India needs to push for a new deal

Global trade and intellectual property are at a crossroads. In a time when multilateral consensus is languishing on a large number of issues, the Trump administration is considering pulling the U.S. out of most free trade agreements on the ground that it needs a more favourable environment for its companies and its people. Much will be written about the carnage as far as jobs, wages and national sovereignty that the current American onslaught on trade deals brings to the fore. Here, I focus on a critical issue — how trade deals are becoming the new Trojan horse to ensure stronger patent protection and continued profits to global companies.

A bit about the historical trajectory of events. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) embodied an international regulatory regime for the first time, in 1995. Although it represented a major compromise for most developing countries, it was only the starting point for many other nations, which have since then promoted excessive protection of private investor interests through bilateral trade agreements, often at the expense of wider public interests. Corporate libertarians, riding high on increased market power, continue to lobby their governments for absolute protection of intellectual property (IP) rights of corporations.

For the U.S. in particular, which has never made any qualms about the importance of its domestic corporate interests, trade agreements are a prime vehicle to supplant its strong domestic standards of IP protection in partner countries, in a bid to ensure the same level of privileges for its companies abroad. Over the past 20 years, the American strategy has been a neat one: to pursue bilateral agreements with individual countries one by one to ensure stronger IP protection across markets, by sidestepping the multilateral regime.

In an inter-connected and highly globalised world, what goes around comes around quite fast and often with drastic consequences for all. In this case, the crux of the matter lies in how these stronger rules are changing the global corporate landscape. For years now, while patent protection is getting stronger in all sectors in a large number of countries, the conditions for its grant are becoming greatly relaxed. Not only do such lax patenting requirements allow companies to claim patents more broadly — or consecutively, with little show of original effort as in the case of evergreening — but also patents can be claimed on all possible inventions (and discoveries) that are of relevance to the present, and even to the future. A large number of countries have already foregone many degrees of policy freedom by signing up to 'TRIPS-Plus' standards of protection. This, in conjunction with other trade measures, is disintegrating existing markets and rigging established rules of the game. A superstar firm today is not necessarily one with the greatest technological breakthroughs or the largest research and development labs, but surely is one that has a large IP portfolio, engages in extensive litigation on patent issues, and thrives on licensing revenues. Noting the gravity of the situation, *The Economist* in 2016 produced two short opinion pieces on how corporate profits and returns on capital are at near record levels in the U.S. and what might be wrong with it. It argued that established companies are "becoming more entrenched" in existing markets worldwide, and made the case that high profits may be a sign of a sickness rather than growth and called for reining in IP rights.

At the global level, these sectors are stratified, with profits neatly split up between large corporations and new kinds of non-innovator firms that simply amass patents speculatively in upcoming, promising technologies for spurious returns. The non-innovator companies are the patriciates of the system: when they hit the technology jackpot, they control the market and have the power to shift wealth and control competition. An example that beautifully captures the situation is Qualcomm Inc., an American company that is the legal patent holder of thousands of patents that are considered critical to build mobile phones with wireless technologies, accounting for a total profit of $5.7 billion through intellectual property licences in 2016 alone.

For India, the fate of its pharmaceutical and software sectors swings in the balance, and guaranteeing fair and unfettered competition will be critical to ensure that we do not lose more ground to global companies abroad and at home. The United Nations Conference on Trade and Development (UNCTAD)'s recent Trade and Development Report calls for stronger measures to protect domestic sectors against the undue domination of large companies, particularly in high-profit sectors such as pharmaceuticals, media and information and communications technology (ICT), where foreign companies still account for most of the transfer of profits across borders. Warning against trade deals that seek to protect the status quo, the report identifies patents as an instrument of unfair market power across markets. The report uses data for U.S. multinational companies (MNCs) and their foreign affiliates in India to show that patent reforms have led to significant increases in the rates of return to affiliates of American companies by enabling monopoly profits when compared to publicly listed and locally headquartered companies, which are increasingly being left behind. In the pharmaceutical sector, for example, the analysis that ranges 20 years (from 1996) shows that profits of domestic companies are in sharp decline since the late 2000s while those for the American MNC affiliates operating in the Indian market are rising steeply. A similar trend is visible in the ICTs sector as well.

It is important to take these findings in the broader perspective of what India's growth drivers will be in the years to come. Our high-technology sectors are already taking a beating because they operate in a volatile global environment. Supporting IP standards that simply follow a 'winner takes all' ideology without emphasis on technological advancement and competitive markets will be a regrettable mistake. What India needs right now is a clear and tough stance on intellectual property both in domestic policy and at the multilateral level. At home, support for innovation has to be accompanied with instruments that guard against the misuse of market power, coercive bargaining and aggressive merger and acquisition strategies if local firms should survive and flourish.

Heated negotiations in the run-up to the upcoming WTO Ministerial Conference in Argentina already show that these issues will be central: there are ongoing attempts by big business to push for new rules in areas such as e-commerce to slice up profit-making opportunities of the future. Other proposals being made will largely limit the ability of governments to constrain corporate behaviour in the public interest even if they succeed partially. In such an international context, we need to stop soft-peddling on these issues in the pretence that we aspire to be a major IP player in the same vein as the U.S. What we need is a return to old-fashioned pragmatism that clearly shows the West that India recognises the fallacy of the current IP system and leads the way to broker a global new deal. This new deal should not only call for a return to business in the WTO by tackling the forgotten issues of the Doha Round but also firmly reopen the discussion on balancing the global IP system with development. That way, even if we don't win in Argentina, we will have made an ambitious start in redefining the global trade and IP agenda.

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