

IMPACT OF TRIPS ON LESSER DEVELOPED COUNTRIES: PLAYING A BETTER GAME?

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It has been recently declared,

“TRIPS is the most ambitious international agreement on intellectual property rights. The main challenge for developing countries is to transform it from a rent transfer mechanism into an effective instrument for technological development.”

- Carlos Primo Braga – World Bank

Even though the majority of the 135 members of the WTO are poor countries, they are being virtually held hostage. Third World countries are compelled to go along with the developed countries because most of these poor countries are dependent on bilateral trade relations with one or more developed countries. The author makes an attempt to discuss the aspect of negotiation in detail with reference to acceptance of TRIPS by the developing & less developed countries and discussed the aspect of bargain between the nations. Further the author makes an attempt to discuss the in detail the view raised by the less developed & developing countries on Doha Declaration, the ACAT draft and TRIPS plus. And lastly the author has made an attempt to recommendation on the enforcement of TRIPS Agreement taking into consideration the concerned views of less developed nations.

Keywords: Agreement, Bargain, TRIPS, Negotiation.

INTRODUCTION

The global world has entered the new era of intellectual property rights. The Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) is an integral part of the new integrated World Trade Organization (“WTO”) system imposes on all Members of the WTO an obligation to establish high levels of IPR protection, and to enforce these high levels of protection.¹ The objective of several multilateral trade agreements of the

¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C,

WTO, the TRIPS Agreement plays a new and important role in the international economic system. Intellectual property can be defined as a “*property right in an intangible asset—a right in the product of the mind.*”² The international minimum standards of intellectual property protection set out in the TRIPS Agreement will eventually determine the level of competition for knowledge goods that are sold or licensed on the global market that emerged from the Agreement Establishing the WTO Agreement of 1994.³

In recent years it has been observed that IPR has “*married*” to International Trade. Most of the developed and developing nations have converted intellectual property into a matter of trade confrontation. Intellectual Property Rights is now a key component of this trading system: “*the protection of intellectual property is one of the three pillars of the WTO, the other two being trade in goods (the area traditionally covered by GATT) and the new agreement on trade in services.*”⁴ The WTO Agreement’s on TRIPS is starting to give way to increased fragmentation, as even former proponents of multilateralism turn to regional, plurilateral, and bilateral approaches to regulation.⁵ WTO has set minimum levels of protection set forth in TRIPS by its all member states, although developing countries may delay full compliance.⁶ Further it requires that states to establish a 20 years of patent monopoly, a 50 years of copyright monopoly, and a 10 years of monopoly for industrial designs and also provided exclusive rights to use trademarks and exclusive rights for the use of marks of geographic origin. Further the agreement covered a new area of IPR protection, computer circuitry, with a 10 years monopoly.⁷

The TRIPS component is built on the Paris and Berne conventions of 1883 and 1886, respectively; TRIPS went well beyond the original anti-copying objectives of the drafters.⁸

LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 81 (1994); J.H. Reichman, Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement, 29 INT’L LAW. 345 (1995).

² Doris E. Long & Anthony D’Amato, Introduction, in INTERNATIONAL INTELLECTUAL PROPERTY 12 (Doris Long & Anthony D’Amato eds., 2000)

³ MICHAEL BLAKENEY, TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A CONCISE GUIDE TO THE TRIPS AGREEMENT 45-107 (1996); J. WATAL, INTELLECTUAL PROPERTY RIGHTS IN THE WORLD TRADE ORGANIZATION: THE WAY FORWARD FOR DEVELOPING COUNTRIES (forthcoming 2000); J.H. Reichman, Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement, in INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT 21 (Carlos M. Correa & Abdulqawi A. Yusuf eds., 1998)

⁴ A. Otten & H. Wager, *Compliance with TRIPS: The Emerging World View*, 29 VAND. J. TRANSNAT’L L. 391, 393 (1996)

