

A PATENTLY WRONG REGIME

Relevant for: Indian Economy | Topic: Issues relating to Intellectual Property Rights (IPRs)

Even an unprecedented pandemic can do little, it appears, to upset the existing global regime governing monopoly rights over the production and distribution of life-saving drugs. If anything, since the onset of COVID-19, we've only seen a reaffirmation of intellectual property rules that have served as a lethal barrier to the right to access healthcare over the last few decades. The neo-liberal order, under which these laws exist, is so intractable today that a matter as seemingly simple as a request for a waiver on patent protections is seen as a claim unworthy of exception.

On October 2 last year, [India and South Africa submitted a joint petition](#) to the World Trade Organization (WTO), requesting a temporary suspension of rules under the [1995 Agreement on Trade-Related Aspects of Intellectual Property Rights \(TRIPS\)](#). A waiver was sought to the extent that the protections offered by TRIPS impinged on the containment and treatment of COVID-19. As we now know, quick and efficient vaccination is the surest route to achieving global herd immunity against the virus. Should the appeal for waiver be allowed, countries will be in a position, among other things, to facilitate a free exchange of know-how and technology surrounding the production of vaccines.

Also read | [U.S. remains non-committal on India's move to get TRIPS waiver to COVID-19 vaccines at WTO](#)

The request for waiver has, since, found support from more than 100 nations. But a small group of states — the U.S., the European Union, the U.K. and Canada among them — continues to block the move. Their reluctance comes despite these countries having already secured the majority of available vaccines, with the stocks that they hold far exceeding the amounts necessary to inoculate the whole of their populations. Their decision is all the more galling when one considers the fact that for the rest of the world mass immunisation is a distant dream. Reports suggest that for most poor countries it would take until at least 2024 before widespread vaccination is achieved.

A patent is a conferral by the state of an exclusive right to make, use and sell an inventive product or process. Patent laws are usually justified on three distinct grounds: on the idea that people have something of a natural and moral right to claim control over their inventions; on the utilitarian premise that exclusive licenses promote invention and therefore benefit society as a whole; and on the belief that individuals must be allowed to benefit from the fruits of their labour and merit, that when a person toils to produce an object, the toil and the object become inseparable. Each of these justifications has long been a matter of contest, especially in the application of claims of monopoly over pharmaceutical drugs and technologies.

In India, the question of marrying the idea of promoting invention and offering exclusive rights over medicines on the one hand with the state's obligation of ensuring that every person has equal access to basic healthcare on the other has been a source of constant tension. The colonial-era laws that the country inherited expressly allowed for pharmaceutical patents. But in 1959, a committee chaired by Justice N. Rajagopala Ayyangar objected to this on ethical grounds. It noted that access to drugs at affordable prices suffered severely on account of the existing regime. The committee found that foreign corporations used patents, and injunctions secured from courts, to suppress competition from Indian entities, and thus, medicines were priced at exorbitant rates. To counter this trend, the committee suggested, and Parliament put this into law through the Patents Act, 1970, that monopolies over pharmaceutical drugs be

altogether removed, with protections offered only over claims to processes.

Also read | [LDCs support request made by India, South Africa for waiving COVID-19 vaccine-related IPR](#)

This change in rule allowed generic manufacturers in India to grow. As a result, life-saving drugs were made available to people at more affordable prices. The ink had barely dried on the new law, though, when negotiations had begun to create a WTO that would write into its constitution a binding set of rules governing intellectual property. In the proposal's vision, countries which fail to subscribe to the common laws prescribed by the WTO would be barred from entry into the global trading circuit. It was believed that a threat of sanctions, to be enforced through a dispute resolution mechanism, would dissuade states from reneging on their promises. With the advent in 1995 of the TRIPS agreement this belief proved true.

As the Yale Law School professor Amy Kapczynski has written, compelling signatories to introduce intellectual property laws like those in the global north was nothing short of a scandal. The follies in this new world order became quickly apparent when drugs that reduced AIDS deaths in developed nations were placed out of reach for the rest of the world. It was only when Indian companies began to manufacture generic versions of these medicines, which was made possible because obligations under TRIPS hadn't yet kicked in against India, that the prices came down. But lessons from that debacle remain unlearned.

Instead, two common arguments are made in response to objections against the prevailing patent regime. One, that unless corporations are rewarded for their inventions, they would be unable to recoup amounts invested by them in research and development. Two, that without the right to monopolise production there will be no incentive to innovate. Both of these claims have been refuted time and again.

Also read | [Biden urged not to accept India, South Africa's proposal at WTO on COVID-19 vaccine](#)

Most recently, it has been reported that the technology involved in producing the Moderna vaccine in the U.S. emanated out of basic research conducted by the National Institutes of Health, a federal government agency, and other publicly funded universities and organisations. Similarly, public money accounted for more than 97% of the funding towards the development of the Oxford/AstraZeneca vaccine. Big pharma has never been forthright about the quantum of monies funnelled by it into research and development. It's also been clear for some time now that its research is usually driven towards diseases that afflict people in the developed world. Therefore, the claim that a removal of patents would somehow invade on a company's ability to recoup costs is simply untrue.

The second objection — the idea that patents are the only means available to promote innovation — has become something of a dogma. But other appealing alternatives have been mooted. The economist Joseph Stiglitz is one of many who has proposed a prize fund for medical research in place of patents. Under the current system, “those unfortunate enough to have the disease are forced to pay the price... and that means the very poor in the developing world are condemned to death,” he wrote. A system that replaces patents with prizes will be “more efficient and more equitable”, in that incentives for research will flow from public funds while ensuring that the biases associated with monopolies are removed.

Also read | [USTR holds talks with Pfizer, Astrazeneca over increased vaccine production, IP rights waiver](#)

The unequal vaccine policy put in place by the Indian state is indefensible. But at the same time, we cannot overlook the need for global collective action. If nation states are to act as a force of good, they must each attend to the demands of global justice. The pandemic has demonstrated to us just how iniquitous the existing world order is. We cannot continue to persist with rules granting monopolies which place the right to access basic healthcare in a position of constant peril. In its present form, the TRIPS regime, to borrow the law professor Katharina Pistor's words, represents nothing but a new form of "feudal calculus".

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