Three Crises and One Waiver

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The debate on the waiver of the international patent protection regime for Covid-19 vaccines, fueled by the surprising support of the United States and the opposition of the German government, entwines three major crises of our time: the Covid-19 crisis, the crisis of the WTO, and the crisis of intellectual property. The first is about public health, the second about international economic law, and the third about IP law. There is no shortage of people who have both expertise and strong opinions on one or two of these. Only few can offer equally competent opinions on all three, and certainly not us.

Covid, vaccines, and the Global South

Which is why we have called Jayashree Watal. She has been working for more than three decades on the patent-protection v. access-to-medicine dilemma, was in charge of that topic for 18 years at the WTO secretariat, had negotiated the compulsory licence clause into the TRIPS agreement in 1989/90 on behalf of India, and now is a professor at the Georgetown University School of Law in Washington D.C. Who knows if not she?

It's obviously true, she says: "Vaccine equity is not happening. With the best of intentions or efforts, but it's not happening." But will a waiver of intellectual property rights, in and of itself, improve vaccine equity? "No. It won't. That's clear."

Manufacturers of generic medicaments in the Global South are capable to reproduce a patented molecule – say, an HIV medicament – or certain biologic products. But to produce a modern mRNA or vector vaccine in large quantities without the cooperation and guidance of the company that has originally developed it is a different matter. If a country waives that company's intellectual property rights, it will be less likely, not more, that it will readily cooperate. "A waiver helps to keep generic manufacturers safe from patent litigation. But they won't even get to that stage without the cooperation of the inventors." On top of that, not all that you need to produce these vaccine generics is patented and, thus, disclosed in the patent application. Much is protected against competitors not via patent law but by keeping it secret. "You can't force the company that hold these secrets to pass it on to you."

So why does India, along with South Africa, push so vehemently for a waiver? "Indian generic manufacturers want to produce these products", Jayashree Watal says. "Of course they do. Every company wants a slice of this hugely profitable pie that is Covid-19 vaccine products. But what they want is voluntary licences." The proposal of India and South Africa can be seen as an "indirect attempt to put pressure on the original manufacturers to cooperate. Whether it works or not is another matter." What the proposal, at any rate, will definitely not achieve is speeding up the Covid-19 vaccination rate in India or other parts of the Global South.

The permanent crisis of the WTO

One way to distribute vaccines globally and equitably would be to establish an "International Pandemic Fund" as proposed by Jayashree Watal. Largely (pre-)financed by the EU and the USA, such an organization would provide money and expertise and, with a speedy decision-making process and without much ado, would distribute the necessary goods where they are needed. According to Watal, setting up this body would be possible in the short term and could already be used in the multilateral fight against this very pandemic.

It would be great, of course, if an "IPF" existed and worked in practice. In the past, by the way, it is important to remember that it was the WTO which used to be the envy of all other multilateral legal regimes

because it worked so well. It is not only its 60 or so agreements, which regulate the rights and obligations of members in great detail, that set it clearly apart from many other areas of international law, which are rarely codified this extensively. The "jewel in the crown" of the WTO, however, is undoubtedly its dispute settlement mechanism, which is not only compulsory but also provides an appeals process and offers effective means – at least compared to other international legal systems – to enforce decisions. Whether the WTO can live up to the expectations that some appear to place in it to fight this pandemic seems unlikely, as the WTO has been in crisis for years. The major problem may be the organization's decision-making process: decisions are usually taken by consensus, including any possible TRIPS waiver. So all it would take is but one of the 164 members not going along, and the waiver would remain nothing but a fancy idea. It would not be the first time that the decision-making process by consensus turns out to be a major impediment.

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That this system of decision-making is susceptible to crisis to began to emerge some 20 years ago – in an organization that began its work just over 26 years ago. In 2001, negotiations began on the Doha Round, which was intended to strengthen the interests and needs of developing countries in the world trading system. The negotiations were supposed to be concluded by 2005. They have not been concluded to date and are considered to have failed. Then, in late 2019, a key part of the WTO system was crippled. The U.S. administration, then still under Trump, had blocked the appointment of the new members of the dispute settlement's Appellate Body. Since then, whenever members appeal first-instance decisions of the panels they appeal into the void.

Despite being hailed as a rule-based system, the WTO decision-making process by consensus is essentially a political-diplomatic one that is still based on the GATT, the WTO's predecessor. It may be sovereignty-friendly, but it is cumbersome, if it is at all workable with such a large number of members. The fact that treaty changes are usually negotiated as packages and that the "all-or-nothing" approach applies in addition to the "all-or-none" principle, does not help. This is also reflected in the contracts. They are a relic of the late 1980s and early 1990s. Whoever searches for the term "digital" in the core agreements will be disappointed.

So is the WTO inevitably dying a slow death because of its inability to act? Not necessarily. Already during the debacle surrounding the appointment of the Appellate Body members, Ernst-Ulrich Petersmann pointed out that decisions in the voting procedure under Art. IX:1 of the Marrakesh Agreement are possible: If consensus cannot be reached, a majority vote is taken. With "Merkel's *Kriegserklärung*" against the

suspension of patent rights, these voices have already re-emerged. So far, WTO members have not made use of this possibility, and it would be a kind of disruption of the system. But perhaps it is time to think more profoundly about whether decision-making by consensus is still suitable to solve the problems that have paralyzed the organization to a large extent. For the moment, at least, it seems that the WTO does not have much to lose anyway.