⁵ Free Trade Agreement between the Republic of Korea and the United States of America, U.S.-S. Kor., art. 18.10, June 30, 2007, available at <http://www.ustr.gov/trade-agreements/freetrade-agreements/korus-fta/final-text>

⁶ Supra note 1

⁷ H. Reichman, *Enforcing the Enforcement Procedures of the TRIPS Agreement*, 37 Va J Intl L 335, 339 (1997)

⁸ TRIPS Agreement, arts. 1(3), 2(1); Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised at Stockholm, July 14, 1967, 25 Stat. 1372, 828 U.N.T.S. 305; Berne Convention

It is most far-reaching and comprehensive legal regime ever concluded at the multilateral level in the area of intellectual property rights (IPR). It supplements and modifies the 'elderly' conventions governing IPR, the most important of which (i.e., the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works) were first elaborated at the end of the nineteenth century. Certainly, these conventions were periodically revised (six major revisions in the case of both Berne and Paris) in order to promote in a gradual and incremental manner a quasi-uniform international regulation of industrial property and copyright.

OBJECTIVE, RESEARCH METHODOLOGY AND HYPOTHESIS

The objective of the study is to identify the level of negotiation made for the acceptance of the TRIPS Agreement by the developing & less developed nation. *Secondly*, to understand the pros and cons of TRIPS Agreement developed nations and less developed nation on the TRIPS. To know the reason of rebate given to the less developed countries for implementation & enforcement of TRIPS Agreement. *Lastly*, to understand the scope of the provisions lay down under the TRIPS Agreement.

In sight of the present topic for research the author has referred to various scholars of intellectual property, interviews and observations made by the World Bank and also observed concerned views of the delegation of several countries like India, China and US on implementation & enforcement of TRIPS Agreement.

It can be hypothesized that over a period of next year's intellectual property rights will be one of the reasons of the grown of the less developed countries. Further less developed countries will able to give new concern i.e. new aspect of protection to all other nations.

LITERATURE REVIEW

The author has refereed several articles, views of dispute resolution body and TRIPS council on interpretation of the provision of the TRIPS which are as follow-

Frederick M. Abbott, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework*, 22 VAND. J. TRANSNAT'L L. 689 (1989). Carlos M. Correa, *TRIPS: An Asymmetric Negotiation*, 1993 Third World Economy. Carlos M. Correa & Abdulqawi A. Yusuf, 2nd Edition. 2008. Panel Report, *China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights* 7.532-579, WT/DS362/R (Jan. 26, 2009). Jeffrey L. Dunoff,

for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971, S. TREATY Doc. No. 99-27, 828 U.N.T.S. 221

Institutional Misfits: The GATT, the ICJ & Trade- Environment Disputes, 15 MICH. J. INT'L L. 1043, 1071 (1994)

DEVELOPING COUNTRY INTERESTS IN THE TRIPS: DEBATE OF NEGOTIATION

The negotiation and conclusion of the TRIPS Agreement are set out in accordance to the preamble, which reflects to a large extent the mandate given in the Punta del Este Ministerial Declaration of the Uruguay Round of MTN. The TRIPS Agreement was concluded after seven years of Uruguay Round negotiations, several years of negotiations leading up to the Uruguay Round mandate, and discussions of an anti- counterfeiting code tracing back to the Tokyo Round negotiations.⁹ The Uruguay Round provided an opportunity to developed state governments to negotiate for a higher level of protection for intellectual property.¹⁰

