Does WTO's Intellectual Property Protection Under TRIPS Jeopardize the Crucial 'Right to Health'?

Unravelling the Conundrum from The Perspective of Developing State Nations…

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Abstract- This Research paper sheds light upon one of the most critical legal questions of contemporary debate viz-a-viz the most vocal criticism(s) of the WTO's TRIPS agreement for its detrimental effect on the crucial 'right to health', specifically-**the effect of patent rights on the cost of medicines**. Unequivocally, this paper progresses onto an engrossing discussion imitating a 'tug-of-war' between the idea of "incentivizing R&D" on one side and, the protection of people across the world from life threatening diseases such as HIV, AIDS & Cancer. This paper concludes with proposing a foolproof suggestion for striking the right balance between rigidity and flexibility through respective Governments legal policies for compulsory patenting. Finally, **this paper also incorporates case study analysis, for undertaking a pragmatic approach to this issue and, adding credibility to our proposition!**

Index Terms- **TRIPS Agreement, International Trade, Right to Health, Global Intellectual Property…**

INTRODUCTION

The famous ***TRIPS Agreement*** stipulates for mandatory protection of *Intellectual Property (IP) rights* by the WTO member states. It substantially replaced the previous comprehensive IP-regimes, which acknowledged significantly greater flexibilities for countries in tailoring IP regulations to their socioeconomic objectives. For illustration, in accordance with the "*Paris Convention for the Protection of Industrial Property"*, states were allowed to disqualify complete industries from receiving a patent and, to choose the period of patenting on a case-to-case analysis. Creators of new items benefit from intellectual property rights as; the owners of ***important IP rights are generally granted monopolistic rights under global IP regimes***. [1] Part II of the TRIPS, for example, stipulates that governments are required to extend patent benefits, or exclusive rights of enjoyment, for 20 years viz-a-viz *"contemporary inventions"* which are competent of trade/commercial application. Intellectual property apparatus is perceived to be justifiable as it promotes exploration, ingenious endeavor, and invention. Patent holders, as a result of this, *benefit from the commercialization of their innovation before facing market competition*.

As a direct negative consequence of this, *the prices for IP-protected commodities naturally rise because of such monopolistic rights*. This situation generates issues in terms of human rights, should the product be necessary for the fulfillment of HR objectives, but is out of reach to people coming from humble economic backgrounds. ***The influence of obligatory global patenting, which disrupt the availability of life-saving medications is a classic example of such a dilemma.*** Previous to analyzing the loopholes of the TRIPS and its impact on 'right to access drugs', it becomes indispensable for us to ***evaluate whether IP can be interpreted directly or indirectly as being a part of the human rights***. Article 15(1)(c) of the ICESCR stipulates the right of everyone- *"to be able to enjoy the utilization of tangible and intangible interests arising from any scientific, scholarly or academic production of which they are the creator"*. The plain explanation under Article 15(1)(c) *appears to propose that the IP-rights could come under the ambit of Human Rights.* Interestingly, the Article 15(1)(c) was the topic of discussion of *General Comment 17 of the Committee on Economic, Social and Cultural Rights* [2]. Where, the Committee demarcated Article 15(1)(c) from IP-rights by highlighting that the latter were *"of a transient character"* and could be *"revoked, licensed or assigned to someone else"*, whereas human rights were "*an ultimate pronouncement of the fundamental entitlements of the human person".*
The right in Article 15(1)(c) safeguards *"the personal association between creators and their innovations and, amongst folks, communities, or other groups and their associated cultural legacy, as well as their tangible objectives which are pivotal to enable creators to facilitate an adequate standard of living"* [Ibid]. On the contrary, IP rights "*primarily safeguard business and commercial interests and investments*" [Ibid]. ***In that regard, the Committee put-forth that Article 15(1)(c) rights are vested upon human beings, and not corporations***.

