TRIPS issues in the WTO negotiations should not remain a missed opportunity

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It may not surprise those who have been in this game quite long that the issues of GIs (geographical indications) extension and disclosure have been on the agenda of the WTO (World Trade Organisation) Council for TRIPS (Trade-related Aspects of Intellectual Property Rights) since 1998, much before the ongoing Doha Round were even conceptualised. The 19th July 2008 proposal from the proponents, with support of Croatia and Georgia added last week, adds up to more than 110 WTO Members by one count. That is a two-thirds majority. It is unfortunate, however, that despite the long legacy and this large support, the issues are not even a part of the discussions which are going on in Geneva. It is time that this constituency, which is not limited to developing countries anymore, asserts itself and moves the issues beyond the current quagmire.

The WTO TRIPS Agreement provides two levels of protection to geographical indications: a higher level for wines and spirits, and a lower level for rest of the products. Most developing countries do not have any wines and spirits to sell; they sell agricultural and artisanal products, to name two.

A small group of developing countries had sought for negotiations more than a decade back to amend the TRIPS Agreement to get this higher level of protection for all products. They are still at it, but as part of a much larger group.

The TRIPS Agreement treats patents as private rights of individuals, which are enforceable through legislative measures that every WTO Member is obliged to install. The United Nations Convention on Biological Diversity (CBD) treats biological resources and traditional knowledge (TK) associated with them as sovereign rights of nations, and obliges all its signatories to ensure prior informed consent (PIC) for access to these resources and TK, and to ensure that access to and benefit sharing of the commercial utilisation of these resources (ABS) is fair and equitable. This is not necessarily possible if a private patent right holder, armed by her/his country's TRIPS obligation, purloins some resource or knowledge from another country and uses it in an invention on which s/he wants a patent. The country may have to grant it despite such bio-piracy.

To stem such bio-piracy and to provide some benefits to the owners of such resources and TK, a small group of developing countries sought negotiations, again a decade back, to amend the TRIPS Agreement to insert in it –

- a requirement on patent applicants to disclose any biological resource or associated TK used in their invention;
- to obtain PIC from the country or source of origin; and
- to ensure that benefits from their commercial utilization are shared equitably with the owners where national ABS regimes so warrant.

They now have support of a much larger group, including some developed countries which were earlier opposing them.

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The opponents of both these proposals are in minority (not more than 10 have ever visibly opposed the proponents) of the WTO membership whose businesses use geographical names of products traceable to their original countries in Europe and/or those which have strong bio-technological and pharmaceutical industries that do not want their current practice of using biological resources and associated TK without a check on what they pay back to the owners. They have taken a stand that these are not on the negotiating mandate in the Doha Round.

In his report to the Trade Negotiations Committee on 9th June 2008 the Director-General of the WTO assessed common grounds on some key underlying objectives: that TRIPS and CBD should be implemented in a mutually supported way, that erroneous patents should be avoided, and that national ABS regimes should be complied with.

On the issue of extension of GIs, he did not attempt to lay out any common ground. And in the run up to the Mini-Ministerial last week, an overwhelming majority of WTO Members asked for inclusion of these issues as part of the horizontal process in order to have modalities texts on them too like on agriculture and NAMA (non-agricultural market access). They wanted negotiations to start, if not end, by the time the Mini-Ministerial ended. The draft modalities texts proposed by them preserved enough space for both sides to argue out their concerns and get them reflected in the final legal text at the end of the negotiations. On 23rd July the WTO DG requested Norwegian Foreign Minister Jonas Gahr Støre to undertake consultations with all interested parties. By 26th July, word was out that he is getting nowhere. On Monday, the 28th of July, he reported continuation of consultations but with no headway to report. Ministers are expected to leave Geneva by 31st July.

It is important that ministers are agreed on these two issues as part of the ongoing Mini-Ministerial; otherwise developing countries would have lost out on one more issue at the end of this week.

Developing countries should recall to Minister Store as well as to the opponents that the implementation-related issues and concerns of developing countries from the Uruguay Round era is the first item of the negotiating mandate in Paragraph 12 of the Doha Ministerial Declaration. They are characterised of utmost importance, a term not used for any other area. It goes on to say that "We agree that negotiations on outstanding implementation issues shall be an integral part of the Work Programme we are establishing..."

The decision on implementation-related issues and concerns, also adopted at Doha, reiterates the agreement of Ministers that outstanding implementation issues be addressed in accordance with Paragraph 12 of the Doha Declaration, and annexes document Job(01)/152/Rev.1, which in turn includes both these issues. It is a lame excuse after such a clear mandate to argue that there is no negotiating mandate on them. It is an excuse basically to renege on the promise to negotiate on outstanding implementation issues. Ministers should take responsibility in this week to ensure that their commitment given in 2001 is not completely ignored just because a handful of opponents do not find any commercial benefit for them. They should not allow the development component of the Round to be scuttled by a few.

It can be admitted that there are issues of definitions and legal effects that have still to be sorted out; the joint proposal of the proponents admit as much. But what they are asking for is not conclusion of a negotiation, but its beginning.

The ministers should bring these two issues into the calculus of this round so that a balanced outcome is ensured. Developing countries appear to be moving towards an agreement on OTDS (overall trade distorting support to agriculture) levels that still leave a lot of water for subsidising agriculture in developed countries, while themselves fighting for livelihood concerns of their poor farmers. They seem to be reconciled to cut their industrial tariffs and even then not being able to exclude infant industry sectors from such cuts.

They are being enticed to go beyond the negotiating mandate of Doha and Hong Kong Ministerial Conferences and declare zero tariffs on some sectors in order to have some water on a few sensitive industrial products. They have not refused to negotiate; have not said that the Lamy Package of July 2008 is beyond the Doha negotiating mandate. They are negotiating. They are responsible. They want the development round to conclude.

Minister Store needs to remind the small minority of opponents to the two TRIPS issues of their responsibility as well. He needs to ask them to agree to negotiate if they want their deal elsewhere to stand the scrutiny of the constituents represented by 110 WTO Members; constituents who have artisans and poor farmers; constituents who are tribal and village communities waiting to get a better return from their traditional knowledge. He should tell them not to force such a majority to call for a vote, a permitted but never used provision of the WTO Agreement. And he has just today to get home the message.