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What Did Doha Accomplish? The Doha Declaration on Intellectual Property Rights and Access to Medicines

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The issue as to whether so called "natural rights", for example the right to housing, healthcare and essential medicines should trump property rights has long been discussed in courts and other fora and is no doubt a worthy debate.

The issue has come to the fore at the WTO negotiations in Doha where activists called for the abrogation of patent rights to ensure that those in need of essential medicines have access to them notwithstanding the intellectual property rights of patent holders. In the past week the activists have declared a victory as the result of a declaration entitled: Draft Declaration on the TRIPS Agreement and Public Health.

It is stated in the declaration that:

We recognize the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.

We stress the need for the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to be part of the wider national and international action to address these problems.

We recognize that intellectual property protection is important for the development of new medicines. We also recognize the concerns about its effects on prices.

We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' rights to protect public health and, in particular, to promote access to medicines for all.

In this connection, we reaffirm the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose...

What does this mean? The Declaration acknowledges the need for access to essential medicines especially in countries where there are health emergencies such as HIV/AIDS, tuberculosis and malaria, but while doing so also reiterates the commitment of the global community to the TRIPS Agreement. In a renewal to the commitment to adhere to the terms of TRIPS there is a reiteration that TRIPS contains so-called "flexible provisions" which allow countries to compulsory license and to import generic versions of the patented pharmaceuticals needed, under certain conditions, to be decided on by the country.

In a report published on 1 December 2000 the Institute stated that the TRIPS Agreement contains flexible provisions which countries, facing medical emergencies, should avail themselves of in order to improve access to pharmaceuticals under patent. The report stated that:

"Where patents do exist, the TRIPS Agreement permits a great deal of flexibility to seek compulsory licenses or parallel imports of drugs under patent. The United States and Europe have indicated that they will not oppose such practices consistent with the TRIPS Agreement."

and

"The TRIPS Agreement permits sufficient flexibility for [African] countries to expand access to HIV/AIDS drugs where other critical elements are in place..."¹

The Institute was accused by activists of "allowing multinational drug companies and developed country governments to avoid their responsibilities for the deaths of many millions of people...and deliberately tries to finesse this culpability."

Thus the report acknowledged that TRIPS contains terms which allow countries some flexibility to obtain essential medicines under certain conditions and that the United States and Europe would not oppose a country which relies on these terms as long as the steps taken are consistent with the TRIPS Agreement.

At the time of publication of the report the activists saw this acknowledgment as supportive of pharmaceutical companies and the governments that supported them in global negotiations. Now, 11 months later, the same acknowledgement by negotiators at Doha is seen as a major victory for activists. The key question therefore is: What has changed?

The answer, it is suggested, is absolutely nothing except the political acknowledgement by WTO Members that developing countries are afflicted by national health emergencies.

In the aftermath of the Declaration, activists have written: "Governments are now free to make or import generic versions of the patented drugs they need."² This is not exactly news, because, in fact, these governments were always free to do so. The TRIPS Agreement allows for countries to compulsory license pharmaceuticals under patent under certain conditions. Those conditions will be decided unilaterally and subjectively by the country and will only be subject to challenge if the patent holder believes that those conditions are spurious. The patent holder may, or may not be, supported in its challenge of the issue of the compulsory license by WTO member states. This was always the case.

A second question therefore is: Does the political statement change this? The activists have declared a victory over the pharmaceutical companies and the countries that support them merely because of the political acknowledgement in the Declaration.

It is the view of the Institute that this is naïve and short sighted. Whenever property rights are challenged, in a place where a market exists for the sale of the particular commodity or otherwise, and the country which has taken steps to abrogate those rights is perceived to have used its discretion unwisely, the property right holder will challenge the decision made. This will happen with or without a declaration of the nature as that contained in the Draft Declaration on the TRIPS Agreement and Public Health, too much is at stake for the situation to be otherwise.

¹ A letter received by the International Intellectual Property Institute (IIPI) written by the Treatment Action Campaign (TAC) on 5 February 2001.

² Gaëlle Krikorian – ACT UP-Paris 15 November 2001.