During the negotiation in Uruguay Round in reference to TRIPS it has been proposed that the agreement would have an impact on the interests of developing countries.¹¹ The question is whether the impact is positive or negative? Is there a net deficit or surplus? Over what period of time? It has been historically clear that certain developing & underdeveloped nation has not provided high level of IPR protection within their national legal system. The Broad arrays covered by industrialized countries, like Japan, United States including Australia, Canada, New Zealand, the Nordic countries instead upon the inclusion of services, investment etc within the umbrella of IPRs protection. Indeed, the proponents of the forum shifted during the Uruguay Round to the extent of the “*cross sector*” linkages are the beauty of the WTO, and allowing at last for negotiations that encompass multiple sectors have a chance to offer benefits to all the nations which were interested in enhancing the IPR protection and they used tradeoffs available during the Uruguay Round to extract IPR commitments from other countries by offering benefits in other sectors of greater import to those countries.¹² It has been observed by the WTO that developing nations including India has were least interested or enthusiastic for the extension from GATT for covering the new areas within the preview of TRIPS. But, at the end the proposal was again made to Arthur Dunkel with the support of the EC, to the effect that “*low-income economies*”, as defined by the World Bank allowed an additional transition period of five years to developing nations for all fields of technology in respect

⁹ Frederick M. Abbott, Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework, 22 VAND. J. TRANSNAT'L L. 689 (1989).

¹⁰ Nitsan Chorev, Remaking U.S. Trade Policy: From Protectionism to Globalisation 153-55 (Cornell 2007)

¹¹ Frederick M. Abbott, Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework, 22 VAND. J. TRANSNAT'L L. 689 (1989).

¹² Laurence R. Helfer, Mediating Interactions in an Expanding International Intellectual Property Regime, 36 CASE W. RES. J. INT'L L. 123, 129 (2004); Jeffrey L. Dunoff, Institutional Misfits: The GATT, the ICJ & Trade- Environment Disputes, 15 MICH. J. INT'L L. 1043, 1071 (1994)

of which a developing nation did not provide product patents as at the date of application of the agreement.

THE SITUATION REMAINED UNCLEAR FOR DEVELOPING & UNDERDEVELOPED NATIONS

Firstly, the ground of denial by the developing & underdeveloped nations who initially resisted the negotiation of the TRIPS as they foresaw the economically undesirable outcome as the IPR ownership right would lead to a transfer of wealth to the developed industrialized economies.¹³ This has been explained by a World Bank economist Michael Finger that enforcement of laws has alone has created an obligation on less developed nations of \$60 billion per year. It has been estimated by the World Bank that “*rent transfers to major technology-creating countries-particularly the United States, Germany, and France-in the form of pharmaceutical patents, computer chip designs, and other intellectual property, would amount to more than \$20 billion if the TRIPS Agreement were fully implemented.*”¹⁴ Likewise, Jagdish Bhagwati declared, “*TRIPS does not involve mutual gain; rather, it positions the WTO primarily as a collector of intellectual property-related rents on behalf of multinational corporations.*”¹⁵

Secondly, It has been criticized TRIPS for being overbroad and intrusive, referencing the Agreement requirements regarding domestic enforcement provisions as a threat to sovereignty.¹⁶ However, developing nations promised “*to reduce the impediments and distortions to international trade*”, “*to ensure proper enforcement of IPR laws and shall not be implemented which shall become barriers to legitimate trade*” and lastly, “*negotiation shall provide clarity to GATT provisions*”.

In the final consideration the nations “*acknowledged*” the principles of IPRs in the agenda of the Uruguay Round was negotiated and formulated in Punta del Este in September 1986 and stated that “*Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT.*”¹⁷

¹³ Carlos A. Primo Braga & Carsten Fink, The Economic Justification for the Grant of Intellectual Property Rights: Patterns of Convergence and Conflict, 72 CH.-KENT L. REV. 439 (1996).

¹⁴ WORLD BANK, GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES 2002, xvii (2001), available at <http://siteresources.worldbank.org/INTGEP2002/Resources/gep2002complete.pdf>.

¹⁵ Jagdish Bhagwati, *What It Will Take to Get Developing Countries into a New Round of Multilateral Trade Negotiations*, in DEP'T OF FOREIGN AFFS. & INT'L TRADE, TRADE POLICY RESEARCH 2001, 19, 21 (2001).

