs might even seep into apparently unrelated areas of negotiation, such as bilateral investment protection agreements. A study by the Organization for Economic Co-operation and Development (OECD) "to clarify the extent to which and how international investment agreements (IIAs), including regional trade agreements (RTAs) with an investment chapter, increase the scope of IPR protection beyond TRIPs minimum standards"[2]can provide sufficient evidence of this practice.

The Lack of a Shared Conceptual Framework

Another big challenge in IPR negotiations for a developing country delegate is the lack of a widely shared conceptual framework from which to draw ones argument for or against different positions. One wishes there were intellectually sound and evidence-based analyses accommodating the diverse specific realities of developed and developing countries; differentiating net technology producers and innovators from the net technology importers and laggards; and the IPR haves and IPR have-nots.

In real negotiating scenarios, submissions and statements are not necessarily consistent from the legal or economic point of view. There can be some degree of manipulation of the WTO jargon at the service of unstated corporate interests from nations at the forefront of technology production and innovation.

These nations negotiate higher standards of IPR protection from the standpoint of economies detaining the better half of protected assets traded globally. They will spare no effort to convince developing countries that accepting longer and stronger monopolies for holders from a few countries in the North is good for their own economic development, however weak or unconvincing the arguments used.

Big Pharma and the Business Software Alliance (BSA), among other similar entities, have refined the art of dogmatic argument and propaganda designed to influence thinking on IPRs.

The local press, academics and other opinion formers will be recruited to shape public debate within developing countries in order to move the domestic agenda in a certain direction. These initiatives may undermine support for official positions being expressed in Geneva. Heads of IP offices may suffer great pressure from lobby groups, sometimes having to uphold institutional integrity under unfavourable conditions of resource scarcity and international cooperation dependence. If they capitulate, these institutions may start to develop agendas of their own, possibly contradicting broader foreign policy goals pursued at higher levels of government.

The negotiating jargon and logic one has to work with at the WTO has the additional burden for developing country negotiators of not being transparent to those outside immediate WTO circles, including members of the broader public that could have a stake in final outcomes. These stakeholders include the national private sector, academics, or non-governmental organisations (NGOs) and, especially, the common citizen back home who will end up bearing the consequences of less-affordable trademark medicines and delayed generics, among many other possible negative outcomes.

The WTO Microcosm: A World All its Own

More experienced, specialised or long-serving negotiators tend to better manipulate the Byzantine jargon and practice of the WTO.

Special courses for aspiring delegates from developing countries coordinated by the WTO can be ground for particular views to be expressed on what is permissible in terms of treaty interpretation, application or negotiation. During actual negotiations, members of the Secretariat are regularly called to provide their "technical" inputs or expertise. It is difficult for a delegate from a developing country to oppose these views when they are not supportive of their national negotiating positions, and I would not venture to comment on the number of times they are not.

WIPO has similar programmes, starting at even younger ages, bringing into Geneva for IP learning tours carefully selected relatives or young individuals of the national policy establishment from different developing countries. During their stay WIPO will showcase the importance of IP under very specific perspectives, probably not the ones more aligned with what the delegate of their own nationality would defend in a real negotiation scenario at the organisation.

Not unlike practices in other multilateral organisations, power is exerted by Member States with greater leverage. Higher positions in the Secretariat will tend to be occupied by nationals from developed Member States or by officials who will have ascended to those positions with a degree of consent from countries exerting greater influence. These senior members of the Secretariat may be predisposed to some form of spontaneous like-mindedness with fellow countrymen delegates or with the Missions

perceived as carrying more weight in the day-to-day business of the institution, including decisions on jobs and promotions.

In the course of real negotiations one should maintain a healthy degree of critical assessment with respect to expertise coming from members of the Secretariat, however independent they may seem or be. In the case of TRIPs, never did the mandated informal consultation process on the outstanding implementation issues, based on someone acting as "friend of the Director-General," leave the purview of a very senior US member of the Secretariat with former ties to a large biotech firm and to the pharmaceutical multinationals. It was up to him to seek progress on the TRIPs disclosure of origin requirement and on GIs. As a delegate of Brazil, I underwent one-on-one "confessionals" on these issues, and faced some very sceptical comments from this official on the viability of my government's proposals ever making it in light of staunch opposition from US and European biotech and pharmaceutical industries.

Developing country delegates will often need to resort to some degree of creative reasoning with respect to the nature and scope of mandates and treaty provisions in order to push through their interests when these are unaccounted for in the negotiating process. Defending your positions and reasoning, however *sui generis* they may seem, is a must, even for a newcomer; doing it with self-confidence and a certain gusto will make it all the more effective.

One cannot afford to wait for full mastery of issues to become outspoken or resourceful when your country's national interest is at stake. NGOs and the press (which are unfortunately denied greater access to the negotiating process and to key documentation at the WTO), along with the South Centre and other organisations better equipped to think from the standpoint of less developed countries and more vulnerable societies, can be a great source of support for a developing country negotiator.

