

WTO breakthrough on access to medicines for developing countries: What next ?

Member States of the World Trade Organization (WTO) were finally able to break the deadlock regarding the issue of intellectual property and public health on August, 30 by reaching an agreement on « better access to medicines for developing countries». Although they managed to untie the Gordian knot ahead of the WTO Ministerial Conference taking place this week in Cancun, Mexico, the question remains: Does the agreement really deal with the root of the problem? Felix Addor, member of the Swiss delegation to the WTO, is also a member of the Board of Directors at the Swiss Federal Institute of Intellectual Property in Berne.

In 2001, the WTO Member States adopted a declaration on the relationship between the WTO/TRIPS Agreement (Agreement on Trade-related Aspects of Intellectual Property Rights) and public health at Doha, Qatar (hereinafter referred to as the Doha Declaration). The declaration underlined the essential flexibility of the TRIPS Agreement for situations concerning serious public health problems such as AIDS, tuberculosis or malaria. A key provision in the declaration was the confirmation of the right of every WTO member facing such problems to make use of compulsory licenses for the patented medicine, thus allowing countries in certain situations to manufacture generic products without authorization of the patent holder.

There was a catch to compulsory licensing, however: If countries already had insufficient manufacturing capacity in pharmaceuticals, how could they effectively make use of a compulsory license? According to WTO law, a compulsory license is to be used predominantly for supplying the domestic market, making this a pretty useless instrument for a country lacking sufficient manufacturing capacity. Further, WTO law does not allow third-party countries to issue a compulsory license for exporting purposes. Thus, a WTO Member State without sufficient manufacturing capacity is in a situation of neither being able to produce a medicine nor import it under compulsory license.

This situation was now addressed by a WTO decision of August 30, 2002, resulting from a long and contentious negotiation process in Geneva. The solution agreed allows developing countries without sufficient pharmaceutical manufacturing capacity to more easily import generic medicines. To the extent to which a product is patented in the importing and exporting countries, compulsory licenses - one for production and exportation and another for importation - can now be granted. The decision is an effort to facilitate access to medicines in developing countries facing public health problems, trying at the same time to avoid abuse of compulsory licenses which undermines the patent right system. By solving such a politically sensitive question, the WTO sends a positive signal to those developing countries confronted with public health problems and to the world in general. Hopefully, it will also set a positive precedent and help break the deadlock in other important negotiation topics under scrutiny at the WTO Ministerial Conference in Cancun, starting September, 10.

If the Gordian knot of better access to medicines has been untied, one is tempted to believe that 'all is well that ends well'. But the real problem of the supply of medicines to developing countries with insufficient - or even nonexistent - manufacturing capacity is still far from being satisfactorily solved. Until it is, there will continue to be millions of people contracting serious diseases without hope of receiving adequate or effective medical treatment.

The WTO contribution to a global and comprehensive solution to the problem of public health is, by definition, limited to purely commercial aspects, such as intellectual property right matters and custom duties. The Doha Declaration of November 2001, now complemented with the decision of August 30, 2003, sets out the contribution that intellectual property can make to solve the problem: It specifies, for example, that each country may parallel import medicines needed. In addition, the poorest countries, 30 of which are currently members of the WTO, will not have to enforce patent rights for medicines until the year 2016. These countries are currently not even under the obligation to grant exclusive marketing rights for new pharmaceutical products. The agreement of August 30 will eventually facilitate access to medicines through compulsory licensing for all developing countries

needing medicines for combating a public health problem which lack the capability of manufacturing them themselves.

It would be illusionary, however, to believe that this complex problem could be solved by simply suspending intellectual property rights. While there is always the danger of a patent holder abusing his rights, the fact is that at least 95% of the essential medicines on the WHO list are not protected by patents. Yet the people of many developing countries still do not have the benefit of sufficient and affordable access to these medicines. In addition, patents play a central role in stimulating R&D investment for new medicines and vaccines including for the health epidemics being experienced by developing countries. R&D, however, is expensive and time consuming. It would be fatal to believe that a reduction in patent protection would improve the situation of victims in the long run.

Most public health crises are due to a conjunction of social, political and economic factors. To efficiently remedy the current precarious situation, a large number of other difficulties must also be addressed in a sustainable manner, the majority of which are not under the umbrella of WTO. First, information and preventative measures, particularly in developing countries, must be improved to halt the growing numbers of people infected daily with incurable diseases such as AIDS. Secondly, infrastructures such as hospitals, medical equipment, roads, electricity, etc. in developing countries must be developed or reinforced if a global improvement of the situation is to occur. This also includes assuring that local authorities are held accountable, upholding the fundamental human rights of sick people and, where necessary, effectively fighting excessive bureaucracy and corruption. One important step which actually is within the authority of the WTO, would be to reduce or lift taxes on imported pharmaceutical products. High import taxes considerably raise the price of imported medicines, even those which are exported at low prices. In certain developing countries, for instance, import taxes account for 35% of the price of anti-retroviral drugs.

In the end, the true Gordian knot is a financial one: it is impossible to fight public health problems effectively with barely a few dollars per capita, which is the amount of the annual health budget in

many developing countries. Reducing the misery in third-world countries can only occur with the financial cooperation and support of the wealthier countries, something which still requires a large amount of persuasion. To reduce the issue of access to medicines simply to one of patents and the WTO is wrong. Such a vision would be detrimental to finding a long-term, global and effective solution. The causes of insufficient distribution of medicines in certain developing countries are very complex. They require cooperative action and important financial aid from the international community. Let us hope that the recent decision of the WTO to facilitate the importation of low-priced medicines to developing countries was the next step and not the last towards a solution which takes a truly global approach to the problem.