TRIPS and The Protection Of 'Right to Health'

The WTO's TRIPS Agreement has been subjected to global criticism for its erroneous impact over the prices of medicines in developing countries. As, in accordance to the TRIPS once the patent rights have extended, the prices get artificially inflated for a

[1] *"Human Rights Council, 'Discussion on the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover', UN doc. A/ HRC/11/12 (31 March 2009) para 24"*
[2] *"CESR, 'General Comment No. 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (art. 15, para. 1(c))', UN doc. E/C.12/GC/17 (12 January 2006) para 2"*

tenure of 20-years during which the beneficiary(s) strive to maximize their profits. For illustration, the cost of patented drugs utilized for combatting the deadly HIV virus is exorbitant! Thirty-days' worth of dosing of *Trizivir (an anti-HIV medicine)* costs US$ 1,650 [3]. Unequivocally, it becomes arduous for folks from developing countries to afford such costly medications, (where woefully the HIV cases are at a spike). As a result of which, the global health-divide becomes starker where: ***HIV persists as being a death-sentence in developing countries and, the developed countries can tackle it for years through alleviating drugs*** [4]. Though undoubtedly, several factors detrimentally affect the access to medicines, high-prices triggered by patent rights by far contribute adversely the most! Adding salt to injury, what is far worse is the fact that the price factor makes access to even preventable drugs/vaccines for life threatening diseases. *For e.g., females from developing countries cannot bear the expenses for vaccine for cervical cancer which is easily accessible (both economically and stock-wise) for women in the Global North.*

The ICESCR through the Article-12, acknowledges the ***"right of everyone to the enjoyment of the highest attainable standard of physical and mental health"***. Furthermore, it specifies regarding the pivotal steps that need to be undertaken by governments for the effective execution of Article-12. It explicitly incorporates the *"prevention, cure and regulation of epidemic, endemic, occupational and other infections (Article 12(2)(c)) and the establishment of an environment which would assure to all, medical service and medical attention in the event of sickness' (Article 12(2)(d))"*. And apparently, ***'the right is not a right to be healthy'*** in lieu, right to health ought to be interpreted as a right for the attainment and extension of the best standards of health through resources, goods and services. And, an inherent element of accessibility is unequivocally, affordability [5]. The *General Comment-14* associated the recognition of indispensable medicines to the WHO's enumeration of critical medications, which gets modified every once in a while, since its inception in 1977. However, it bears an inherent complication as, only 5% of the drugs currently listed uphold patent protection. It encourages us to raise a critical question as to, ***"how can this be the case when several patented drugs are the only treatment disposable for certain life-threatening diseases"***? And shockingly, one of the fundamental criteria for incorporation into the WHO's enumeration is the so-called *"cost-effectiveness"* as, numerous developing states cannot sustain supply of patented drugs; and hence excluded from the list.

However, under the obligation, the States are mandated to take a progressive approach for the availability of all effective drugs whether or not a constituent of the WHO's enumeration. In addition to that, the committee also observed that, *"the adoption of any law(s) or policy(s), bilateral or multilateral agreements interfering with the extension of the components of right to health, shall be perceived as being inconsistent with the binding obligations of the state party"* [Ibid]. In line with the aforementioned comment, the committee certainly believed that the acceptance of TRIPS agreement or other WTO provisions by States, resulted in a breach of the ***ICESCR obligations***. In 2009, the ***UN Human Rights Council*** unanimously agreed to recognize the existence of a right to access to medicines. The 53 members of the Council, *(the majority of which are WTO member states)*, acknowledged that the right to health included access to medicinal drugs as a vital component. While acknowledging the value of IP protection [6], the Council nevertheless voiced ***"concerns about its effect on prices"*** [7]. Last but not least, it demanded that all States uphold IP rights in a way that would not impede *"legitimate trade in medicines"* and that offered *"safeguards against the abuse"* of such rights. In a previous General Comment, the Human Rights Council (HRC) recommended that States should undertake ***"all feasible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics"*** [8]. The General Comment states that it is likely in violation of Article 6 for actions to restrict access to life-saving medications.