The Demise of Neo-liberalism, and the Discontinued Body of Independent Theoretical Work in Support of the South

Turning back to the issue of a conceptual framework, it is regrettable that for a number of years from the 1980s up to the international financial crisis of 2008 much of the accumulated corpus of independent thinking on economic development and trade produced by such agencies as UNCTAD and the Economic Commissions of the UN was discontinued, deliberately discredited or simply faded. This happened during the prime years of the "Washington Consensus," which left little room for thinking outside the neoliberal box.

The potential for self-destruction in the wake of neo-liberalism was more widely acknowledged when systemic failure stroke at the core of the international system, hitting the financial markets of the major economies.

Responses to the crisis by the neoliberal formulators themselves have been an ABC of anti-Washington consensus policies, including fiscal stimulus packages, expansion of the monetary base, state-funded support for market-failed private banks and financial

institutions, induced competitive monetary devaluations and so forth. Changing the rules of the game when it is your turn to comply is a privilege only the masters of the playing field can afford.

The recent trend of competitive exchange rate devaluations to which some of the key major economies have resorted in their reactions to the crisis has had the effect of eroding significant margins of market access that were painstakingly negotiated during years of multilateral trade rounds under the GATT 47 and the WTO.

Calculations for Brazil indicate that tariffs for certain sensitive sectors would now have to be raised to 180 percent *ad valorem* simply to compensate for devaluation of international reserve currencies *vis-à-vis* the Real, thereby re-establishing pre-2008 margins of effective protection. This is hugely detrimental to industry in developing countries that have struggled to achieve a reasonable degree of macroeconomic stability, and thereby managed to uphold with sacrifice the value of their national currencies in previous recessions and throughout the 2008 international financial meltdown.

While the impact of currency manipulation on market access can be many times superior to those of tariff reduction commitments, IPRs are essentially unaffected by them. After the 2008 debacle, the value of royalty remittances from the more stable economies of the South to the devalued economies of the North will in fact increase along with the changing exchange rate differentials, thereby raising returns on marketing of IPR assets in developing and emerging economies.

This will come as yet another unexpected windfall for the big IPR holders of the North: TRIPs will have extended the strength and duration of their IPRs "South of the border"; while the 2008 crises will have raised the value of their royalty remittances thanks to competitive exchange rate devaluations of the international reserve currencies.

WTO courses for developing country officials, however useful to provide needed introduction to the technicalities of negotiations, are no substitute for a reflection from the South on the big issues of development and the trade-offs of complex multilateral IPR rounds.

Developing country TRIPs negotiators should revisit older material from the Economic Commission for Latin America and the Caribbean (ECLAC), in particular the writings of Argentinean Raúl Prebish and Brazilian Celso Furtado, founders of an autonomous branch of development economics. Much of their output is currently being revisited in light of challenges posed to developing countries in their renewed quest for technology absorption, production and specialisation.

Prebish expressed in clear terms the dangers of developing countries settling into the role of global producers of low value-added raw materials or specialising in low-yield low-technology agricultural production systems.

Criticising the conceptual base on which the international rules-based trading system evolved as per the GATT 47, Furtado emphasised that developing countries needed to

guide their international positions on the basis of "dynamic comparative advantages," not static ones.

This meant questioning all national and international norms that impose *ex-ante* restrictions on options available to less advanced countries in their policies for economic and industrial development.

Obviously, accepting changes to the TRIPs Agreement that unduly strengthen IPRs concentrated in the hands of a few "haves" while offering no technological trade-off to the IPR "have-nots" (developing nations) would be a non-starter from the traditional UN Economic Commission for Latin America and the Caribbean (CEPAL) point of view.

Some of the reasoning behind early CEPAL thinking has been recaptured, more recently, by the "policy space" concept at the center of the United Nations Conference on Trade and Development (UNCTAD XI São Paulo Consensus adopted in 2004 - an opportune tribute to Furtado and Prebish).

Writings from the 1970s by authors such as Carlos Correa, published under an UNCTAD series on IP and transfer of technology, should be re-edited and made more accessible. Correa knew that contrary to what big business may hold, IPR protection is not a moral issue, and is does not promote technological development where conditions for it do not exist; it is a negotiated term for access to and development of technology.

Depending on the particular situation, one can argue that IPRs actually hamper competition and artificially dictate return on investment and profit margins without necessarily expressing any particular correlation to cost or conditions of production and trade. A non-disclosed amount of resources invested in research and development (R&D) (pharmaceutical companies tend to assert very high investment numbers in R&D, but never allow their accounting books to be publicly scrutinised) is supposed to be legitimately recovered by the innovative entrepreneur thanks to the IP system, but in today's world of global corporate dominance and asymmetric markets, such claims fall outside the realm of the verifiable truth.

It must be said that the most successful Brazilian technology based industries emerged from a benign combination of national political consensus and state activism. The Brazilian IPR system (in fact still of little significance for the domestic industry) had little to do with their creation and subsequent evolution.

