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Do the recent negotiations signal an end of an era?

This month Chicago was the site for the eighth round of negotiations on a potential Trans-Pacific Partnership (TPP). Nine countries, including the United States, met for a week to discuss a potential free trade agreement that our government has described as “an ambitious 21st century agreement that will enhance trade and investment among TPP partners.” At first glance, the TPP seems to be just one in a chain of free trade agreements that have occurred with numbing frequency in the past decade. These agreements are generally “locked door” agreements, shrouded in secrecy. No official public version is usually released until the document is within weeks of signing. Resulting protection standards continue to go well beyond those required by the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), the multinational IP treaty established in 1994 that is the acknowledged floor for IP protection globally. Although developing countries may participate in these negotiations, there is little evidence of any moderating influence as a result of such participation. This litany of diplomatic routine, however, may be merely a cover for more significant events. While few were paying attention, the multilateral harmonization system that has governed international IP standard-making since the 19th century may have died. Its death knell may have been sounded in Chicago this month as the TPP negotiations continued their well-worn path despite strong criticism of such shielded tactics. What remains in its wake requires a new strategy for protecting intellectual property rights globally.

As global trade has increased, international agreements establishing international protection standards for trademarks, patents and copyrights have similarly grown. From the narrowly crafted, largely bilateral agreements of the 18th century, focused primarily on piracy and counterfeiting, to the multinational treaty of TRIPS; international agreements regarding definitions, rights and enforcement obligations for intellectual property have increased in scope and variety. They also created a multinational institutional system to support continuing harmonization efforts. Formative systems such as the “Authors Union” created by Victor Hugo in the 1830s (that sought to curb cross-border distribution of pirated works) evolved into the World Intellectual Property Organization (WIPO), a U.N.-based agency focusing exclusively on intellectual property rights internationally.

Until the 1980s, the complex multilateral IP system that epitomized global harmonization efforts for intellectual



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Global IP

By Doris Estelle Long

property standards operated primarily under the institutional auspices of WIPO or its predecessors. Negotiations were relatively transparent; draft treaties and position papers were circulated to the public and end-users and other interested parties were allowed to observe and participate in the proceedings. Perhaps even more critical, developing countries were strong participants in the creation of emerging international protection standards. Over time, the Berne Convention contained increasingly broader fair-use rights for copyrighted works, while the Paris Convention for the Protection of Industrial Property, first established in 1883, required patented inventions be “worked” in registration countries or face forfeiture.

TRIPS, negotiated outside the boundaries of these transparent procedures, represented both the broadest scope of IP standard-making and the first signal that the multilateral harmonization system in existence for more than 100 years was ending. Signed in 1994 after eight years of negotiations, by more than 144 countries, TRIPS established new definitional and rights standards for nearly every area of intellectual property. Facially, it also contained significant advantages for developing nations, including grace periods for compliance as well as recognition in Article 7 that “the protection of intellectual property rights should contribute to ... the transfer and dissemination of technology ... in a manner conducive to social and economic welfare.” But the negotiation of TRIPS outside the traditional corridors and processes of WIPO became only the first of many such departures. Regional efforts increasingly served as a powerful countervailing force against harmonization. Growing concern with local protection issues resulted in the adoption of standards at variance with TRIPS by organizations such as the Andean Com-

munity. The multiplicity of organizations considering IP issues in the first decade of the 21st century not only made future harmonization on a multilateral basis unlikely, it eroded the power of any single institution to sponsor effective multilateral harmonization efforts.

The conclusion of the TPP negotiating session in Chicago should serve as a clarion call to IP owners that increasingly nuanced efforts to secure rights at domestic and regional levels will be required. For those who represent clients engaged in biogenetic research and marketing, local trends toward rejecting innovations based initially on the traditional knowledge of indigenous tribes and imposing local working obligations for patented inventions are growing. Copyright owners will find themselves increasingly at the mercy of exceptions for personal use and interoperability demands, while trademark owners will find the competitive spaces of the Internet occupied by third parties. In addition to creating carefully developed protection and exploitation plans on an individual market basis, IP owners will need to be more proactive at the standard-making phase. This will require increasing attention to the standard-making processes of domestic legislatures in key market countries. In many countries expert studies often precede such legislation. Thus, the Gower Report preceded the recent proposed legislation in the United Kingdom to create a statutory format-shifting right under copyright. Such studies present an excellent opportunity to influence future standards since most seek outside information as part of their review process. Notices regarding such studies are often posted on the websites of the affiliated intellectual property office.

IP owners should also monitor standard-making processes of non-IP focused organizations, including the World Health Organization (WHO), the Organization for Economic Development and Cooperation and various human rights organizations, including the Permanent Forum for Indigenous Peoples. The declarations and studies of such organizations often have a direct impact on present debates surrounding IP protection. For example, WHO’s essential medicine lists strongly influence present debates surrounding the importation of patented pharmaceuticals. Many of these organizations provide free blogs and RSS feeds and accredit nongovernmental organizations, including the American Bar Association, to participate in an advisory capacity. The challenges in this multipolar legal universe will be great. But they can no longer be avoided at the individual company level.