European Duplicity Undermines Anti-Pandemic Efforts

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Despite facing the world's worst pandemic of the last century, rich countries in the World Trade Organization (WTO) blocked efforts to enable more affordable access to the means to fight the pandemic.

Everyone knows that access for all to the means for testing, treatment and prevention—including diagnostic tests, therapeutic medicines, personal protective equipment and vaccines—is crucial.

European Deceit

In October 2020, South Africa and India requested that the WTO temporarily suspend relevant provisions of its Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). By May 2021, the proposal had sixty-two co-sponsors and support from more than two-thirds of WTO member states.

Despite overwhelming support from low- and middle-income countries, Western governments, Big Pharma and other industry officials dismissed this waiver request as not only unnecessary but also undermining future technological innovation.

Although most European Parliament members supported the waiver proposal, it was actively opposed by European governments and the European Commission (EC), the European Union (EU) executive.

It was also resisted by Brazil and other rich countries, such as the UK, Norway, Switzerland, Australia, Canada and Japan. However, the Biden administration supported a temporary waiver for vaccines, but was silent on the other items urgently needed.

Misleadingly, European leaders insisted that the temporary waiver request was unnecessary. But IP rights (IPRs) are essential for innovation. 'IPR regimes have, at best, second-order effects upon the rates of innovation.' In fact, 'when patent rights have been too broad or strong, they have actually discouraged innovation'.

The leaders misleadingly claimed that access could be achieved by existing provisions for voluntary licensing (VL), technology transfer, COVAX bulk purchasing and existing TRIPS flexibilities, especially compulsory licensing (CL). But these purported solutions were known to be grossly inadequate.

COVAX was struggling due to poor funding, supply shortages and inadequate donations. Hence, many poor countries had not even applied to it. With IPRs strengthened internationally since 1995, transnational corporations (TNCs) have found technology transfer agreements to be less profitable.

Big Pharma Law

Strict international enforcement of patent protection is recent. Pfizer's then chairman, Edmund Pratt, successfully pushed IP onto the agenda of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), which created the WTO and TRIPS in 1995.

Fearing that stronger IP rights would enhance corporate power and reduce affordable access to life-saving medicines, many developing countries resisted TRIPS. But rich countries pushed TRIPS through, using carrots or sticks to divide developing countries.

TRIPS includes CL, first introduced in the 1883 Paris Convention for the Protection of Industrial Property. A government can thus allow a third party to make or use a patented product or process without the patent owner's consent. But this can only be for domestic use, subject to other conditions, such as paying 'the right holder … adequate remuneration'.

Despite great efforts, rich country governments failed to increase members' TRIPS obligations at the 1997 Singapore WTO ministerial. Nevertheless, US President Clinton tried again at the 1999 Seattle ministerial, triggering an African walkout.

After 9/11, some concessions were made before the 2001 Doha ministerial, including a new 'Development Round' of WTO talks. Two decades later, no conclusion was in sight as rich countries saw little chance of getting what they wanted.

With the HIV/AIDS crisis, campaigning against TRIPS was boosted by President Mandela's leadership. The Doha Ministerial Declaration included 'public health exceptions' to TRIPS. Now, there is no need to first negotiate VLs during health emergencies. Also, countries without manufacturing capacity can use CLs to import cheaper versions.

European Deceptions

By insisting that existing TRIPS flexibilities were sufficient, European leaders denied all actual problems around intellectual property. Ignoring decades of experience, they insisted that VL provisions were enough to expand output and share expertise.

In reality, VLs are often shrouded in secrecy, with patent-holders choosing beneficiaries and even distributors. Thus, the AstraZeneca VL to the Serum Institute of India limited what it could produce, and prevented it from meeting Indian and other needs.

European leaders conceded that when 'voluntary cooperation fails, compulsory licences … are a legitimate tool in the context of a pandemic'. But CLs are only relevant for patents, not new vaccines which have not been patented, and deny other IP barriers.

EC arguments protected Big Pharma but effectively rejected the World Health Organization's COVID-19 Technology Access Pool (C-TAP) initiative. C-TAP seeks to enable equitable access to technologies for approved COVID-19 vaccines and therapies. But industry and government officials dismissed technology-sharing as unnecessary, and worse, dangerous for future innovation.

Inflexible 'Flexibilities'

For a long time, Big Pharma and their governments, including the EC, pressured developing countries not to use the very CLs they were now touting as the solution. The US Trade Representative routinely threatened sanctions against countries that used CLs for medicines, recognising others' right to use them only in 2021.

CLs are very difficult to actually use, especially by countries with limited negotiating capacities or relevant manufacturing capabilities. Existing provisions require complicated country-by-country, company-by-company and patent-by-patent negotiations, also raising massive coordination problems.

The CL provision may be enough for some, but certainly does not provide all needed equipment, tests and medicines. Many products need several CLs, implying that 'a harrowing number of CL must be coordinated and granted in multiple countries'.

Also, CL does not require sharing industrial secrets, confidential information, industrial design and other relevant knowledge necessary for viable production. These can be critical, such as for mRNA vaccines that use new technologies.

Those countries unable to produce vaccines themselves have to find others willing to issue CLs to produce cheap generics for export. Yet more hurdles are contained in the fine print of TRIPS and the 2001 'flexibilities'.

Bogus Claims

In fact, sharing such confidential information not only spurs competition but also enhances innovation. Thus, Shantha Biotechnics in India developed a low-cost hepatitis B vaccine, the basis for UNICEF's lauded global vaccination drive.

Contrary to industry and political leaders' claims that circumscribing patents would kill pharmaceutical innovation, 'a host of new drugs and improved HIV treatments' followed 'the agreement on Public Health exception to TRIPS'. These new and improved treatments effectively ended the deadly hepatitis B pandemic.

After inventing the polio vaccine, Jonas Salk was asked, 'Who owns this patent?' He famously replied, 'Well, the people I would say. There is no patent. Could you patent the sun?'

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