This is true for small giants, such as Petrobras, one of the world's largest deep-sea oil drilling companies; EMBRAER, producer of business jets, military training planes and regional aircrafts and Embrapa, the agricultural research institute responsible for Brazil becoming one of the world's largest producers of grain and livestock. All of them put together will hold no more than a handful of patents, though presumably now that they are big and have consolidated in their respective fields, patent numbers may start to become a matter of interest or concern.

Making a quick jump of over some 50 years since CEPAL started with Prebish and Furtado, we can find in Nobel Laureate Joseph Stiglitz (among other similar analysts and policy formulators) a welcome renewal in independent economic theorists.

In a presentation in 2005, Stiglitz underlined the non-temporary nature of exclusive rights conferred to IP holders by a patent. Although TRIPS establishes 20 years as the minimum duration, the power of market domination conferred to the holder by a patent monopoly can last much longer, due to a combination of first entrant advantages and an acquired capacity to influence the conditions and pace for the marketing of further innovations on competing products.

Stiglitz's "Initiative for Policy Dialogue," launched in July 2000, provides great insights for developing country delegates wishing to unveil the intricacies of IPRs from a less self-interested corporate perspective. One of the task forces created under the initiative focuses on intellectual property and can be accessed at http://policydialogue.org.

Changing TRIPs from Outside the WTO

Corporate IPR agendas pushed by the captured governments of the developed countries will move forward relentlessly in several fronts and fora simultaneously. This requires developing country delegates to be informed and aware of different negotiating processes and their interrelationships, lest they end up focusing only on a Doha Round IPR debate while deep action is going on elsewhere.

It is therefore difficult to focus this particular article on TRIPs alone, when much of what is advancing with respect to IPRs, that is substantive, currently falls outside of the Doha framework.

These processes include the ACTA – the shadowy parallel rewriting of TRIPs Part-III, mentioned above, that may hamper international trade in legitimate goods from developing countries through extraterritorial extensions of IPRs imposed as border measures.[3]

There is constant pressure at the WIPO in favour of the transnational corporate dream of a global patent. Actually, it would be more precise to describe it as a patent better to enforce in less-safeguarded foreign developing countries and emerging economies than in the more IP-savvy markets of developed countries.

Differences of substance among the OECD members – first-to-file versus first-to-invent, different benchmarks for assessing patentability, different local working requirements applied to publicly funded inventions, different litigation and judicial practices and culture – provide them ample "policy space" to tweak their industrial policies. This means developed countries usually retain room to manoeuvre their way out of a prospective global patent "straight jacket"; not so developing countries, whose national patent systems are usually not as sophisticated or complex.

There is the WIPO "digital agenda," started right after the adoption of the Uruguay Round package, which led to two agreements that provide stronger exclusive rights to

copyright holders than those previously protected under the more balanced Bern Convention of 1886 (revised several times thereafter).

It was alleged that new developments in digital technology required updating the Bern standards to safeguard holders' rights (not necessarily those of authors or artists; but those of the transnational entertainment and sports industries) against unauthorised copies of their products in the digital format.

In this apparently innocent updating of older legal instruments, there was much to be gained by big business and much to be lost by common citizens, especially those in developing countries where the public domain and exceptions and limitations to rights are less safeguarded.

As an example, one can point to the legal endorsement by the WIPO 1996 digital treaties[4] of the so-called technological protection measures (TPMs). Such "updated" provisions had the effect of reducing citizens' access to private copies of music, books, teaching materials, video excerpts and a plethora of other information sources.

Circumventing TPMs (technology embedded in digital products to prevent copies), whether the product is actually protected or not in a particular national jurisdiction, was essentially criminalised by the WIPO 1996 treaties, in a move that runs counter to the expected "democratisation" of information in the age of knowledge societies.

Copyrights are being pushed, universally, from an already lavish "author's life plus 50 years" of the Bern Convention, to "author's life plus 70 years"[5]. Exceptions and limitations to rights, several of them found in domestic laws of developed countries, such as the US fair use exception, were not included in the new WIPO treaties. Had those exceptions and limitations been made universal or mandatory for all WIPO members their widespread adoption would have protected individual rights and social welfare in developing countries against encroachment from the higher levels of IPR protection afforded to holders.

The critically important 45 recommendations adopted by the WIPO General Assembly in 2007, which make up the "WIPO Development agenda," can provide a platform for rebalancing IPRs from the perspective of developing countries' needs and priorities. They set negotiating principles and benchmarks that are relevant for any future IPR substantive treaty-making exercise, whether at WIPO or in the WTO.

What to Expect at the WTO/Doha Negotiating Table

TRIPs is the only Uruguay Round Agreement amended thus far. This process was finalised by a decision of the General Council (functioning as Ministerial Conference) in December 2005. The goal was to make permanent in the TRIPs Agreement the "temporary" waiver to Article 31 (f) adopted as a result of the Ministerial Declaration on TRIPs and Public Health in 2003[6].