¹⁶ Molly Land, Rebalancing TRIPS, 33 MICH. J. INT'L L. 433, 461 (2012)

¹⁷ The Making Of The Trips Agreement Personal Insights From The Uruguay Round Negotiations By Jayashree Watal And Antony Taubman

TRIPS: A PACKAGE OF BARGAIN

The negative impact of the TRIPS Agreement has been stated by the commentators and has pointed out one main dominant narratives on the length of the TRIPS Agreement i.e. bargain.¹⁸ The relationship between the developed and less developed countries is a bargained-for-exchange-intellectual property protection. It appears in reference to the Uruguay Round has achieved procedural balance but in the close examination it appears to reveal that a disproportionate burden is on the developing countries.¹⁹ It has been argued that developing nations have gotten only benefits in some specific field such as textile, agriculture and other fields are unchanged which existed in the pre-TRIPS Agreement era. The European Union has provided massive subsidies for its farmers' exports of important staple crops such as wheat. The EU subsidies allow its farmers to undercut the prices of developing country farmers, and thereby diminish developing country export opportunities. TRIPS set forth comprehensive modifications to the administration and law of Member States, including the developing Member States. In recognition of the problems faced by developing Member States, TRIPs states that developed Member States shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favor of developing and least-developed Member States.²⁰

However, they were not entirely satisfied with the agricultural concessions that were ultimately made the EU concessions did not reach the level they had hoped for, and the United States did not press the EU as hard as it might have, so there is some dissatisfaction with the terms of the bargain. It can be said to be an ignorance made by the developed nations towards the less or developing nations i.e. a play of unfair trade imposed on them. The aspect of ignorance defines that developed nations have ignorant about the potential of the less developed nations and further it has been stated that it developed countries have refused to honor their promises to reduce tariffs and subsidies in the areas of agriculture and textiles.²¹

LESS BENEFITS FOR LESS DEVELOPED NATIONS: A CRITICAL ANALYSIS

¹⁸ DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS 3-27 (3d ed. 2008); JAYASHREE WATAL, INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES 11-47 (2001); Peter K. Yu, TRIPs and Its Discontents, 10 MARQ. INTELL. PROP. L. REV. 369, 371-79 (2006)

¹⁹ Carlos M. Correa, TRIPs: An Asymmetric Negotiation, 1993 THIRD WORLD ECON. 9, 10

²⁰ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization Annex 1 C, LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 81 (1994)

²¹ COMM'N ON INTELLECTUAL PROP. RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 8 (2002)

The aspect of bargaining narrative is said to be most convincing, less developed countries clearly did not experience much success in the negotiation process. This aspect can be explained by going into the depth of the provisions laid down under the TRIPS Agreement. The less developed nations obtained limited concessions in the form of articles 1.1, 7, 8, 40, 41.5, 65, 66, and 67, some minor adjustments in other provisions and preamble which states the special needs of the least-developed country members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a viable technological base.

Art.1.1 provided that members may but shall not be obliged to implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.²² Articles 7 and 8 lay down the Agreement's overarching objectives and normative principles.²³ Which also have led the less developed nation to disappointment as highlighted in the limitations of article 8 in its TRIPS-consistency test.²⁴ ; Some commentators have considered Article 7 as “mere hortatory”.²⁵ WTO panel reports have applied Articles 7 and 8 in such a prospective which it was stated that they provide the much-needed balance to make the Agreement a legitimate bargain between developed and less-developed countries.²⁶ Even the similar objective was reiterated in Doha Declaration that TRIPS Council “*shall be guided by the objectives and principles set out in articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.*”²⁷

Article 40 permits member states to take appropriate measures to curb “an abuse of intellectual property rights having an adverse effect on competition in the relevant market.” Article 41.5 explicitly stipulates that a WTO member is not required to devote more resources to intellectual property enforcement than to other areas of law enforcement.

