Global Public Health: Should the Trade Forum Reign?

T G Agitha†
Inter University Centre for IPR Studies, Cochin University of Science and Technology, Kerala, India

Received 27 November 2012

Access to public health is a basic human right. Now the World Trade Organization, which is a trade forum, has a substantial role in regulating access to public health internationally. This is unfortunate since the motivating factor in the trade forum is trade concern rather than human right concern. Besides, trade forum is dominated by the developed country members and the health concern of the developing countries usually goes unattended. The World Health Organization, which is bound by its Constitution to ensure universal access to public health should intervene and use international law as an instrument to fulfil its obligation. In this paper is addressed the issue whether the trade forum should be allowed to reign the terrain of public health and the responsibility of the WHO in ensuring universal access to medicine using international law.

Keywords: Public health, human right, adequacy of trade forum, WHO

Public health is a basic human right and it is the fundamental duty of every nation to ensure its people universal health care. One of the most serious challenges in access to pharmaceutical products is patent monopoly. It is paradoxical that while patent protection may be necessary for promoting research and innovation in the pharmaceutical sector, especially in the modern context, the system, most often, cuts at the very root of the purpose behind the protection, viz., enabling public access to the benefit of such research and development. The pre-WTO international norm was very flexible and the contracting parties were free to design their domestic patent law in accordance with their national interests. However, shifting of the platform for international intellectual property rule making and norm setting from the WIPO to GATT has changed the entire scenario. An attempt is made here to examine the desirability of the trade forum in addressing the public health problems and to consider the obligation of the World Health Organization (WHO) to ensure Global Public Health. The ultimate aim here is to address the issue whether the trade forum should be allowed to reign the terrain of public health and to examine the responsibility of WHO in ensuring universal access to medicine using the international law.

From WIPO to GATT

In spite of the fact that the World Intellectual Property Organization (WIPO), a specialized international agency, an apt forum for making international rules in the field of intellectual property, an entirely different forum, having diverse and conflicting concerns, was opted for accomplishing that mission. The reasons for regime shifting from WIPO to GATT have been meticulously examined by different scholars. Susan K Sell, while examining the origin of a trade based approach to IP protection, states that it is the change in the domestic industrial policy in the United States in the late 1970s and early 1980s that has influenced the shifting of forum. There were many takers of the view that the trade deficit in the US is due to lack of adequate intellectual property protection abroad. This line of thought, along with the increasing dissatisfaction of the developed countries with the WIPO platform in negotiating industrial property due to the demand from developing countries for the revision of the Paris Convention to grant differential treatment to developing countries, low standards of protection available and lack of effective implementation mechanism under the Paris Convention, and the institutional features of the GATT that facilitated adoption of more stringent intellectual property protection standards were the motivating factors behind forum shifting. In reality the shifting of platform was a strategy adopted by American and European intellectual property industries, which were later on taken up by their respective governments.

GATT and the TRIPS Agreement – the Myth of Level Playing Field

Though the GATT/WTO functions on a consensus based decision making rule rather than a weighted voting rule, and therefore is stated to be a ‘level-
playing field’, it is interesting that the US and the EU dominate in the GATT/WTO decision making. Steinberg, on a detailed analysis, suggests that adoption of the consensus decision making rule, based on the sovereign equality of states is ‘organized hypocrisy in the procedural context’. His view is that such a model is adopted to give legality to the decision making process as the consensus model can be cited as an evidence of sovereign equality of states. However, there are other factors like the non-transparent green room discussions and lesser number of delegates from the low income countries in the negotiation process etc., influencing the decision making process. In ‘Green Room’ discussions only most active countries in the negotiations participate. Most often the ‘Green Room’ decisions are accepted by consensus with only minor changes in the final decision in the formal plenary meeting of the GATT/WTO members. Powerful states like the EU and the US, dominate in the decision making under the cover of sovereign equality, also using the power-based bargaining method. In a power-based bargaining model, powerful nations may use their influence to dominate organizations with unweighted voting. Large market size is one major factor contributing to the bargaining power of a nation. A threat of trade closure or losing a given volume of exports is an effective tactic in the bargaining process against countries with smaller markets. With the combined power of market size and economic dominance the US and the EU wield greater influence in the multilateral trade negotiations.