The main purpose of the waiver was to modify the rules of Article 31 in the Agreement, which authorised countries to issue a compulsory license for the manufacturing of

patented products, if they considered that the patent-holding company was charging unreasonably high prices for them. The Article however provided that such licenses should be given predominantly for supplying the domestic market. The rules therefore prevented production of generic drugs under a compulsory license for export to third markets. The temporary waiver from those rules adopted in 2003, which subsequently became a permanent amendment to the TRIPs Agreement, provided that countries that had manufacturing capacities to produce generic versions could grant compulsory licenses to their pharmaceutical companies to produce cheaper generic versions for supply to developing countries that did not have manufacturing capacities to produce them. The waiver, however, laid down strict conditions with a view to ensuring such generic versions were not diverted for sale in other markets.

It is interesting to note in this context that when the strenuous negotiations on the text of the waiver were nearing completion, some of the developed countries that were pressing for additional stricter conditions (Pharma inspired) insisted that these tougher conditions should at least be read out by the Chairman. The waiver was adopted and the Chairman read out his statement. But there was no formal link between one action and the other. This detail is very important. Later on, after these decisions were taken and the official documentation was issued, delegates who tried to obtain the decision document from the WTO website found out, to their astonishment, that the Secretariat, on its own initiative, had inserted an "asterisk" into document WT/L/540 and Corr. 1 to indicate that the waiver was subject to the statement read out by the Chairman[7]. This constituted serious manipulation of a formal agreement by Member States, and a heavy handed attempt to distort WTO law and practice, as from the legal point of view a waiver is considered to be a legally binding stand-alone document.

On the negotiation of TRIPs issues in the Doha "development" Round, one must demystify what many in Geneva would describe as the extremely complex and technical nature of the IPR mandates. This view is often raised as a barrier to the non-partisan observer giving his or her objective opinion against the types of bargains one could actually strike within the given TRIPs/WTO framework as a matter of fact.

It is true in many respects that the devil is in the details. But it has become strikingly clear as the Doha Round progresses towards prolonged stagnation that it is the political will and the capacity to muscle in economic and political pressure that pushes the process forward. Therefore, the knowledge of treaty intricacies we are often led to invest in may not be enough, on its own, to define the outcomes of negotiations.

Self-referential specialisation in the WTO tends to legitimise the broader, highly prescriptive, highly managed framework for global trade. One can easily get lost in the forest for gazing too vigorously at the particulars of specific trees.

TRIPs itself was not considered a pro-development or pro-developing country outcome. Its conclusion came at the end of the Uruguay Round's single undertaking and worked as an inducement for the adoption in Marrakech, in April 1994, of the full package of treaties, including the Agreement establishing the WTO.

When documents of such legal intrusiveness are in order one can never be careful enough in submitting them for prior in-depth analysis by specialised national institutions or socially representative bodies.

Countries should not join in a leap of faith, however enthusiastic they may have been at the time with the neoliberal wave (those were the heydays of the Washington Consensus). For some developing countries, however, it might have been difficult to resist pressure from the national business constituencies' narrower, short-term trade interests, which could be caricatured as follows – tariff reductions for a couple of low-value raw products sold abroad by the business elite of some developing country against critical extensions of market monopolies for high-value IPR-embedded products for the globalised corporations of the developed ones.

IP is not a short-term issue. A country has to be able to plan years ahead to know what it is doing when discussing the legal framework for the protection of IPRs. It must be in a position to manage complex transversal innovation public policies, that require the articulation of public finance, tax incentives for research, funding of labs and universities, adequate educational curricula emphasising the more expensive science courses, anti brain-drain policies and laws, in addition to an IP culture, which many in the developing world have not yet acquired or developed. In a developing country, it is easier to be a secondary purchaser of technology from the North than to run the risk, against many odds locally, to innovate, produce and attempt to market your own.

It is not the purpose of this paper to judge the Uruguay Round outcome in light of other possible developments. But a significant lack of pro-development content was widely recognised shortly thereafter, when the difficulties of internalising the legally binding elements of those lengthy documents arose.

The impact of the TRIPs "minimum" standards was much more of a burden for non-innovating developing countries than they were for the developed ones. Basically, those standards globalised one-size-fits-all solutions for the protection of IPRs, ignoring the fundamental lack of balance between IP-assets haves and have-nots.

The consequences were not just theoretical. More affordable generics for treating HIV/AIDS and other life-threatening illnesses in poor developing countries, as well as patent-expired trademarked drugs, suddenly were out of reach in many national societies, thanks to the TRIPs extension/reinstatement of enforceable monopolies in third markets.

There were in fact serious "implementation issues" for developing countries, and a listing of them was actually spelled out in the post-Uruguay Round period of WTO discussions, during the run-up to the launching of the Doha "development" Round in 2001 – more than 100 of them. At that point, many developing country delegates believed it was high time for those implementations issues to be addressed, especially the ones left "outstanding."

