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Was the recent skirmish on the TRIPS Agreement and Covid-19 really worth it?

Miquel Montaña (Clifford Chance) · Monday, October 26th, 2020

As Bob Hudec explained in his legendary *The GATT Legal System and World Trade Diplomacy*, GATT's (since 1995, WTO) long-standing practice of seeking to adopt decisions by consensus finds its roots in 1947, when the then 23 parties to GATT were a small club of good friends. The proposition that a friend might impose a decision via a majority approval on another friend was not quite in line with the friendly atmosphere that delegates enjoyed at the headquarters of GATT, a charming building situated in front of lac Leman. This spirit of consensus, which, of course, has advantages (no losers) and disadvantages (ambiguous legal texts), has lasted to this day.

Last week, word got around that a proposal made by India and South Africa during the last meeting of the TRIPS Council aimed at introducing rules that would waive certain intellectual property rights ("IPR") to ease access to Covid-19 vaccines was initially rejected due to a lack of consensus. For example, according to the United Kingdom ("UK") government, the proposal was "an extreme measure to address an unproven problem". The European Union, the United States and Australia backed the UK, while other delegations, such as Kenya, supported the proposal. Clearly, the days where GATT was a small club of good friends are gone, although disagreement is not necessarily indicative of an unfriendly mood. And, most likely, the struggle to arrive at a consensus will continue in future meetings.

But was this proposal necessary in the first place? Interestingly, on 15 October 2020, the WTO published an "Informative Note" under the title *The TRIPS Agreement and COVID-19*, the reading of which casts doubts on whether any time and energy devoted to another useless modification of the TRIPS Agreement, such as the introduction of Article 31 bis (waivers for export purposes), would be worth it. Why was so much time, effort and so many newspaper headlines consumed in that amendment of the TRIPS Agreement to introduce export waivers, if nobody uses them?

Reading the "Informative Note" (the "Note") prepared by the WTO's Secretariat, which has gone relatively unnoticed and is actually good reading, illustrates that the TRIPS Agreement already contains the necessary legal armamentarium to address the need posed by Covid-19. The Note also reports the measures already adopted by some WTO members on this front. For example, the Note explains that some countries, such as Brazil and Russia, have introduced accelerated patent examination procedures for applications related to Covid-19. Likewise, some patent offices have introduced measures aimed at easing requirements, such as formalities and payment of fees. Also, some WTO members such as Canada, Germany, Hungary, Israel and New Zealand have approved rules based on Article 31 ("other use without the authorization of the right holder") of the TRIPS

Agreement to allow the granting of compulsory licences, if needed, in emergency situations. Depending on how things unfold, it will be interesting to see how Courts interpret the contours of Article 31, a provision with the typical convoluted flavour of provisions adopted by consensus.

All in all, the aforementioned example regarding the lack of use of Article 31 bis illustrates that discrete *petits pas* within the current legal framework are more useful than high profile legal reforms.

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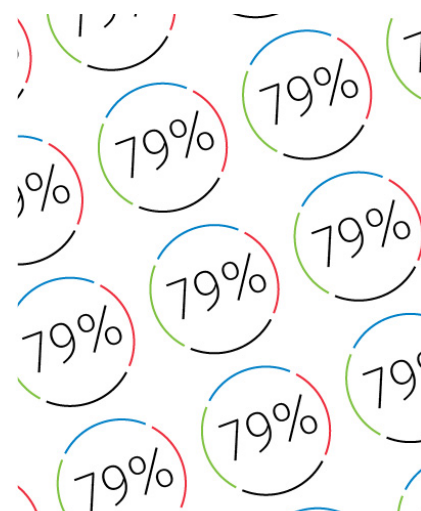
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