Public Health and the Trade Forum: Incongruities

In a trade regime, the trade concerns govern and that is evident from the history of incorporation of TRIPS Agreement into the GATT framework. It is also clear from the post-TRIPS incidents that the result of such incorporation was tilting the balance envisaged under the intellectual property system between owners and users of IP in favour of the owners of intellectual property or rather the interests of trade. The Globalization report has stated that the debate has been skewed mainly towards guaranteeing the protection of innovation and invention, and has rarely been approached in a holistic and human rights-sensitive manner. This could be attributed to the inherent problem of a trade forum.

Though the Objective Article 7 and the Principles Article 8 of the TRIPS Agreement necessitate that the protection and enforcement of IP should contribute to transfer of technology, balancing of the rights of users and producers of technological knowledge and protection of public health, those fundamental principles are most often neglected. The attempts by developing and the least developed countries to address the adverse impact on public health, created by the TRIPS requirements to extend patent protection to all fields of technology, and to issue product patent to pharmaceutical inventions using the existing flexibilities in the TRIPS Agreement, were met with severe consequences. The challenges against the laws in South Africa, Brazil, India, Kenya and Thailand exemplify the grim state of affairs. In South Africa, the Government introduced the Medicine and Related Substances Control (Amendment) Act enabling the concerned Minister to prescribe conditions for allowing parallel importation with a view to handle the severe HIV/AIDS problem in the country. Thirty nine pharmaceutical companies from the US and the EU approached the African court against the Government to stop enacting the law. These cases were finally withdrawn as a result of worldwide protest. Similarly, the US initiated a dispute before the WTO against Brazil for the reason that requirement for compulsory ‘local working’ of the patent under the Brazil’s Industrial Property Law 1996 is inconsistent with Article 27 of the TRIPS Agreement. Both these incidents highlighted the resistance faced by the developing countries when they were making use of the TRIPS flexibilities like parallel importation and compulsory licensing for ensuring access to medicines. This ultimately led to the Doha Declaration on the TRIPS Agreement and Public Health, which simply clarifies the scope of available TRIPS flexibilities.

Another crucial challenge to health interests of developing countries is the WTO Dispute Settlement mechanism and the strict enforcement of panel decisions using cross-retaliation measures. It is a sword hanging over the neck of the countries which intend to use the TRIPS flexibilities for promoting public interest. A unique feature of the new regime is ‘reverse consensus’ by which the report of the panel or Appellate Board is being adopted by the DSB. Reverse or negative consensus means that the report will be deemed to be adopted unless there is a consensus not to adopt it. This rule prevents the possibility of one party (usually the party against whom there is an adverse finding) or a few from vetoing the adoption of the report. The majority of the users of the Dispute Settlement mechanism are
developed country members among which the US is the most frequent complainant. The Global trade report has concluded that the developed countries, who are the main stakeholders and protagonists in the trade arena, are also in a position to readily use the Dispute Settlement Understanding (DSU) to protect their interests because of their resources and expertise in making use of it and thus there is a divide in the access to the Dispute Settlement system. Apart from the resource constraints and the lack of technical know-how to access the Dispute Settlement system, the developing countries are also handicapped by the process of choosing the WTO panelists, who are mostly government officials and diplomatic representatives serving in Geneva, a great majority of whom belong to the developed countries. Another problem with the DSU is the lack of transparency of its proceedings. Asymmetry in resources and technical know-how between developed and developing countries, predominance of the developed country in the number of the panelists, who are mostly government officials and diplomats of member countries in Geneva, lack of transparency of the WTO DSU proceedings, the high cost of services of specialized international law firms on legal issues as complex as those arising under the WTO/GATT regime, which places impossible burden on poor countries, etc., are factors which weigh against the developing countries under the current DSU system. Moreover, the trade sanctions on non-compliance of WTO panel decisions are viewed by developing countries with more apprehension than by the developed countries.

