

COVID-19, IP Waivers, and Global Health Equity

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Abstract

The essential need for universal access to vaccines, diagnostics, and treatments has been highlighted by the COVID-19 pandemic. The role of intellectual property (IP) rights under the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which provides patent protections that may prevent developing nations from accessing life-saving medical technologies, is at the heart of the global health debate. In response, South Africa and India suggested temporarily waiving several TRIPS clauses to allow for the increased manufacturing and distribution of medical supplies linked to COVID-19. This essay critically analyzes the TRIPS waiver proposal's ethical and legal aspects as well as how WTO members have responded to it and how it affects global health fairness. It assesses how IP regimes both facilitate and impede access and innovation, and it makes the case for a more adaptable and inclusive method of IP governance in times of public health crises. The necessity for a balanced framework that puts public health and human rights ahead of stringent commercial safeguards during times of global crises is emphasized in the study's conclusion.

Keywords: COVID-19; TRIPS Agreement; Intellectual Property; IP Waiver; Global Health Equity; Vaccine Access; WTO; Public Health; Developing Countries; Pandemic Response

1. Introduction

The axiom that "health is wealth" is undoubtedly true in that many of the great aspirations of potentials of persons may become secondary when issues of health is involved. Thus, health issues are so important and overriding in view of the fact that it sustains the capacity to cripple the potentials of a man, an organization or a society at large. This is why the society treats as important societal health crisis at any level whether communally, nationally or globally in context.

Several nations of the world have at one point or the other gone through severe health crisis. The recent global health issue which literally put the world at a standstill was the COVID-19 pandemic which posed a global health crisis with numerous death tolls on daily basis. As a way out of the pandemic, several medical research institutes and personnel embarked on a rigorous journey of finding a vaccine. The discovery of this vaccine became a beacon of hope for the world in salvaging the situation.

However, with the arrival of the vaccine, the contention of Intellectual Property rights of the companies which produced these vaccines arose, meaning only those companies will be able to make, sell and license these vaccines. This restriction obviously created a whole lot of controversy due the limitations of these few companies to meet the wide demand for the need for the vaccines in various countries of the world.

It is against this background that the world began to discuss the possibility of the waiver in Intellectual Property rights in matters of Global Health such as COVID-19 to ensure equitable distribution of the vaccines to combat the global health

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crisis. Thus, this article aims to discuss Intellectual Property waivers for the purpose of Global Health Equity within the Context of COVID-19

2. The TRIPS Agreement and Global Health Governance

TRIPS is an acronym which stands for Trade Related Aspects of Intellectual Property Rights. Intellectual Property Law is an area of law which see to the protection inventions which also includes intangible creation of human intellect (Kehinde F, 2019). Thus, it covers music, artistic works, inventions, and within the content of this write up specifically, it covers drugs. It gives this protection through exclusive rights such as patents, copyright, trade secrets and so on. Global Health Governance on the other hand refer to the system, institutions, laws and policies that coordinate the international effort to improve global health experience across the world (Bärnighausen, Bloom, & Humair, 2014). This structure undoubtedly includes institutions such as World Health Organization (WHO), World Trade Organization (WTO), United Nations (UN) among others. These organizations mobilize and coordinate resources needed for the health stability of the world thereby having important discussions and resolution which has the potency of affecting global health.

The TRIPS Agreement is legally binding under the World Trade Organization (WTO), it was adopted in 1995 and it sets minimum standards for the protection of Intellectual Property across all member states. This protection also includes patents for pharmaceuticals. Under this Agreement, once a drug is patented, companies or countries cannot produce it without the patent owner's permission for about 20 years. This obviously can be a source of disaster in a case of a pandemic such as COVID-19 where countries could not get the authorization to venture into the production of these vaccines to be able to save their people.

The effect of TRIPS agreement has its backdrop from the nature of interconnectedness of the world today. The world is now a global village not just in term of technology but even on matters of health crises and pandemic. The COVID 19 saga is a virus which started in a small village – Wuhan in China and spread all over the world from there. Thus, if content of agreements such as TRIPS is allowed to be unfettered, it can pose a global health risk because the entire globe can become a victim of a virus that originated not necessarily from their soil and the agreement may prevent equitable access to vaccines for treatment.

