V-CHAPTER

THE TRIPS AND THEIR LEGAL IMPLICATIONS ON DEVELOPING COUNTRIES WITH SPECIAL REFERENCE TO INDIA:

5.2 - EVOLUTION OF TRIPS:

Knowledge and ideas play an important role in increasingly diverse the array of products in international trade.\textsuperscript{182} Laws on intellectual property have shown great progress and development in the recent times. The reason may be the tremendous growth and diversification of trade and business transactions. As a consequence there was need for strengthening and harmonization of intellectual property laws. The internationalizations of IP laws, regulation and policy began in the eighteenth and nineteenth century, when IPRs appeared in Friendship, Commerce and Navigation (FCN) treaties.\textsuperscript{183}

Laws of intellectual property have shown great progress and development in the recent times. The reason may be tremendous growth and diversification of trade and business transactions especially cross border transactions. As a consequence there was need for strengthening and harmonization of intellectual property laws

The Four Main Phases of the Internationalization of Intellectual Property are as follows: the first phase throws light on the major treaties and corresponds to the growth of bilateral relations in the field of intellectual property in the nineteenth century. The second and third phases are marked by the adoption of the major treaties in this field, in particular the Paris Convention for the Protection of Industrial Property (hereinafter the "Paris Convention"), the Berne Convention for the Protection of Literary and Artistic Works

\textsuperscript{182}Antara Dutta and Siddharth Sharma, “Intellectual Property Rights and Innovation in Developing Countries: Evidence from India” world bank publication, October 2008, Georgetown University page no 2,

\textsuperscript{183}M.Sornarajah , The International Law and Foreign Investment( Cambridge press 2004), pp no 209 Accessed on 9 of Feb 2015, at 11.43 am
(hereinafter the "Berne Convention") and Annex 1C of the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter the "TRIPS Agreement"). The main difference between phases two and three is that, there arose an increasing importance of trade rules in the background to intellectual property negotiations. The current, fourth phase is perhaps the most challenging ever. After the breakdown of talks in Seattle in December 2000, World Trade Organization (hereinafter the "WTO") negotiators were able to launch a new global round of trade talks in late 2001. Updating the TRIPS Agreement will be on the agenda, as will, in the wake of the incorporation of most substantive rules of the Paris and Berne Convention into TRIPS Agreement, the incorporation of new World Intellectual Property Organization (hereinafter the "WIPO").184 WIPO is administering and all the conventions are executing through this organ. The intellectual property communities are currently facing several important challenges

Before the Uruguay round of trade negotiations that occurred between 1986 and 1994 there was no specific agreement on intellectual property rights in the framework of the GATT multilateral trading system. Protection for IPR differed among the nations especially developing countries gave lower standards of protection than developed countries. Highest cost was borne by developed nations for their products was under protection with increasing trade and economic integration between countries such differences in intellectual property laws became a source of tension in international economic relations. The TRIPS Agreement formulated in 1994 is an attempt to narrow the gaps in the way intellectual property rights are protected around the world.185

185Supra note 182
Although the TRIPS Agreement is connected to a series of international trade negotiations, enforcement of intellectual property rights has been a subject of academic and policy debate for many years, even without this context of trade and globalization. In the post TRIPS regime, Small firms of developing countries may suffer in the longer term benefits of IPR protection and this in turn have implication for industry, structure and composition in developing countries.

While there are regional and international efforts to harmonize IP laws, protection of IPRs still varies significantly amongst countries and is generally restricted to the geographic area of the state in question. In this sense, IPRS are territorial.\(^{186}\) Developed countries realized that their economic future lay not in industrial production but in advancement through information, knowledge and intellectual creation.

There is tremendous growth in technology (invention of computer and satellite technology) and emergence of the knowledge based economy on the horizon, developed countries felt in order to fully exploit innovative advantages, stronger laws were needed to avoid misappropriation through counterfeiting and piracy. Though there exists stronger laws but it would do very little to combat misappropriation outside of national borders, and with international agreements not capable of providing the desired level of protection, developed countries began acting unilaterally and seeking an alternative forum to address intellectual property policies.\(^{187}\) These developed nations, especially countries like U.S.A, based their arguments by directly linking intellectual property protection and engages in unfair competition, as it can benefit through cheap production and sale of counterfeited goods. After initial opposition, developing countries with objections turned to negotiating the

\(^{186}\)Accessed, [www.piipa.com](http://www.piipa.com) IP and Human Development.

\(^{187}\)Infra note 195, page no 72
agreement. The resulting compromise, the TRIPs agreement is comprehensive in coverage and includes seven sectors of IPRs (copyright and related rights; trademarks; geographical indicators; industrial designs; patents; layout designs of integrating circuits and protection of undisclosed information) The TRIPs Agreement incorporates many provisions from other intellectual property instruments, including the Berne convention and the Paris convention for the protection of industrial property of 1883.

The increasing standardization of intellectual property rules will likely have differential impact for industrial and developing countries, with further differentiation between the more economically and institutionally advanced developing countries such as (china, India, and Brazil) and those of LDCs. WTO through TRIPS is trying to harmonize and bring balance between these nations.

