Source : www.thehindu.com Date : 2021-05-10

A TRIPS WAIVER IS USEFUL BUT NOT A MAGIC PILL

Relevant for: International Relations | Topic: Effect of policies and politics of developed & developing countries on India's interests

The United States has finally relented and declared its support for a temporary waiver of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement for COVID-19 vaccines at the World Trade Organisation (WTO). In October 2020, India and South Africa, at the WTO, proposed waiving Sections 1, 4, 5, and 7 of Part II of the TRIPS agreement (covering copyrights, industrial designs, patents, and undisclosed trade information) related to the prevention, containment, or treatment of COVID-19.

The U.S.'s support of the TRIPS waiver is a significant step forward in the global fight against the pandemic. Hopefully, the U.S.'s decision would cause other holdouts like Canada and the European Union to give up their opposition. Legally, the waiver is surely possible since Article IX of the WTO Agreement allows for waiving obligations in 'exceptional circumstances' (https://bit.ly/3uCTMJy), which the COVID-19 pandemic undoubtedly is. The stumbling block is the political will of the richer countries that house the giant pharmaceutical corporations producing COVID-19 vaccines and medicines.

The fig leaf of patent protection has to drop

While the U.S.'s decision is to be welcomed, the devil would be in the details. The countries would now negotiate on the text of the waiver at the WTO. If the experience of negotiating such waivers, especially on TRIPS, were anything to go by, it would be too early to celebrate. In the aftermath of the HIV/AIDS crisis in Africa in the 1990s, the WTO adopted a decision in 2003 waiving certain TRIPS obligations to increase the accessibility of medicines in countries that lacked manufacturing capability. Specifically, the obligation contained in Article 31(f) of TRIPS that medicines produced under a compulsory licence are predominantly for the domestic market of that country was waived, paving the way for the export of such medicines to a country that lacked manufacturing capability.

However, this waiver (later incorporated as Article 31 bis in the TRIPS agreement) was subject to several stringent requirements such as the drugs so manufactured are to be exported to that nation only; the medicines should be easily identifiable through different colour, or shape; only the amount necessary to meet the requirements of the importing country are to be manufactured; the importing country has to notify to the WTO's TRIPS Council, etc,. Given these cumbersome requirements, hardly any country, in the last 17 years, made effective use of this waiver.

The statement issued by Katherine Tai, the U.S. Trade Representative, states that the negotiations on the text of the waiver will 'take time' given the WTO's consensus-based decision-making process and the complexity of the issues involved. This signals that the negotiations on the waiver are going to be difficult. While the U.S. would not like to be seen as blocking the TRIPS waiver and attracting the ire of the global community, make no mistake that it would resolutely defend the interests of its pharmaceutical corporations. The developing world should be conscious to ensure that a repeat of 2003 does not happen.

Explained | Intellectual Property Rights waiver resolve the COVID-19 vaccine shortage?

Ms. Tai's statement also reveals that the U.S. supports waiving intellectual property (IP) protections on COVID-19 vaccines. However, India and South Africa proposed a waiver not just

on vaccines but also on medicines and other therapeutics and technologies related to the treatment of COVID-19. So, the U.S. has already narrowed down the scope of the waiver considerably by restricting it to vaccines. Medicines useful in treating COVID-19 and other therapeutics must be also included in the waiver.

While the TRIPS waiver would lift the legal restrictions on manufacturing COVID-19 vaccines, it would not solve the problem of the lack of access to technological 'know-how' related to manufacturing COVID-19 vaccines. Waiving IP protection does not impose a legal requirement on pharmaceutical companies to transfer or share technology. While individual countries may adopt coercive legal measures for a forced transfer of technology, it would be too draconian and counterproductive. Therefore, governments would have to be proactive in negotiating and cajoling pharmaceutical companies to transfer technology using various legal and policy tools including financial incentives.

Explained | What the easing of IP norms on Covid vaccines means for India

Finally, while a TRIPS waiver would enable countries to escape WTO obligations, it will not change the nature of domestic IP regulations. Therefore, countries should start working towards making suitable changes in their domestic legal framework to operationalise and enforce the TRIPS waiver. In this regard, the Indian government should immediately put in place a team of best IP lawyers who could study the various TRIPS waiver scenarios and accordingly recommend the changes to be made in the Indian legal framework.

Notwithstanding the usefulness of the TRIPS waiver, it is not a magic pill. It would work well only if countries simultaneously address the non-IP bottlenecks such as technology transfer, production constraints, and other logistical challenges such as inadequacy of supply chains and unavailability of raw materials to manufacture vaccines and medicines.

Prabhash Ranjan is a senior assistant professor at South Asian University's faculty of legal studies. The views expressed are personal

Please enter a valid email address.

END