In addition, articles 65.2 and 65.3 delayed the implementation of the TRIPS Agreement in less developed and transition countries for four years. Article 66.1 granted least developed countries a transitional period of ten years, which has since been extended to at least seventeen and a half years.²⁸ Article 66.2 states that “developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in

²² TRIPS Agreement art. 1.

²³ Peter K. Yu, The Objectives and Principles of the TRIPS Agreement, 46 Hous. L. REV. 979 (2009)

²⁴ Supra Note, 18.

²⁵ Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2843 (2006)

²⁶ Daniel J. Gervais, *The TRIPS Agreement and the Doha Round: History and Impact on Economic Development, in 4 Intellectual Property And Information Wealth: Issues And Practices In The Digital* (Peter K. Yu ed., 2007)

²⁷ World Trade Organization, Declaration on the TRIPS Agreement and Public Health of 14 November 2001, 5, WT/MIN(01)/DEC/2, 41 I.L.M. 746 (2002)

²⁸ World Trade Organization, Declaration on the TRIPS Agreement and Public Health 7, WT/MIN(01)/DEC/2 (2001), 41 I.L.M. 755 (2002)

order to enable them to create a sound and viable technological base.” Article 67 requires developed countries to “provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members.”

The argument put fourth is that remaining provisions, which were drawn primarily from developed countries' proposals, less developed countries obtained concessions through the built-in ambiguities, flexibilities, limitations, and exceptions. Part III of the TRIPS Agreement; contain vague, broad, undefined, and result-oriented terms. These terms include ‘effective’, ‘reasonable’, ‘undue’, ‘unwarranted’, ‘fair and equitable’, and ‘not unnecessarily complicated or costly’.²⁹ And the key terms like ‘commercial scale’ have remained undefined by the agreement.³⁰

The TRIPS Agreement is viewed as a bargain between developed and less developed countries, as advanced through the bargain narrative, the latter group of countries not only got a bad bargain but also a failed one. The TRIPS bargain is bad because gains by less developed countries in the areas of agriculture and textiles would not make up for losses in the intellectual property and information technology areas. Many less developed countries simply do not possess the needed wealth, infrastructure, and technological base to take advantage of the opportunities created by the TRIPS-based intellectual property system.³¹

REVOLUTION TO OVERCOME THE BARGAIN

During the Sixth Ministerial Conference in Hong Kong, countries voted to accept the proposal to formally amend the TRIPS Agreement.³² Declaration on the TRIPS and Public Health i.e. Doha Declaration, the proposed amendment shall add art.31bis which allow countries with insufficient or no manufacturing capacity to import generic versions of patented pharmaceuticals. The amendment has not come into the effect because of insufficient ratifications by WTO members.³³ Further, during the Doha Declaration the less developed countries have also advanced a proposal for the development of a new art.

²⁹ UNCTAD-ICTSD, Resource Book On Trips And Development 576 (2005); J.H. Reichman, Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement, in *Intellectual Property And International Trade: The Trips Agreement* 23, 71 (Carlos M. Correa & Abdulqawi A. Yusuf eds., 2d ed. 2008)

³⁰ TRIPS art. 61; Panel Report, China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights 7.532-579, WT/DS362/R (Jan. 26, 2009)

³¹ Keith E. Maskus, *Intellectual Property Rights In The Global Economy* 237 (2000)

³² General Council, Amendment of the TRIPS Agreement, WT/L/641 (Dec. 8, 2005)

³³ Members Accepting Amendment of the TRIPS Agreement, WTO, <http://www.wto.org/english/tratop-e/trips-e/amendment_e.htm (last visited January 25, 2017)

29bis³⁴, which seeks to create an obligation on the countries to disclose the source of origin of the biological resources and traditional knowledge in patent applications.³⁵ However, the proposal was strongly opposed by US & Japan expressing their fear that the additional requirement would destabilize the existing patent system.³⁶ This strong objection or resistance raised by the developed nations itself can said to be in violation of the said principle laid down under TRIPS & WIPO i.e. to provide assistance to the less developed nations.