Property as a right of exclusion

In these times, the narratives traditionally used to justify the right to the exclusive exploitation of tangible and intangible goods tend to be found somewhat unpersuasive by a rising number of people, whether in rental housing, academic publishing or software development. In the case of pharmaceutical patents, the narrative is that no manufacturer will take the risk of investing in costly research and development and take the risk to fail along the way if any competitor can just come along and copy what they did without paying any of costs involved. This is perfectly plausible for ordinary drugs that doctors prescribe and pharmacies sell. But for state-funded and operated vaccination campaigns? Products that are pre-ordered, paid for and distributed by the state?

In general, it is not easy to see why a pharmaceutical company would need a monopoly as an additional incentive to enter into such a risk-free deal. It is even more difficult to understand why this exclusivity should also extend to countries which are too poor for doing any business in the first place. What remains is, once again, ideology: waiving patent protection would have all sorts of disruptive effects and do all sorts of damage to the credibility of the system! Which is probably true, but it's not entirely self-evident that a bit of disruption would necessarily be a bad thing, is it?

After all, a patent is not just a reward for its owner's willingness to take risks and invest. The deal is also that the inventor, having his innovative lead legally secured, can fearlessly disclose how his invention works for everyone to see and learn and build on and develop further, instead of hiding his ideas from public view. But that part of the deal doesn't seem to work when vaccine inventors keep some of the process a trade secret, making it hard to produce generics without their help even if you were entitled to. This way, they can have their cake and eat it, which is certainly very convenient for them and in some places even downright governmental maxim, but still not a sustainable concept in the long run.

On the other hand, blaming some Pharma behemoth is certainly always as cheap as it is fair, but that shouldn't blind anyone to the fact that it is our own governments that have failed to insist on according regulations in their vaccine contracts and to shape the international patent regime in a less dysfunctional and more equitable way. The fact that the pandemic is a global pandemic and that inexistent access to vaccine in Congo will not remain a Congo problem alone for long, could have been known by the US government or the EU Commission. Now it is too late, and the result is that for the moment the northern part of the Covid-19 world map is, once again, fading into ever more delicate pink as they walk towards full vaccination, while the south is, once again, drowning in ever darker red. May the future at least draw the right conclusions from this catastrophe.

The week on Verfassungsblog

In the constitutional conflict in **Poland**, a new player has entered the arena, one who hadn't made much of an appearance so far. And with a bang! A chamber of the European Court of Human Rights in Strasbourg has issued a verdict according to which the Polish "Constitutional Tribunal", with the so-called "anti-judges" participating in its panels, does not qualify as a "tribunal established by law" under Article 6(1) ECHR. Readers of Verfassungsblog have been well aware of this since 2016, but the fact that the ECtHR has now made an explicit statement to that effect this is a huge deal – especially since this Polish "Constitutional Tribunal" will soon deliver its PiS-ordered "judgement" on the binding effect of judgements of the other European Court, the one in Luxembourg, on the subject of the independence of the judiciary. Now the PiS government and its minions in the "Constitutional Tribunal" will have to disobey both European Courts

along with the inter- and supranational legal orders behind them. Do they truly believe they will get away with that? We do not know. More detailed information on the Strasbourg ruling will be available here soon.

The German Federal Constitutional Court's major decision on **climate protection** will give us plenty to think about for years to come, and definitely for another week: KATJA RATH and MARTIN BRENNER look into the "fundamental right to intergenerational justice" that could be inferred from the decision. HELMUT PHILIPP AUST clarifies what the resolution demands of the legislator. "For all its balance, the decision contains a clear statement: we can only afford our freedom as long as we consider the consequences of its use." BENT STOHLMANN, meanwhile, wonders about the "unfathomable" dogmatic paths taken by the court. Why does it not build its argument on the duties to protect fundamental rights? What does this reveal about the problems that the court creates for itself with its standard-setting?

A provocative song by the rapper Danger Dan has caused a far-right MP in the German Bundestag to question the state funding of culture. SASCHA WOLF reports on the AfD's dangerous strategy of a "***Kulturkampf von Rechts***".

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The Green politician Renate Künast wants to take **Facebook** to court to make it act more consistently against fake news. MATTHIAS FRIEHE analyses how the lawsuit contradicts the current 'overblocking' debate and puts social networks in a tight spot between freedom of expression and protection of personality.

In the **Czech Republic**, the scandal-ridden Prime Minister Andrej Babiš remains in power. In April, the EU Commission had published its final report on the subsidies for Babiš's company Agrofert. VLADIMÍR NAXERA and ONDŘEJ STULÍK reflect on Babiš' ongoing conflict of interest and his lack of discernment between public and private.

At the **EU Social Summit** in Porto these days, the realisation of a "social Europe" is high on the agenda. SOPHIE SCHWERTNER and TENSIN STUDER report on the important steps being discussed there.

In **Spain**, the Constitutional Court is dealing with a law of the Galicia region that threatens vaccination refusers with a fine. DOLORES UTRILLA explains why compulsory vaccination could be constitutional in Spain, but not as envisaged by the Galician parliament.

In **Zimbabwe**, the constitution was amended to allow the president to personally select high-ranking judges. HOITSIMOLIMO MUTLOKWA fears that Zimbabwe could soon be a "failed state".

In **Mongolia**, the president has decided that the ruling party must be dissolved. BAT-ORGIL ALTANKHUYAG describes the constitutional conflict behind this.

So much for this week.

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All the best, thank you and see you soon,

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