Responsibility of the World Health Organization

The above discussion reveals that though the WTO regime is governed by one vote one country system (Article IX), the playing field is far from being level. The incongruity in the trade regime wielding absolute control over public health has become plain as the nose on your face. Thus, it has become extremely necessary to seek a new platform for discussing and deciding on the issue of public health. Undoubtedly the most apt forum for addressing public health issues is the World Health Organization (WHO) and it has an obligation to ensure that all other international forums comply with the WHO’s decision in this matter.

The Article 18 (l) and (m) of the Constitution of the WHO declares that ‘(t)he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition’ and recognizes that the objective of the WHO shall be the attainment by all peoples of the highest possible level of health. In order to achieve this objective, the Constitution has identified that the functions of the Health Assembly (WHA) include ‘to establish such other institutions as it may consider desirable and to take any other appropriate action to further the objective of the Organization. It also confers on the health Assembly, authority to adopt regulations concerning various standards in relation to the trade in pharmaceutical drugs as per Article 21 of the WHO Constitution. Health is defined in the preamble to the Constitution of the WHO to cover ‘a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity.’ Article 19 of the WHO Constitution states that the WHA ‘shall have the authority to adopt conventions and agreements with respect to any matter within the competence of the Organization’. The scope of this power is not confined just to the infectious disease control but to human rights, international trade and environmental conditions.

However, the WHO has shown little interest in taking up responsibility to protect human right to health, in the international level as proclaimed in the WHO Constitution, until the HIV/AIDS problem became so huge. For the first time the WHO thought of exercising its power under Article 19 as a response to the growing concern on the alarmingly growing rate of non-communicable diseases as a result of tobacco consumption and proposed an international framework convention on tobacco control. Another important endeavour of the WHO was the revised drug strategy in 1998. WHO’s global health policy, Health for All in the 21st Century, also mentions a number of obligations the WHO need to fulfill using international law for ensuring universal access to medicine. In spite of all these mandates, the WHO has yet to take up any major initiative in this respect in the required vigour.

Conclusion

More dynamism needs to be shown by the World Health Organization in addressing the international public health crisis owing to the unequal level of technological know-how and capacity to invest in research and development among the developed and developing countries, failure of patent system to properly address the health concerns of the developing countries, problems faced by developing...
countries and the poor people belonging to the developed world to access available medicines because of exorbitant price resulting from intellectual property protection etc. The WHO has to use its right to intervene in appropriate stages in international legal affairs and use its own forum to enforce the basic human right to health in an effective manner.

References
1. Article 1(1) of the Universal Declaration of Human Rights states: ‘Everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control’. Article 12 of the International Covenant on Economic, Social and Cultural Rights requires the States Parties to the Covenant ‘to recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’ and to take steps to achieve the full realization of this right including, the prevention, treatment and control of epidemic, endemic, occupational and other diseases; the creation of conditions which would assure to all medical service and medical attention in the event of sickness etc. (emphasis added).


4. Sell Susan K, Private Power, Public Law: The Globalization of Intellectual Property Law, Cambridge Studies in International Relations(Cambridge University Press, New York) , 2003 Chapter 4, pp. 80,81; Mossinghoff Gerald J, The importance of intellectual property protection in international trade, Boston College International and Comparative Law Review, 7(2)(1984) 236. His argument is that in order to compete internationally the US industry was bound to innovate and due to the high cost of research and development, innovation, required the incentive of strong IP protection. Likewise, effective use of patents is also required for increased exporting and licensing of new technology. Thus, patents and trademarks are integral components of trade and industry (pp. 236-38).


6. Helfer Laurence R, Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking, The Yale Journal of International Law, 29 (1) (2004) 21, 22. According to the author three institutional features of the GATT/WTO made it a superior venue for the United States and the EC to negotiate intellectual property protection standards. With their largest domestic markets, they have significant negotiating leverage in the GATT/WTO and the principle of consensus on which the negotiations in GATT/WTO operates can be used by the United States and the EC have strategically to force disclosure of weaker states’ preferences, block the advancement of proposals those states favored, and advance their own initiatives; the ability to link intellectual property protection to other issue areas within the GATT/WTO expanded the zone of agreement among states with widely divergent interests; the GATT’s dispute settlement system was perceived to be far more effective than the mechanisms for reviewing states’ compliance with WIPO-based conventions.