The international framework of legislative and administrative assistance to developing countries has been strengthened by the agreement on trade related Aspects of intellectual property rights (TRIPS) administered by the world trade organization (WTO) in cooperation with WIPO. Developing countries which are member states of WTO were given different periods of time to adapt their intellectual property systems before being obliged to apply the TRIPS Agreement. The last to be so obliged will be the least developed countries (LDCs). Developed countries were required to make only minor changes to their domestic intellectual property laws for compliance,

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190 UNDP 2001 at page 105
191WIPO’s intellectual property handbook: policy law and use, Third chapter, the role of intellectual property in development and WIPO’s development programs, http://www.wipo.org
developing countries found themselves struggling to cope with the substantial legal and enforcement mechanism overhaul that was inevitable, in order to conform to TRIPs.\textsuperscript{192}

The international environment with respect to intellectual property has changed considerably with the conclusion of the TRIPS Agreement. The TRIPS Agreement accommodates the demands of the industrialized countries for higher international standards of protection by mandating the extension of patentability, virtually to all fields of technology recognized in developed countries patent systems, by prolonging the patent protection for a uniform term of twenty years and by providing, legal recognition of the patentee’s exclusive rights to import the patented products.\textsuperscript{193}

All the signatories to the trade negotiations are therefore, obliged to harmonize their IPR regime and to product patents for pharmaceuticals and chemicals.\textsuperscript{194}

The nature or major characteristic and the impact of the agreement can therefore be summarized as “harmonization of national intellectual property regulation”, because the TRIPs Agreement implicitly considers harmonization as a norm for the WTO agenda. In effect, national intellectual property systems had to be adapted to the specific provisions, recognizing that developing countries are inherently disadvantaged in their participation in international trade, different rules in addition to differential and more favorable treatment by developed countries was incorporated as fundamental

\begin{footnotesize}
\begin{enumerate}
\item Nageshkumar, IPR, Technology and Economic Development; Experiences of Asian countries, study paper Ib, Commission of IPR, New Delhi available at www.iprcommission
\item I bid, page38
\end{enumerate}
\end{footnotesize}
principle of the General Agreement on Tariff Trade (GATT) and now the WTO.  

5.3- TRIPS AND DEVELOPING COUNTRIES

Knowledge has the power to drive the economy and is not tangible. Knowledge is abstract and cannot be stolen, and will not be reduced in obsolete quantum when transferred to or shared with others. Twenty first century will be the century of knowledge, indeed the century of mind. Innovation is the key for the production as well as processing of knowledge. A nation’s ability to convert knowledge into wealth and social good through the process of innovation will determine its future. In this context issues of generation, valuation, protection and exploitation of intellectual property (IP) are going to become critically important all around world. The increasing importance of knowledge in the economy and society: the so called knowledge-based economy. The world development report 1998/1999(World Bank, 1998, pp6-8) argues that knowledge has become the crucial factor for development, as it has become for the global economy with its implications for R and D expenditure. Continuous innovation, automation, and competition in the creation and use of knowledge have shortened product cycles in many industries. Implications for developing countries were summarized in UNCTAD. Technology is advancing faster than ever before and developing countries that fail to build capabilities enabling them to participate in the evolving global networks of knowledge creation risk falling

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197 Dr. R.A Mashelkar, Director General Council Scientific Industrial Research New Delhi, Intellectual property and wrongs: the developing world concerns, Charted Secretary, Journal, January 2002 page no 5
198 The term gained relevance through the OECD report entitled “The Knowledge-Based Economy” (Paris, OECD, 1996)
further behind in terms of competitiveness as well as economic and social development.

Regarding the question of interpretation of the TRIPs provisions, the Doha declaration directed that it should be made in light of the object and purpose of the TRIPs agreement laid down under Articles 7 and Article 8 of the Agreement. It thus stipulated that the provisions must be interpreted in a manner conducive to social and economic welfare and that the members will be free to amend their domestic laws so as to promote and protect the public health. The full implementation of the TRIPS Agreement is likely to have an important bearing on the patterns of development in developing countries. The following issues are raised by a majority of the developing and least developed countries.

a. Local technological capability Building

The strengthening and harmonization of IPR regimes worldwide has considerable implications for the process of acquisition of local technological capability by developing countries. For instance the provision of product

200 Article 7 of TRIPS speaks about, the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

201 Article 8 of the Agreement speaks about Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement and Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

patents on chemicals and pharmaceutical products would adversely affect the process of innovative activities of the developing country enterprises in the manufacture of chemicals covered by patents. Development of new chemical compounds is beyond the capability of most developing country enterprises, as they involve huge resources.\textsuperscript{203}

This stronger patent regime has not encouraged innovative activity in developing countries, rather adoption of utility models or petty patents and design patents has a greater potential in encouraging local technological activity rather than implementation of the TIRIPs in poorer countries.