3. The TRIPS Waiver Proposal: Background and Developments

Flowing from the understanding of TRIPS and its discussions vis a viz COVID-19 above, there is need for the consideration of TRIPS waiver. A waiver is a temporary suspension or relaxation of some IP rules under TRIPS. The TRIPS waiver proposal is thus a proposition introduced during the COVID-19 pandemic to allow countries especially developing countries access and manufacture vaccines, treatments and health technologies without facing legal penalties (Gurgula. O, 2021).

The background to this proposal is the worsening effect of TRIPS on developing countries during COVID-19 which prevented them from accessing vaccines and treatment which is only accessible in high-cost pharmaceuticals abroad due to this IP restrictions. The formal proposal for this waiver was officially laid to the World Trade Organization in October 2020 by India and South Africa wherein they asked for a temporary waiver of TRIPS requirements on Vaccines, Medicines, Diagnostics and Medical supplies related to COVID-19. The rationale for this proposal is the removal of IP barriers on these commodities in light of the fact the situation at hand is a global health emergency.

The global response to this proposal is the support of over 100 countries in the WTO. World Health Organization (WHO) and many Human Rights Organizations also supported this proposal citing moral and public health grounds for their support. However, there were counter arguments by major powerful countries who were not in support of the proposal because according to them it will discourage innovation. The United Nations in May 2021 announced their support for a limited waiver focused on vaccine alone. This however excluded treatments and diagnostics. It has nonetheless provided a leeway for countries to access vaccines to combat the raging pandemic.

4. Patent Barriers and Vaccine Access in Developing Countries

A patent is a legal right in Intellectual Property given to an inventor or company that gives them exclusive access to manufacture and sale of their products or invention. In this case, patent on vaccine is an exclusive right to pharmaceuticals to control the production and sale of vaccine which are their inventions. Patent barriers are thus, the

restrictions that this patent create in preventing companies and countries from manufacturing and selling these products even during an emergency (WIPO, 2019).

Patent barrier matter for vaccines because like other inventions, medical discoveries like drugs and vaccines can be patented as an intellectual property given the inventors the exclusive right to manufacture and sell except for countries or companies which they unequivocally license to do same. The whole aim of patent on vaccines is therefore to reduce its accessibility.

However, there is a major negative effect that this restriction has on developing countries. Rich countries were able to buy large quantities of vaccine earlier on while leaving the poorer countries are left in delays, shortages and high costs. Even when certain countries have the capacity to produce, they could not do so because of the patent restrictions on them. Thus, such a matter of serious global importance is left at the table of capitalist economy in a bid to protect the businesses of some companies. As such, the jurisprudential arguments against these patent barriers does not just stem from whether or not Intellectual Property right can be granted for vaccine but a consideration of the global health crisis as against the economic preservation of a few people. Thus, the vaccine distribution among countries became very unequal with many countries left hanging out dry while the bigger ones took delivery of the vaccines. This raises significant questions as to global health equity and the prioritization of global health policies (Chandrasekharan. S, Amin. T, Kim. J, Furrer. E, Matterson. A, Schwalbe. N & Nguyen. A, 2015).

There are however two ways in overcoming the patent barrier hurdle even though they are very limited. First is the TRIPS waiver proposal which has been discussed above while the other is compulsory licensing. Compulsory Licensing is an offshoot of Article 31 of the TRIPS Agreement which is a legal mechanism that allows the government to authorize a local manufacturer to manufacture or sell patented products without the consent of the patent holder usually for public reasons. While this also serves as a leeway to escape the patent barrier hurdle, the bureaucratic bottleneck involved makes it very limited and very unlikely for it to take effect.

5. Compulsory Licensing: A Tool or a Toothless Provision?

Compulsory licensing is a legal framework introduced by Article 31 of TRIPS which empowers member states to authorize the production or sale of patented products without the consent of the patent holder. It specifies certain protections and formalities, including previous consultation with the patent holder (unless in cases of emergency), restricted use and duration, non-exclusivity, equitable compensation for the patent holder, and usage primarily for the domestic market. Additionally, it requires that any such decisions be reviewed by a judge or other impartial party. When a patent's use is dependent on another or when the authorization is intended to counteract anti-competitive activities, certain regulations apply. All things considered, Article 31 offers a legal foundation for striking a balance between public interest and patent rights, especially in medical emergencies (Yamane. H, 2015).

