

**TRIPs AGREEMENT AND HUMAN RIGHTS:
PROTECTING PUBLIC INTERESTS IN DEVELOPING
AND LEAST DEVELOPED COUNTRIES AT THE
CROSS-ROADS**

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Abstract

IPRs qualify as human rights since they have moral standing and developmental value to assist the enjoyment of other rights. However, being included in the *TRIPs Agreement* they take hold of protectionist trade implications and monopolistic ownership traits. Having based in developed countries and recognised as human rights, IPRs clash with the principle of free trade and comparative advantage. As a result, developing and least developed countries lose the comparatively advantageous reverse engineering of knowledge products and lag behind in fulfilling developmental needs in agriculture, health, biodiversity, economic development and so on and consequently causes concerns on a broad range of human rights including right to health and life, right to food, right to education, privacy and expression, indigenous people's rights and so on.

1. Introduction

The World Trade Organisation (WTO) *Agreement on Trade Related Aspects of Intellectual Property Rights*, 1994 (the *TRIPs Agreement*)¹ has

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¹ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 *I.L.M.* 1197 [hereinafter *TRIPs Agreement*]. For the purpose of its entry into force, it contains detailed provisions in Article 65. Article 65.1 provides member states the general transitional period of one year from 1 January 1995 of entry into force of the WTO for implementing the *TRIPs Agreement*. Article 65.2 and 65.3 entitles developing countries and countries in the process of moving to market economies another four years for implementing it on consideration of their special problems. In addition, Article 65.4 provides developing countries an additional period of five years to extend product patent protection to technology. On recognizing the special needs of the Least Developed Country (LDC) members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base, they were initially accorded with a transitional period of ten years. The TRIPs Council which is constituted under the *WTO Agreement* and in

long been a subject of debate between its current and potential developed, and developing and least developed country (LDC) members for its uniform and strict intellectual property rights (IPRs)² protection standard-setting. The standard-setting follows IPRs-owning developed countries and binds all countries irrespective of their development standing. The stringency in protection standard and its coercive enforcement paradigm monopolise IPRs by extending the reach and length of IPRs protection and hence constitute derogation from the principle of free trade.³ The protective regime also impedes the reverse engineering of IPRs-protected products. This contradicts with the free trade principle of comparative advantage since some developing and least developed countries having necessary infrastructures lose the advantage of reverse engineering. Therefore, the IPRs-monopolisation and taking comparative advantage of imitation and adaptation appear as a blockade to fulfil the developmental needs of IPRs-using developing and least developed countries in agriculture, health, biodiversity, economic development, and so on and consequently causes concerns on a broad range of human rights including right to health and life, right to education, privacy and expression, indigenous people's rights and so on.⁴

charge of monitoring compliance with the *TRIPs Agreement*, is authorised to extend the transitional period further upon 'duly motivated request' from LDCs. On 29 November 2005, the transitional period for an LDC member is extended to 1 July 2013 unless it graduates from being LDC. To address possible adverse effects on public health in LDCs, the patenting of pharmaceuticals is delayed till 1 January 2016. See for details, WT/MIN(01)/DEC/2, 20 November 2001, (01-5860); WTO, Press Release, Press/424, 29 November 2005, (05-5683).

² It was customary to refer to industrial and intellectual property rights. The term 'industrial' was used to cover technology-based subject areas like patents, designs and trade marks. 'Intellectual property' was used to refer to copyright. The modern convention is to use 'intellectual property' to refer to both industrial and intellectual property. The *TRIPs Agreement* translates IPRs into trade-related intellectual property rights to commercialise the inventions and simultaneously to stop others from doing so unless rents are paid on licensing; see for details, M Rafiqul Islam, *International Trade Law of the WTO* (2006) 379-80.

³ Philippe Cullet, 'Patents and Medicines: The Relationship between TRIPs and Public Health' 79(1) *International Affairs* (2003) 139, 140.

⁴ For earlier analyses of these trends, see Peter Drahos, 'The Universality of Intellectual Property Rights: Origins and Development'

<<http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf>> 25 July 2008 (documenting proceedings of panel discussion held by World Intellectual Property Organization in collaboration with Office of U.N. High Commissioner for Human Rights, 19-23, 1998; Laurence R Helfer, 'Human Rights and

2. Position of IPRs from the Standpoint of Human Rights Instruments

The creations of human mind qualify as a category of property named intellectual property.⁵ The State protects such property in the form of IPRs conferring upon creators or inventors a statutory monopoly for a given term to prevent their unauthorised exploitation and to reward for the inventions or creations.⁶

There are two ethical approaches and one economic defence to justifying intellectual property protection.⁷

First, fairness or compensatory justice approach meaning inventors and creators should have a proprietary entitlement to the fruits of their labour. This instrumental view supports John Locke's 'just desert argument' that persons are in general owners of the fruits of their own labour, and the taking of these fruits stands for an attack on the sovereignty or even the reliability of the person.⁸

Second, self-developmental approach meaning the products of the mind are stamped with the personality of their inventors or creators, thus bestowing them with an ethical claim to exploit those products to the exclusion of third parties. This view supports Georg Hegel's argument that 'legitimacy of property was intimately tied to the existence of the free individual and the recognition of that free individual by others.'⁹

Third, economic defence approach meaning inventors and creators will sub-optimally undertake invention or creation in absence of incentive or compensation at its full social value. This further-developmental view supports economic argument that an innovator or creating firm will be less likely to make investment if someone else

Intellectual Property: Conflict or Coexistence?' (2004) 22 *Netherlands Quarterly of Human Rights* 167, 171-75; Laurence R Helfer, 'Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking' (2004) 29 *Yale Journal of International Law* 1, 26-45.

⁵ Michael Blakeney, *Trade Related Intellectual Property Rights: A Concise Guide to the TRIPs Agreement* (1996) 10.

⁶ Ibid.

⁷ Christopher May, *A Global Political Economy of Intellectual Property Rights* (2000) 22-9.

⁸ Christopher May, *The World Intellectual Property Organization: Resurgence and the Development Agenda* (2007) 10-3.

⁹ Christopher May, see above n 7, 28.