10. Article IX of the Agreement establishing the World Trade Organization states that ‘where a decision cannot be arrived at by consensus, the matter shall be decided by voting.’ It defines consensus the same way it had been defined in GATT practice since 1959: a decision by consensus shall be deemed to have been taken on a matter submitted for consideration if no signatory, present at the meeting where the decision is taken, formally objects to the proposed decision (See footnote 1 to Article IX.1). If there were recourse to voting in the WTO, Article IX provides that decisions would be taken by majority, two-thirds, or three-fourths vote-depending on the type of measure. But there has been no voting at the WTO.


13 Schott Jeffrey J and Watal Jayashree, Decision-making in the WTO Policy Brief, 2 March 2000, http://www.iec.com/publications/pb/pb.cfm?ResearchID=63#note4. Green Room consultations typically include the Quad (i.e. United States, European Union, Canada, and Japan), Australia, New Zealand, Switzerland, Norway, possibly one or two transition economy countries, and a number of developing countries. Developing countries that often participate in the Green Room include Argentina, Brazil, Chile, Colombia, Egypt, Hong Kong, China, India, Korea, Mexico, Pakistan, South Africa and at least one ASEAN country; most smaller developing countries stay out for lack of adequate resources or capabilities. Also read Mayur Patel, ‘New Faces in the Green Room: Developing Country Coalitions and Decision Making in the WTO’ Global Trade Working Paper, GEG Working Paper 2007/33, http://www.globaleconomicgovernance.org/wp-content/uploads/Patel_Main%20text_new.pdf. The author states at p. 3 that the lack of transparency and exclusivity of these meetings, combined with the limited resources of weak states, meant that developing countries found themselves isolated from many decision-making processes.

14 Steinberg Richard H, In the shadow of law or power? Consensus-based bargaining and outcomes in the GATT/WTO, International Organization, 56 (2) (2002) 339,346-348,355, http://www.jstor.org/stable/3078608. However, Mayur Patel, in his study, ‘New Faces in the Green Room: Developing Country Coalitions and Decision Making in the WTO’ Global Trade Working Paper, GEG Working Paper 2007/33 http://www.globaleconomicgovernance.org/wp-content/uploads/Patel_Main%20text_new.pdf has expressed the view that recently, coalition building among different interested groups has shown its impact in the decision making process and has improved the participation of developing countries in WTO decision making. The information gathered by these coalitions are being widely disseminated internally. This information dissemination has allowed weak states to identify trade-offs and to contribute to consensus-building. It has also improved some aspects of the internal transparency of the negotiations (far from all), particularly given that records of informal meetings are not kept, and hence, unlike official meetings, they cannot be followed without an actual presence in the discussions or an established line of communication p. 17, 19; Panagiotis Delimatis, Transparency in the WTO Decision-Making, TILEC Discussion Paper, DP 2012-006, 9 February 2012, p. 9.


18 This is evident from the South African and Brazilian experience when those countries went for making use of compulsory licensing flexibilities.


22 WHO Document EB101.R24. It urges member states, inter alia, to reaffirm their commitment to develop, implement and monitor national drug policies to ensure equitable access to essential drugs and to ensure that public health rather than commercial interests have primacy in pharmaceutical and health policies and to review their options under the Agreement on Trade-Related Aspects of Intellectual Property Rights to safeguard access to essential drugs.

23 WHO Document EB101.R24. It urges member states, inter alia, to reaffirm their commitment to develop, implement and monitor national drug policies to ensure equitable access to essential drugs and to ensure that public health rather than commercial interests have primacy in pharmaceutical and health policies and to review their options under the Agreement on Trade-Related Aspects of Intellectual Property Rights to safeguard access to essential drugs.