Unable to resist and perhaps focussing their priorities in other areas, developing countries went along with an extremely ambiguous mandate (another one of those WTO sleights

of hand) for addressing the so-called outstanding implementation issues as part of the Doha work programme.

One of them was of major interest to developing countries: the relationship between the TRIPs Agreement and the Convention on Biological Diversity (CBD). For developing countries, this was supposed to be an opportunity to discuss rampant global bio-piracy (by scientific institutions, multinational companies and laboratories from the North) preying on the vulnerable, though unique and abundant biodiversity riches located mainly in the South.

For once, the possibility of the WTO TRIPs Agreement protecting an asset widely held by many in the developing South from misappropriation through undisclosed patenting of bio-pirated subject matter in the developed North held the promise of a concrete deliverable of interest to a majority of developing countries.

Unfortunately, much negotiating time has been spent since 2001 on sterile discussions as to whether the negotiating mandate for a disclosure of origin requirement in TRIPs is part of the Doha Round's single undertaking, or just an issue on the regular agenda of the TRIPs Council, where it can be left to stagnate through years of uncommitted back and forth.

The mandate for TRIPs and CBD should have been delivered to a TRIPs Council in "special session" where negotiations under the Doha mandate are taking place in order for it to be irrefutably an integral part of the "single undertaking," thus obliging all parties to engage. But, the language churned out in the Doha Declaration was not clear enough to this effect, so countries have to make additional efforts simply to get a straightforward discussion going.

To overcome such obstacles, a group of developing countries together with European countries interested in the protection of GIs and less resistant to the idea of a TRIPs amendment on disclosure of origin of generic resources (the EU and Switzerland) joined forces. Together, they managed to bridge one of the challenging North-South divides in the TRIPs Doha discussions by putting forth the breakthrough submission TN/C/W/52, of July, 19, 2008.

The proposal reflected one of the few instances during the course of the Doha Round when a significant part of the North met a significant part of the South to converge on substance and process in three different but related issues, presenting draft modalities for their parallel negotiation as part of the Doha Round single undertaking:

a) the establishment of a registry for wines and spirits;
b) a mandatory requirement in TRIPS for the disclosure of origin of genetic resources and/or associated traditional knowledge; and
c) the extension of GI protection under Article 23 of TRIPs to all products (not just wines and spirits).

Developments taking place after the submission was presented are captured more or less comprehensively in the reports put out by Ambassador Trevor Clark of Barbados

(TN/IP/19, of November, 25, 2009), and Ambassador Darlington Mwape of Zambia (TN/IP/20, of March, 22, 2010).

Over 100 countries co-sponsored document TN/C/W52. Few other submissions enjoy such broad-based support. In it, a balanced trade-off was pre-negotiated among over two-thirds of the WTO membership, setting the baseline for moving negotiations towards a final outcome with respect to the GI register, the TRIPs disclosure of origin requirement, and the GI extension.

Negotiating parameters are fairly self-explanatory in the draft modalities text contained in document W/52, though one must never underestimate the capacity of the opposing minority to filibuster by endlessly splitting hairs over technicalities, especially when the IP-obsessed corporations of the majors, their infatigable associations and federations, close ranks with them.

Tackling the TRIPs Mandates

The TRIPs negotiating mandates for the Doha Round are broken down into parallel formal tracks, making it more difficult to negotiate a package deal that could promote a bargain between (a) a clear majority of developing countries dissatisfied with the little that was achieved in their national interest through the Uruguay Round TRIPs Agreement in general. In particular they resent the absence of clauses that would prevent misappropriation of their biodiversity through patenting and discourage the use of traditional knowledge associated with those increasingly valuable resources without the prior informed consent of holder communities and benefit sharing, in accordance with applicable national legislations or an international regime under the CBD; (b) European countries wishing to secure better protection for GIs through a multilateral system of notification and registration, and generally wanting to extend the higher protection afforded by Article 23 of TRIPs to products other than wines and spirits (GI extension); and (c) a minority group of mostly "New World" developed countries, amalgamated around the US's anti-GI extension position, which for strategic purposes tend to rally behind the entrenched position of the US IP-based industry, ideologically opposed to an Amendment to TRIPs for a biodiversity disclosure of origin requirement. The United States resists engaging in a more open, substance-driven debate on TRIPs reforms considered either to "weaken" the patent system in favour of bio-diverse countries (mostly developing countries) or to increase protection for products better known the world over for their European origins, and thereby coveted on the understanding that their brand name provides a reliable indication as to the true geographic origin of their production in accordance with age-old traditional manufacturing techniques and local conditions intrinsic to the quality expected of them.