It has been seen that less developed countries are overcoming the pressure of handling and enforcing TRIPS. In other words, the revolution has been adopted by the less developed countries in order to reach the threshold of maintaining and implementing the provision incorporated under TRIPS. For example, some poorest countries across in francophone Africa have adopted some of the highest protections in the intellectual property area and such adoption is particularly troubling considering that the United States and other developed countries have not exerted pressure on these countries to strengthen intellectual property protection.³⁷

RESPONSE TO: 'ACAT DRAFT AND APPLICATION OF TRIPS PLUS'

During the TRIPS Council meetings, however, less developed countries have become more aggressive. In the June 2010 meeting, both China and India made important interventions, largely in response to the release of the draft ACTA text and to the highly disturbing trend concerning TRIPS-plus enforcement standards.³⁸ Some policymakers including India commentators therefore correctly read this provision as a ceiling that requires members not to implement more extensive protection than the Agreement requires if such additional protection would contravene the art 1.1 of the agreement and it may upset the delicate balance struck in the TRIPS Agreement through an arduous multiyear negotiation process.³⁹ The Indian delegation noted in its intervention at the TRIPS Council that *“Although TRIPS Agreement is usually considered to be a minimum levels agreement, enforcement levels cannot be raised to the extent that they contravene TRIPS Agreement.*

³⁴ Council for Trade-Related Aspects of Intellectual Prop. Rights, The Relationship Between the TRIPS Agreement and the Convention on Biological Diversity: Checklist of Issues, IP/C/W/420 (Mar. 2, 2004)

³⁵ Council for Trade-Related Aspects of Intellectual Prop. Rights, Trade Negotiations Comm., Doha Work Programme-The Outstanding Implementation Issue on the Relationship Between the TRIPS Agreement and the Convention on Biological Diversity 2, WT/GC/W/564/Rev.2 (July 5, 2006)

³⁶ Supra Note, 24.

³⁷ Carolyn Deere, The Implementation Game: The Trips Agreement And The Global Politics Of Intellectual Property Reform In Developing Countries (2009)

³⁸ China's June 9 statement was reprinted as The Problems with the “TRIPS Plus” Enforcement Trend: China's View, S. BULL., July 28, 2010, at 13.

³⁹ Henning Grosse Ruse-Khan, A Trade Agreement Creating Barriers to International Trade? ACTA Border Measures and Goods in Transit, 26 AM. U. INT'L L. REV. 644, 653-57 (2011).

*TRIPS plus measures cannot be justified on the basis of Art 1:1*⁴⁰ It also lamented the fact that intellectual property rights negotiations in regional trade agreements and plurilateral processes like ACTA completely bypassed the existing multilateral processes. By undermining the “systemic checks” against trade protectionism that had been built into the WTO framework, these negotiations have harmed multilateral trade.⁴¹ And at the end offered a trenchant critique of ACTA, covering issues that ranged from customs seizure of in-transit generic drugs to the restriction of TRIPS flexibilities to the inconsistencies between ACTA and the Doha Declaration.

As the matter of interpretation is concerned the emphasis is required to be made on the historical draft of the submitted by the European Communities and the United States, for example, used the negative language “*nothing shall prevent Parties from implementing TRIPs-plus measures*”. However, the current provision is concerned that “Members may, but shall not be obliged to” implement such measures.⁴² To some extent, the present language reflects the rare gains less developed countries made during the TRIPS negotiations.⁴³

RECOMMENDATION

The passive resistance put up by less developed countries in the TRIPS Council, China and India's recent interventions signalled a more proactive attitude toward the TRIPS interpretation game. However, it needs to put forth more proper guidelines in order to make the balance between the IPR protection and legitimate trade a key concern of both the WTO and its TRIPS Agreement. The key guidelines are required to be followed which are as follows-

- The IPR provisions of a regional trade agreement, free trade agreement or regional agreement to which a WTO Member was party must not be inconsistent with the TRIPS Agreement of WTO. The imperative need for *balancing protection* with other objectives.
- The enforcement of the TRIPS provisions must not create “*distortive effects*” on legitimate international trade; and
- WTO Member states must “*not be prohibited*” from the autonomy for utilizing its public enforcement resources.

