US Unilateralism: A Threat to Global Sustainability?

By Kristin Dawkins

On June 30, more than 200 non-governmental organizations and individuals from dozens of countries around the world signed a letter to U.S. Secretary of State Madeleine Albright expressing "concern at the manner in which the United States government is intervening in the domestic affairs of numerous other nations regarding their intellectual property laws." Acknowledging the need for governments to conform with international agreements to which they subscribe, the signatories pointed out to Secretary Albright it is neither "the United States' responsibility nor its right to interfere with their national democratic processes for doing so."

The letter was provoked by correspondence sent to the Royal Thai Government (RTG) by the U.S. State Department regarding draft Thai legislation allowing Thai healers to register traditional medicines. Dated April 21, 1997, the letter advises the RTG that "Washington believes that such a registration system could constitute a possible violation of TRIPs and hamper medical research into these compounds. The State Department letter requests a copy of the draft legislation and official responses to 11 questions, beginning with the question: "What is the relationship of the proposal to the granting of patent protection in Thailand?" and ending with the question: "Does the RTG envision a contractual system to handle relationships between Thai healers and foreign researchers in the future?"

In their letter to Secretary Albright, the NGOs suggested that the questions asked in the State Department letter imply an interest on the part of the U.S. government to facilitate the transfer of traditional Thai knowledge to U.S. researchers, and their eventual solicitation of patents on this knowledge.

Thailand is not alone at the receiving end of U.S. pressure over intellectual property rights. Earlier this year, the U.S. unilaterally reimposed import duties on US$260 million of Argentine exports in retaliation for Argentina's refusal to rewrite its patent legislation in a way judged by the U.S. to be adequate. Similarly, the United States threatened the Ecuadorian government, under Section 301 of the U.S. Omnibus Trade Act, with the cancellation of trade preferences if its national Congress failed to ratify a bilateral agreement on intellectual property rights, affecting some 400 products of export interest to the Ecuadorian economy and the possible loss of US$80 million worth of income from its exports to the U.S. of uncanned tuna and fresh fish. In this case, pressure from seven Ecuadorian Indigenous groups, Ecuadorian NGOs, and other NGOs around the world may have helped the Ecuadorian economy: just weeks ago, Ecuadorian newspapers reported that the U.S. withdrew its threat of unilateral sanctions.

And months before the July 1997 decision of a dispute settlement panel of the WTO, which agreed with the U.S. that India had failed to implement the so-called "mail-box" provisions of Article 70 of TRIPs, the U.S. Ambassador to India had announced that "certain areas of research and training will be closed to cooperation" if India failed to amend its patent laws, threatening some 130 scientific projects supported by the U.S.-India Fund. (Despite the five-year transition period for developing countries, Article 70 requires them to establish legal procedures for receiving applications for patents on pharmaceutical and agricultural chemicals immediately so that, upon their full implementation of TRIPs, patents can be back-dated to the date of filing. India had developed a legal administrative procedure, which the dispute panel deemed insufficient.)

The U.S. has also filed formal complaints with the WTO against Pakistan regarding its national patent laws governing pharmaceutical and agricultural chemical products.

Indeed, the U.S. State Department notwithstanding, the TRIPs agreement itself would appear to leave room for the draft Thai legislation – and the existing laws of Ecuador, India and Pakistan — to proceed in full conformity with WTO rules. In the first place, developing countries have until the year 2005 to fully implement TRIPs. And, Ecuador is a member of the Andean Pact which recently concluded a regional agreement widely recognized to be TRIPs-consistent. Second, Article 27.3(a) allows members to exclude from patenting "diagnostic, therapeutic and surgical methods for the treatment of humans and animals," which surely traditional medicines are. Third, Article 27.3(b) entitles all WTO members to develop sui generis (literally, in Latin, "of their own making") systems for the protection of plant varieties, which comprise most traditional medicines, as an alternative to patents.

The sui generis clause in TRIPs would seem to enable countries subscribing to the Biodiversity Convention or the International Undertaking on Plant Genetic Resources to craft national legislation that, ultimately, complies with TRIPs as well.

Another factor many governments must take into account, as they review their national policies concerning useful plants, is the Convention on Biological Diversity. It stipulates that parties cooperate to ensure that intellectual property rights "are supportive of and do not run counter to" the objectives of the convention: namely, the conservation and sustainable use of biodiversity, and the equitable sharing of its benefits. If patents on life promote monocultural production - an argument that the successful cloning of sheep and cattle would seem to support, as does Monsanto's prediction that 20 percent of the 1998 soya crop in the U.S. will be planted with patented genetically-modified herbicide-resistant seed - then these patents would seem to run counter to the Convention on Biological Diversity.

The Convention on Biological Diversity also obligates parties to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities" relevant to biodiversity. And the International Undertaking on Plant Genetic Resources of the FAO provides for "Farmers Rights." Now under revision, negotiators are grappling with the task of devising legal and financial instruments to support farming communities in the ongoing development and conservation of the germplasm and technologies their ancestors cultivated collectively over many generations. The patenting of seeds, plants and animals would seem to conflict with these emerging legal principles, as well.

Experts will undoubtedly haggle for years over the merits of these arguments, but the sui generis clause in TRIPs would seem to enable countries subscribing to each of these international legal regimes to craft national legislation that, ultimately, complies with them all. The United States should itself comply with TRIPs, and give developing countries time to meet their legal requirements without violating the norms of traditional cultures. The world can only be enriched.

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