Paragraph 12 of the Doha Work programme on implementation related issues and concerns makes a subtle procedural distinction between issues that "have been provided a specific negotiating mandate in the Declaration" and those to be dealt with "as a matter of priority by the relevant WTO bodies." This wording has been the object of much debate and polarisation since the Round was launched in 2001; and, in fact, it was a last minute formulation that left the outstanding implementation issues of interest to developing countries on a separate negotiating track as agenda items for regular meetings

of the respective WTO bodies to which they are ascribed. The relationship between the TRIPs Agreement and the CBD, which provides the basis for discussions on Article 27.3.b of TRIPs (protection of plant varieties and other life forms) and for the proposal on a TRIPs disclosure of origin requirement are formally allocated to the regular sessions of the TRIPs Council, so that members opposing these issues rely on the wording of Doha Declaration paragraph 12 to refuse taking it up during a TRIPs Council meeting in Special Session (jargon for a session that directly negotiates matters within the Doha Round single undertaking). The same applies to GI extension. But the multilateral system of notification and registry of GIs for wines and spirits was subjected to a specific negotiated mandate and therefore is the only issue accepted by all as an integral part of the Doha Round single undertaking.

One way to overcome this break-up of the TRIPs mandates was explored by countries that have offensive interests in the TRIPs mandates indicated in the (a) and (b) categories above: that is, the Brazil, India, the EU, Switzerland and most developing countries from Africa, Latin America and Asia, totalling more than 108 members out of 153. In 2008, this group first entered into an informal substance-driven process of approximation among their respective positions on the GI register, on the disclosure of origin requirement and on GI extension. The question of mandates was temporarily set aside in favour of reaching common ground among over two thirds of the WTO membership and making progress. The outcome of this groundbreaking initiative was formalised as document TN/C/W52, of July, 19, 2008. Thanks to this effort, the TRIPs issues gained much greater traction and were discussed at higher levels in several Green Room discussions led by the Director-General Pascal Lamy himself, as per the mandate entrusted to him under the 2005 Hong Kong Ministerial Declaration. If an understanding can be reached that makes the Doha Round move forward taking on board the position of 108 members, there are ways to overcome the "parallel mandates problems" by a decision of the Trade Negotiations Committee to take up the issues for text-based negotiations under the Doha Round single undertaking process.

Basic Elements of Document W/52

GI REGISTER

Proposed modalities for the GI register appear as the first of the three TRIPs related issues in document W/52, in recognition of the fact that this issue possesses the clearest negotiating mandate, as per Article 23.4 of the TRIPs Agreement.

The first paragraph emphasises that the proposal is valid for wines and spirits only. Whether or not the registry would apply to other products is a decision that would be considered in the context of the paragraph for modalities on GI extension. The register would be multilateral (meaning non-voluntary). The system of GI notification would be straightforward and automatic, and the WTO Secretariat would not be required to verify validity of information provided. The information to be included and its format would be defined in the course of drafting the final legal text.

The second paragraph of submission W/52 stipulates an obligation of national authorities to consult the multilateral registry with the WTO and to take it into account when

deciding on registration of trademarks and GIs in accordance with their domestic procedures. This solution is similar to the one in the so-called Joint Proposal.

The sentences that follow define the main substantive effects of the register: (a) in the absence of proof to the contrary, the presence of a GI in the WTO multilateral register will constitute *prima facie* evidence that it meets the definition of a GI in accordance with Article 21.1 of TRIPs; (b) claims to the effect that a name is or has become generic, within the exceptions provided for by TRIPs Article 24.6, would have to be "substantiated." These two requirements would increase the basis for actions at the domestic level within the national jurisdiction of WTO members with a view to protecting GIs. They are clearly less intrusive options than the one first put forth by the EU, which had the aim of establishing a "rebuttable presumption" of validity of any GI included in the register without opposition within a certain time frame. Since the EU´s baseline position was softened, it seemed no longer necessary to create a time frame for opposition to notifications.

TRIPs and CBD: "Disclosure Requirement"

In submission W/52 the EU and Switzerland took the critical step of accepting an amendment to the TRIPS Agreement, with a view to establishing a mandatory requirement to disclose the country providing/source of genetic resources and/or "associated traditional knowledge" used in an invention claiming patent protection. It is proposed that a functional legal definition would have to be agreed for the term "associated traditional knowledge," so as to promote greater judicial predictability. The term "source," used in Switzerland, but not in the CBD (based on the notion of sovereignty and, therefore, on the idea of "country providing"), would be more flexible and probably find greater acceptance.

The sensitive issue of the legal effects of lack of compliance with the mandatory disclosure requirement would be relegated to the pre-grant phase of the patent procedure, and the sanction would be interruption of administrative processing of the patent claim until the requirement is fulfilled. Revocation of patents for lack of compliance with the disclosure requirement is not therefore included in the proposal, but the submission states the possibility of additional elements contained in members' proposals being raised and considered, "such as PIC (Prior Informed Consent) and ABS (Access and Benefit Sharing) as an integral part of the disclosure requirement and post grant sanctions." The language does not prejudge the outcome of negotiations on these elements.

