

Agriculture: Great Expectations from Cancun? for "the day after Syndrome?"

Wednesday, September 03, 2003 08:00 IST
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No new issues, Doha first and Doha last. If "India and Company" echoes this sentiment and slogan and succeeds in pursuing through the unfinished Doha Development Agenda or more practically called the Doha Work Program, Mr. Jaitley and colleagues would have "something to pat" themselves.

However, it does not require an expert's eye to see that TRIPs and Public Health has been pushed back and Agriculture has taken the centrestage on the eve of Cancun. Agreed that Agreement of Agriculture (AOA) is by far a bigger agenda, but we were so close on para 6 and 31 (b) of TRIPs, and other aspects (Article 6, 7 and 8) of TRIPs post-Doha, the developing countries deserved to take it to its logical conclusion and close the issue.

The debate that raged post-Doha, is now in the U.S. Courts. "The US Open" is now being played with "Doha-TRIPs" Ball between the US Government and the Pharma MNCs - with the LDCs and developing countries on the sidelines. In all probability the game will continue beyond the conclusion (if at all there is any) of the Cancun Round.

A lack of consensus on TRIPs and Public Health could before Cancun (already late and hence bound to miss the bus) could disturb the confidence in WTO and its work program. The "unfinished business" is of uppermost concern for developing countries, and as such deserving priority in Cancun, before pushing through "Singapore" issues of new agenda of investments (TRIMS) and Government procurement. The Multilateral economic order seem to be crumbling in this post-Doha phase where U.S. is pushing bilateral agreements on its trading partners especially the LDC's (Least Developed Countries) who are the worst sufferers of the non-implementation of the Doha declaration and who are "voluntarily (?)" being forced to forego the benefits of cheaper access to critical and lifesaving medicines thereby indirectly refusing countries like India, Brazil, China, Thailand and others to export these medicines to LDCs who have any way been granted extension up to 2016 from full implementation of TRIPs provisions and who thereby acquired immunity from potential punitive actions for IPR violations especially on patent infringements in cross border trade.

Road from Doha to Cancun was expected to be smooth, but has now proven to be riddled with potholes and barricades. The missed deadlines could frustrate the developing countries from co-operating on new issues.

At Doha, the major achievement was the declaration, which stated that WTO Rules on Patents (TRIPs) do not and should not prevent governments from taking measures to

protect public health. This obviously cleared the road for issuing compulsory licences wherever required by sovereign governments to domestic producers for making cheaper generic versions of patented medicines (the provision as was available in India under "Licence of Rights" under the Patent Act, 1970, now modified under 2002/2003 amendments, whereby compulsory licences can be claimed under certain conditions with payment of royalty). However, what is remaining unresolved are the dispute on range of diseases and the issue of parallel imports.

Post-Doha, the developed countries, agreed on HIV-AIDS, Tuberculosis and Malaria as the range of diseases covered for flexibility on Para 6 (of TRIPs) operation, while the developing countries are demanding a full coverage of Article 7 & 8 by widening the scope to life threatening diseases like Diabetes and others or Public Health in general.

The other related aspect in the disputed area is in interpretation of Article 6 of TRIPs itself. Article 6 states that ".....this Agreement (TRIPs) shall be used to address the issue of exhaustion of intellectual property rights". While the developed countries insist on a limited interpretation, the developing countries demand a full exhaustion (international exhaustion) of TRIPs. This means that once a patented products goes through the first sale, it is no more restricted by patents including for cross-border sales.

This is again linked to Article 31 (f) of TRIPs. Exceptions to Rights confirmed (on Patent Owner) is covered under Article 30 and other (permitted) uses without authorisation of the Right holder are covered under Article 31. The sub article (f) of 31 reads as follows "any such use shall be authorized predominantly for the supply of the domestic market of the member authorizing such use". While there is almost no dispute that compulsory licensing is valid under TRIPs (even U.S.A., U.K., France and others have compulsory licensing or similar provisions including those for Government use), the controversy is regarding the word "predominantly", leading to the question whether it is open for 'exports' against indents from LDC countrys' governments or government authorized private importers, who are any way exempted from disputes on account of TRIPs upto 2016.

USA has lately appeared to be softening on the issue and promised to conclude the issue before Cancun. However, the MNCs seem to have persuaded otherwise. Government of India appears overwhelmed and hyperactive on the Agricultural Agenda. Mr. Moorasoli Maran, who headed the Indian delegation to Doha came back claiming "victory at the crusades". Doha, of late seems to have got abandoned or orphaned. The new team headed by Mr. Arun Jaitley might as well want to focus and win the Agricultural battle at Cancun. Doha was anyway to be settled before Cancun and has run out of steam. "Agro-success" at Cancun will please the larger farmer lobby and would be an "original" victory to the new negotiating team, rather than sealing the already won battle of Doha - the credit of which was already taken by Mr. Maran.

Whether Cancun settles the unfinished Doha Declaration agenda or not, it will not be the end of the "TRIPs & Public Health" controversy. The primacy of Public Health especially in the context of poor nations and their right to access cheaper medicines from "third"

("or even second") world countries will remain unchallenged in the current or future context. Over the years, this issue is expected to gather momentum rather than moss. Not resolving key issues of concern to the majority WTO members could endanger the institution, which has much good to contribute to the benefit of all.

The General Council of WTO last week cleared the draft of the Agreement on TRIPs and Public Health. This contentious item was under debate for nearly 2 years, even beyond the December 31, 2002 deadline set by the Doha Declaration.

As per this Agreement, poor member-countries of WTO can now import patented but essential medicines for contagious diseases from cheaper alternate sources. There are two basic conditions. The first is that the importing country has to inform WTO that they have no domestic pharma manufacturing facilities and hence require to import medicines involving compulsory licence provisions. The second major condition is that the drugs manufactured for export to poor countries will be different in appearance (including packing) compared to commercially marketed product. There may be other minor conditions. There may be provision for complaint to TRIPs Council or WTO in case of any diversion from importing country to another. There may or may not be royalties. There will always be some fine print. But what is important is that a major issue regarding "Primacy of Public Health over TRIPs and Patents" has been settled. This will also help the Indian Law-makers to set the trend for the 3rd Amendment to the Patent Act, 1970, more unambiguously.

All said and done WTO, TRIPs, "Patents" innovative research and Patenting is good for India and Indian scientists and entrepreneurs. Let us hope that at Cancun "HOPE" wins. "Positive thinking" is good for Health, with or without TRIPs.

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