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"I am sympathetic with the overall goals of the CPTech treaty. The patent-driven market mechanism does a poor job driving research in areas of unique concern to poor populations. It raises prices and limits output. Furthermore, without a treaty, the costs of innovation are not allocated among nations in accordance with any theory of fair sharing. However, I can't provide you with a detailed critique of the proposal because I don't fully understand it. The comment from DiMasi and Grabowski apparently assumes that CPTech envisions abandoning the patent system for pharmaceuticals. If that is the case, then my intuition is that their critique is correct: substituting central planning for a market mechanism is problematic on many grounds.

In fact, however, I read the proposal as envisioning a mixed system. But if that is the intent, then I need more information on how the proposal treats the interface between patent-generated research and research funded under the proposal's mechanisms. Most important, I do not know what it means to say that "no patent applications can be submitted that rely upon the data from the QOPGD." (14.1). The HapMap example doesn't help. I am not entirely familiar with why the "term and condition" referenced in the proposal was dropped, but my understanding is that one of the fears inspiring its inclusion was that someone might attempt to patent information that was already in that database. But because patents are only granted to true inventors, it soon became clear that there was no need to address that scenario. Another concern was that someone might take information in the HapMap and use it to develop and patent a new product or process. But barring that type of use turned out to be problematic: the patent system was then no longer able to perform its role in motivating work in fields dependent on information in the HapMap.

If CPTech intends to use the "term and condition" that the HapMap rejected, then it may, in part, be doing indirectly exactly what DiMasi and Grabowski think it is doing directly—eliminating the force of the patent system in areas dependent on data are generated by public good projects. The concerns DiMasi and Grabowski express would then apply in full force in those areas. If "rely upon the data" is not meant to bar all uses that would lead to patenting, then the meaning of the expression needs to be clarified. Furthermore, some attention should be given to enforcement. If the idea is to enforce the provision by stripping follow-on researchers of their patent rights, the treaty could wind up chilling research that arguably relies on the QOPGD data, even when that research is not otherwise funded under the terms of the proposal.

The other problem with a mixed system is that those doing work funded by treaty mechanisms will need to deal with patents on any research inputs that their work requires. Licensing these inputs will raise the cost of financing treaty projects. I assume that the provision on minimum exceptions to patent rights for research

(14.2) is meant to deal with that issue. However, once again, more elaboration is needed. I am in wholehearted agreement that a research exemption is desirable. However, if it is too broad, it could chill commercial research. For example, there may be reluctance to invest in the development of research tools whose use would often fall under the exemption. Perhaps public financing of tools will make up for the deficit, but— again—public financing has its own problem."