As the GI register already falls under the purview of the TRIPs Council in special session, a reference was made to "intensification of negotiations" in that format. But for the disclosure requirement and GI extension, still discussed under the TRIPs Council in regular sessions, a phrase was added to elucidate that "text based negotiations shall be undertaken, in Special Sessions of the TRIPs Council, and as an integral part of the Single Undertaking," making it clear that the three elements of the W/52 submissions would be negotiated as a package, notwithstanding the different interpretations members may have on the nature of their respective mandates when the Doha Round was launched in 2001.

GI Extension

The proposed draft modalities text for GI extension is quite straightforward, and simply states that members agree to extend the protection of Article 23 of the TRIPs Agreement to GIs for all products, including the extension of the register, as well as to apply to these the exceptions provided in Article 24 of the TRIPs Agreement *mutatis mutandis*.

Special and Differential Treatment

A catch-all phrase was added at the end of the W/52 submission stating that "Special and Differential treatment shall be an integral part of negotiations in the three areas above, as well as special measures in favor of developing countries and in particular least-developed countries."

Opponents First Informal Reaction to Submission W/52

The group that has taken a defensive position on the TRIPs issues remained opposed to the idea of parallelism among the multilateral system of notification and registry of GIs, the TRIPs disclosure of origin requirement, and GI extension, as proposed in submission TN/C/W52. In their first informal reaction, they articulated a non-paper in order to better reflect their position in the report that was to be prepared by WTO Deputy Director-General Rufus Yerxa on implementation issues, in 2008:

> **Non-paper on GI-extension and TRIPs-CBD as Outstanding Implementation Issues**
>
> Communication from Australia, Canada, Chile, the Republic of Korea, Mexico, New Zealand, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the US
>
> We are WTO Members with significant interests in intellectual property issues. Among us are developed and developing countries, representing a broad geographical diversity and substantial proportion of world trade, particularly in products potentially affected by TRIPs proposals under discussion. We are united by a joint concern that the current delicate stage in the DDA negotiations should not be unnecessarily disrupted by efforts to rush, revisit, reinterpret or change our existing negotiating mandates. On May, 30, at a meeting organised by Deputy Director General Yerxa pursuant to the Director General's authority under paragraph 39 of the Hong Kong Declaration, Switzerland introduced a "draft text" in the form of a "non-paper." Dated May, 26, the paper was submitted by "proponents of TRIPs issues"[(1)] and supported at the meeting by a number of delegations. The paper requests that reports to the Trade Negotiating Committee reflect the agreement of its authors to include the issues of "GI Register, GI extension and TRIPs disclosure requirement" as "part of the horizontal process in order to have modality texts that reflect Ministerial agreement on the key parameters for negotiating final draft legal texts as part of the single undertaking" for each of these issues. We, like others who spoke at the meeting, wish to express our strong opposition to this proposal, and our conviction that it would substantially set back efforts to arrive at a viable way forward for the Doha

negotiations. We reject the artificial parallelism in the May, 26 Paper. Each of the TRIPs issues cited in the non-paper has its own terms of reference (2), and particular subject matter. Many technical issues remain, and the extent and interest of Members in the content and potential outcomes for each issue varies considerably. For example, on the issue of extension, even basic objectives are far apart, discussions have revealed no consensus, and the suggested draft modalities text presented by the *demandeurs* prejudges an outcome. We understand that some Members require assurances that matters such as the TRIPs Implementation issues will not be left behind. However, asking Ministers, in today's highly sensitive context, to address these distinct, divisive and highly technical TRIPs issues in the way suggested in the 26 May paper, goes well beyond such assurances.

Note:

(1) This description is inaccurate as there are delegations that have made formal proposals on "TRIPs issues," but who do not support the May, 26 paper.

(2) We note that "the GI Register" does not fall within the purview of the Director General's authority under paragraph 39 of the Hong Kong Declaration, has a distinct mandate under paragraph 18 of the Doha Declaration and Art. 23.4 of the TRIPs Agreement, and has been the sole subject of negotiations in the TRIPs Special Session. The sponsors of this statement are fully committed to fulfilling the Doha mandate on the GI register for wines and spirits as part of the Doha Single Undertaking.

Final Comments

One must bear in mind that the more radical elements of the proponents' original positions on the three issues encompassed by document W/52 were smoothed over among its 108 supporters so that compromise could be reached in a commendable display of constructive flexibility.

Document TN/C/W/52 was negotiated in Geneva basically among delegates of Brazil, the EU, India, Switzerland, representatives of the African, Caribbean, and Pacific (ACP) and the African Group, and was thereafter cleared by the respective capitals. Additional co-sponsors were added subsequently. The sheer critical mass of support it received demonstrated that the draft modalities text for the three TRIPs issues could not continue to be discussed only at the technical level. DG Pascal Lamy decided in mid-2008 to include these issues in Green Room consultations on draft horizontal modalities for the Ministerial Meeting in July of that year. Consultations were presided over by the Director General himself initially, then by the Foreign Minister of Norway, Jonas Store, and later, for technical clarification purposes, by former Head of the TRIPs Division at the WTO, Adrien Otten, who coordinated a couple of sessions. After the Ministerial Meeting of July 2008 broke down for reasons to do with agriculture and NAMA, the Doha Round as a whole entered into a much less promising phase, which of course was not helpful to the cause of TRIPs issues. Nevertheless, the GI register, TRIPs and CBD and GI extension are still on the table and have been the object of ongoing activity, as is clearly informed

in the DG´s report to the General Council and to the Trade Negotiations Committee of April, 21, 2011, documents T/GC/W/633 and TN/C/W/61 (document TN/IP/21, also of April, 21, 2011, contains the report of the Chair of the TRIPS Council in Special Session on the GI register).