⁴⁰ Council for Trade-Related Aspects of Intellectual Prop. Rights [TRIPS Council], Communication from India, Intervention on TRIPS plus Enforcement Trends (June 9, 2010), reprinted in *Why IPR Enforcement* in ACTA & FTAs Harm the South, S. BULL., July 28, 2010, at 10-11.

⁴¹ Council for Trade-Related Aspects of Intellectual Property Rights, Minutes of Meeting 250, 264, IP/C/M/63 (Oct. 4, 2010)

⁴² Daniel Gervais, *The Trips Agreement: Drafting History And Analysis* 487 (3d ed. 2008)

⁴³ *Supra* Note, 32.

- Promotion with greater acceptability of the TRIPS Agreement is to stop unilateral actions and to prevent to put pressure on the developing countries to go farther than the TRIPS Agreement for protection of IPRs.
- The principle of article 7 and 8 of the TRIPS agreement must be read in a “*development*” prospective i.e. aspect of growth of all the nations; as to connect the TRIPS regime with other intellectual property or related international regimes; as a sword to defend and challenge the “*aggressive*” standards made by the developed nations; must be used as “*a guiding light*” for interpretation and implementation of the Agreement.

CONCLUSION

As Ambassador Swedish diplomat and Chair of the TRIPS Negotiating Group Mr. Lars Anell, has questioned with respect to protection is “*how much is too much*”, or in different manner, “*how much*” is not “*enough*” or “*adequate*” protection.

The optimal approach to creating and maintaining an equitable balance in the international IPRs system will likely involve a combination of approaches. Nevertheless, it is clear that the TRIPS Agreement was part of a package bargain. The immediate criticism was that the WTO's linking of IPR with other trade sectors such as agriculture and textiles permitted extortion by developed countries, who used their superior bargaining power to extract infeasible promises from developing countries eager for a piece of the international trade pie.⁴⁴ As less developed countries continue to improve, it is important to explore not only how well they perform in each game but also how each game would affect the outcome of other games. The analysis of TRIPS Agreement, we tend to look at the different distinct aspects of the Agreement—the negotiation process, implementation reforms, WTO panel reports, threats of cross-retaliations. However, all of these aspects are interconnected.

In view of the importance of the TRIPS Agreement and the multidirectional interactions between these different games, it is essential that we explore the Agreement more holistically by taking into account its various stages of development. In so doing, we will gain better and deeper insights into the full impact of the TRIPS Agreement. We will also be able to come up with more effective reforms to enable less developed countries to perform better in the WTO and within the international intellectual property regime.

The implementation of TRIPS Agreement is not a one-off event where countries play only once. It is a reiterated game that countries will have to continue to play over and over again i.e. change their policies with the developing needs and technological advancement. From

⁴⁴ Ruth L. Gana, Prospects for Developing Countries Under the TRIPS Agreement, 29 VAND. J. TRANSNAT'L L. 735, 740 (1996); Donald P. Harris, Carrying a Good Joke Too Far: TRIPS and Treaties of Adhesion, 27 U. PA. J. INT'L ECON. L. 681, 725 (2006)

the negotiation and implementation of new rules to ultimately enforcing those rules to facilitate compliance with TRIPS standards to the negotiation of even newer rules, the TRIPS game will include a cycle of mini-games that are connected to each other. How well a country is to perform in the international intellectual property arena will depend on how well their governments have understood the scope and vision of TRIPS regime.