Evaluating the Efficacy TRIPS Flexibilities in Ensuring Obedience to The Human Rights Duties

In a report submitted to the HRC's meeting on the 'Right to Health' by Mr. Anand Grover, he shed light upon the fact in his analysis that TRIPS in no way interfered with effective implementation of the right. In lieu, he put emphasis on how the governments ought to utilize provisions outlined under the TRIPS flexibilities, should they be incapable of facilitating access to patented medications. He further suggested that the ***States ought to systematically practice their discretionary powers over the IP-protocols for tackling anti-competition activities***. Mr. Anand Grover elucidated that the premature implementation of international IP-regimes has established developing countries & LDCs in a vulnerable position as, they stand prevented from utilization of generics and, simultaneously the development of regional manufacturing entities to cope up. [9] Furthermore, he highlighted that even though the TRIPS' Article-27 speaks about compulsory patenting for fresh innovations, it doesn't clearly state any particular standard of criteria for extending patentability.

And hence, developing countries are seemingly capable of implementing strict norms viz-a-viz the regulation of patentability in accordance to their objectives. [Ibid] The aforementioned strategy can be effectively utilized for preventing the ***"Evergreening of patents" where minor alterations are made to the formulas of medicines*** *(in our analysis)* for its registration as a fresh patent. In

[3] *"David Costello, 'Treating HIV becoming profitable commercial' New York Times, 25 February 2007"*
[4] *"Sam Jacobs, 'International Trade and the Right to Health 'in Alex Campbell and May Roberts (ecs), Tracing the Right to Health (Swiss-magazine, Geneva affairs, 2008) 362–3"*
[5] *"Amif Attaransh, 'How Do Patents Policies Deteriorate Accessibility to Critical Medicines In Developing States?' (May/June 2006) Law Affairs 185"*
[6] *"Report of the Special Rapporteur on the right to health, above n 30, para 47"*
[7] *"General Comment 14, above n 21, para 39 (emphasis added)"*
[8] *"Human Rights Committee, 'General no. 6, The Right to life (art. 6)', Sixteenth session 1982 (30 April 1982), para 5"*
[9] *"Special Commentary Repository on the Right to Health, above n-1, para-7"*

addition to that, Mr. Grover also specified that the TRIPS don't restrict state from constituting laws allowing revocation of granted patents in certain situations. He cited the example of *India and Thailand* [10]*, who have greatly successful in averting* ***the patenting of certain crucial anti-HIV medication***. He also states that the excursion of political pressure by stronger over weaker states, comprises of an extraterritorial violation of human right by the former. Such an influence could also be exerted by pharmaceutical corporations; as observed in the Novartis's case [11]. Where, the Swiss based company declared that it would ***"redirect its R&D programmes away from India to more welcoming environments"***. [12]

CONCLUSION:

The ***TRIPS Agreement*** has in all likelihood lead to the most vehement criticisms of the WTO for breaching human rights' objectives, especially in reference to its ramifications on *the right to food and the right to health*. However, this Research Paper adjusted its analytical focus primarily on the effect(s) of TRIPS on access to medicinal drugs. It is possible that TRIPS, as a matter of fact, *permits adequate policy-room to countries to obey with their objectives under the* ***"right to health" guidelines***. Having said that, it definitely makes that task more arduous, particularly for developing countries. Unequivocally, as thoroughly discussed in this paper, the conventional justification(s) for global patent protection are indeed subject to scrutinization. As, ***the development rationale backing the international IP-safeguard is contentious, particularly with regard to the fact the "Global North" countries didn't actually adhere to such rights during their own journey to development***. Despite objections to the appeal of international IP safeguard under TRIPS; definitive acceptance of major policy flexibilities in the Doha Declaration, and the 2003's waiver, the conventional stance in contemporary local and multilateral trade conversations is to drive increasing IP-safeguard benchmark. TRIPS' relaxation for several developing countries (not limited to LDCs) ought to be a superior regulatory strategy.

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