Even though there is still no consensus on negotiating a disclosure requirement as an integral part of the Doha single undertaking (or on doing it through an amendment to TRIPs), the mere fact that over 100 members are willing to go along with it bodes well for negotiations in this area of critical importance to megabiodiverse and traditional knowledge (TK) endowed developing countries.

The critical mass of support reflected in W/52 has already produced the effect of raising the three TRIPs-related issues to the level of Green Room, DG-led informal consultations. Ambassadors were forced to better acquaint themselves with issues that were, until then, the concern of second-ranking Geneva-based negotiators only. To the extent that the Doha Gordian knot is at some point cut loose, it would be foolish not to prepare for the possibility of an outcome on the basis of W/52.

"Specialised work" hasn't stopped. During winter of 2011 in the northern hemisphere, much was made of a breakthrough in respect of the GI register negotiations. The announcement on the WTO website of January 13 reads: "For the first time in over 13 years of talks, WTO intellectual property negotiators have started work on producing a single draft text for setting up a multilateral geographical indications register for wines and spirits. A draft on notification — the first of six broad topics of the system to be discussed — was circulated by chairperson Darlington Mwape at an informal meeting of the full membership on January, 13, 2011". Interestingly, positions on this issue for two thirds of the membership are defined by their agreed modalities in the W/52 document.

Progress on the registry should be a call to arms for the broad W/52 grouping of nations. They must remain united and stick to the essential: a requirement to disclose genetic resources and/or associated TK in patent claims must be made obligatory for all WTO Members through a TRIPs amendment containing elements spelled out in the W/52 draft modalities text; a GI register, along the lines of W/52 should be acceptable, together with the idea of extending GI protection for products beyond wines and spirits.

The devil is in the details and there is much to negotiate. But, the lack of outcome on proposals supported by an absolute majority of WTO members would really make the organisation and its negotiating procedures look bad. From the perspective of developing country negotiators, it would constitute a major blow to the "development" component so loudly proclaimed as the Doha Round guiding principle.

Endnotes

1 See 'WIPO: India Rejects Outcome of Casablanca Patent Harmonisation Meeting', Bridges Weekly, 13 April 2005, http://ictsd.org/i/ip/39678/, and 'General Assembly Bypassed in Informal WIPO Talks on Patent Harmonisation', Bridges Weekly, February, 23, 2005, http://ictsd.org/i/ip/39684/. Both articles refer to the Casablanca informal consultations of February 2005, convened by the Director-General of WIPO with a group of representatives acting on their own behalf, cherry-picked on the basis of their willingness to support a "global patent" deal within WIPO´s Standing Committee on the Law of Patents. The Brazilian invitee was the only member not aligned with the DG´s proposal, as was made clear in WIPO press update 241, of February, 18, 2005, http://www.wipo.int/pressroom/en/prdocs/2005/wipo_upd_2005_241.html.

2 Liberti, L. 2010. Intellectual Property Rights in International Investment Agreements, OECD Working Papers on International Investment, No. 2010/1, http://www.oecd.org/document/24/0,3343,en_2649_33783766_45219352_1_1_1_34529562,00.html.

3 In December 2008 Dutch customs officials seized a shipment of the generic pharmaceutical product Losartan used to treat high blood pressure. Produced in India, the product was in transit for Brazil. The active principle is considered generic both in India and in Brazil, but was allegedly under patent protection in Europe. The seizure defies the national territorial jurisdiction of the patent system, and one could claim that it ignores TRIPs Part III, Article 41.1, which states members shall avoid the creation of barriers to legitimate trade. Brazil and India requested formal consultations with the EC and the Netherlands as a first step in a dispute settlement procedure regarding the violation of GATT 94 and of the TRIPs Agreement.

4 WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).

5 Extension of copyright protection term in Europe was achieved through European Council Directive 93/98/EEC of October, 29, 1993 harmonising the term of protection of copyright and certain related rights, and in the USA through the Sonny Bono Copyright Term Extension Act of 1998, adopted on October, 27, 1998.

6 WTO document WT/MIN(01)/DEC/2.

7 See WTO document WT/L/540, September, 02, 2003, "Decision of August, 30, 2003*". The footnote associated with the asterisk added onto the title of the Decision states: "This Decision was adopted by the General Council in the light of a statement read out by the Chairman, which can be found in JOB (03)/177. This statement will be reproduced in the minutes of the General Council to be issued as WT/GC/M/82."