However, there are debates on whether or not the provision helps to cushion the harsh effects of patent barrier to access of products, especially using the COVID-19 period as a case study. For proponents of argument in support, the Compulsory Licensing provision already provides a way out of this hurdle and prioritizing global issues over and above personal profits (Bird. R, 2009). There are a few precedents as to the workability of this provision. From 2006 to 2007, Thailand compulsory licenses for antiretrovirals (like Efavirenz) faced global backlash but succeeded in reducing prices. Also, by producing a generic version of Nexavar, Natco was able to drastically reduce costs thanks to the 2012 Natco v. Bayer case in India.

Nonetheless, there are arguments which view the compulsory licensing as a toothless dog and a charade which falls short of its full intention. The said article provides for a lot of cumbersome and procedural complexities around its invocation. The pressure from companies and big countries who are these patent holders also helps in watering down the provision of the article. Since nations receiving help from the international community most times depends on their global leanings, many countries are very afraid to stand against patent holders from these big countries. Lastly, even if Article 31 of TRIPS is invoked, it does not provide the raw material nor the technical know-how on manufacturing the products. Thus, many of these countries, even though they can invoke this provision, still do not since they lack the capacity to produce. During COVID-19, notwithstanding this provision, scarcity of vaccines still lingers because developing countries had no capacity to produce as such (Desai. M, 2016).

6. Analysis: IP, Sovereignty, and Global Health Equity

Deep cracks in the global health system were revealed by the COVID-19 pandemic, especially in the area of availability to treatments and vaccines that could save lives. The debate revolved around the role of intellectual property (IP) under the TRIPS Agreement and how global health equity (the belief that everyone should have equitable access to healthcare regardless of wealth or location) and sovereignty (the right of states to act independently in protecting their citizens) clashed or aligned.

The philosophical argument is the interaction between IP rights, the sovereignty of independent nations vis a viz the understanding of global health equity. The much-needed global peace has been very much prescribed to be premised on justice and equity. The security of lives and property of people is then most fundamental duty of government in any sovereign state. Thus, global health emergencies ought to be treated very seriously and its solution not kept within the shackles of IP rights. While the TRIPS agreement is very commendable in that it helps to set minimum requirement for IP rights among WTO member states.

7. Recommendations and the Way Forward

In light of the various issues that have been raised above, here are a few recommendations to chart the course for better global health equity.

7.1. Amendment of TRIPS Framework

Usually, a strategic agreement such as TRIPS may be deficient because most times, the true test of a law is in its enforcement. However, when such a lacuna is discovered, then the agreement can be varied or amended to reflect a better portrait of what is intended. Article 31 should be amended to remove procedural hurdle especially those who limit cross border cooperation and make waiver mechanisms permanent for pandemic.

7.2. Institutionalize a Global Pandemic IP Protocol

WTO should partner with WHO in fashioning out global response in terms of global health emergency. The COVID-19 situation has shown that the world lacks a collaborative effort to respond to global issues without IP hurdles. Thus, a document jointly fashioned by these two organizations will be a good response to pandemic issues in the world.

7.3. Introduction of Innovation Incentives

In as much as IP waivers on vaccines, will go a long way, sovereign governments should also be encouraged to invest in research institutes and innovation center where some of these discoveries can be made locally. Most of the governments of top nations funded the research for the COVID-19 vaccines while most developing nations were waiting for the discoveries to be made abroad.

7.4. Expand Local Manufacturing Capacities

Governments must also expand the capacity of their local pharmaceutical companies to manufacture drugs and vaccines to respond to health emergencies such as COVID-19.

7.5. Global Solidarity

COVID-19 brought to the fore again the undoubted connectivity of the world and the need for the world to stand together to defeat such a challenge. Thus, the subject of global solidarity and global consciousness should feature more in international community discussions especially on global health equity.

8. Conclusion

The COVID-19 pandemic made it clear how vital it is to strike a balance between the demands of global health justice and intellectual property rights. Though its restricted reach and slow implementation revealed underlying disparities in global health governance, the TRIPS framework and IP waivers were designed to enable wider access to life-saving innovations. In order to guarantee that access to necessary medications and technologies is regarded as a universal right rather than a privilege, significant reform that is based on solidarity, clear guidelines, and proactive international collaboration is necessary going forward. Only by making such a commitment will the world be more equipped to handle health emergencies in the future.

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