b. **Implications on industrialization, technology transfers and trade:**

Strengthening of IPRs regime, may further limit the access of technology by developing country enterprises. Developing countries stressed the need for transfers of technology from the developed world and the liberal use of compulsory licenses in order to promote local production of goods. It was thought that these policies would counter monopoly prices and lead to greater economic development, but in reality many developing countries were left with even more expensive, inferior products, and several inefficient industries operating without the threat of competition.\textsuperscript{204} Korean corporations being denied technology licenses by patent holders in the western world forcing

\textsuperscript{203} Supra note 191

them to reverse engineer the products,\textsuperscript{205} these recent trends suggest a reversal trend of the growing importance of transfer of technology as multinational enterprises prefers to internalize the technology transactions.\textsuperscript{206} This led to rising of imports from developing countries and number of local firms will come under pressure to close down or may form alliances with larger firms.\textsuperscript{207} And TRIPS could affect import volumes.

c. Prices of medicines and loss of consumer welfare:

After the introduction of product patents and its effect, on prices of medicines have simulated welfare losses for consumers in developing countries. In china, after the introduction of product patents in 1993 prices of drugs was increased.\textsuperscript{208} In developing countries like Argentina, Brazil, India, Mexico, Korea and Taiwan etc. finds the welfare losses from introduction of product patent would range between $2.9 billion on to $14.4 $ billion. The gains to the patent owners from such introduction of product patents stated to be between US $3.5 billion to $10.8 billion. The welfare loss to India could be around 14

\footnote{\textsuperscript{205}Kim Linsu (1997) Imitation to innovation: The dynamics of Korea’s technological learning, Harvard Business School press Boston, Massachusetts.}

\footnote{\textsuperscript{206}Kumar Nagesh, technology generation and technology transfers in the world economy. Recent trends and implications for developing countries science, technology and society (SAGE) 3(2)1998, page no 265-306}

\footnote{\textsuperscript{207}Global Economic Prospects and Developing Countries 2002, Washington DC, the World Bank (World bank2002)}

\footnote{\textsuperscript{208}Lanjouw, Jean O ‘the introduction of pharmaceutical product patents in India: Heartless exploitation of the poor and suffering’? NBER Working Paper Series No. 6366, national bureau of economic research, January , (1998)}
billion to 4.2 billion in a year.\textsuperscript{209} This trend is likely to increase pharmaceutical prices and bring down welfare measures in India. With these, product patents drug price in India could increase around 26\% to 42\%.\textsuperscript{210} Another study also reveals that maximum price increase of 67\% for India following the product patents.\textsuperscript{211} Introduction of product patents would affect prices of medicines significantly and unless new drugs are more efficient, there will be decline in the health levels of population.\textsuperscript{212} Recently in south Africa, it was noticed a case of huge difference between prices of HIV AIDS drugs sold by patent holders, and their generic substitutes, just provides further evidence to the potential of price increases following the introduction of product patents and at the same time, it may be argued that the vast majority of drugs are out of patent protection and hence will not be affected.\textsuperscript{213}

d. \textbf{Income transfers from developing counties:}

Strengthening and harmonization of IPRs regime will lead to a substantial increase in flow of royalties and license fees from developing countries to developed countries, as USA tops the list of developed countries.\textsuperscript{214} World intellectual property indicators 2014 gives detailed information on patent and filing of patents, top place is occupied by US and china, and India and Brazil

\textsuperscript{209}Watal Jayashree, pharmaceutical patents, prices and welfare loss: Policy option for India under the WTO TRIPS Agreement, The world economy, Vol 23 no page no. 733-752

\textsuperscript{210}Ibid


\textsuperscript{212}May Christopher, A global political economy of intellectual property rights: the New enclosures? London and New York Routledge published in 2000. Its brief discussion is available at the global political of intellectual property rights in the new millennium, Published in July 22 2009 by E – international relations available at http; www er-irinfo ,accessed on 25\textsuperscript{th} Jan 2015 evening 4oclock.

\textsuperscript{213}See supra note 191, pp no 40

\textsuperscript{214}World intellectual property indicators 2014 published by WIPO www.WIPOKint accessed on 26\textsuperscript{th} January 2015 page no 14
stands in the top 20 list. Impact of patent harmonization finds that it has the capacity to generate large transfers of income between countries with US being the major beneficiary.\textsuperscript{215} This was further given in the World Bank report also India’s outflow of patent rents is $ 903 million.\textsuperscript{216}

e. **Impact on global technological Activity and availability of drugs:**

Stronger IPR regime can be achieved through Research and development IPR regime is based on the environment more of expenditure on R and D. Hence ensuring adequate appropriability with more stringent IPR protection was deemed to be a necessary condition for sustaining the pace of innovation in the global economy.\textsuperscript{217} In general R&D activities in developing countries, emerge now from simple adaptation processes to research. Strengthening of IPRs will increase innovative activity even in the developed world especially for solving the problems and diseases faced by developing countries, furthermore, the research priorities of MNEs are determined by the purchasing power and very little R&D is currently done on tropical diseases.\textsuperscript{218} International community should take steps such as those discussed by the recent report.\textsuperscript{219}


\textsuperscript{216} World bank, Global Economic Prospects and Developing Countries 2002, Washington DC; the world bank publications

\textsuperscript{217} See supra note 191

\textsuperscript{218} World Bank Report on Global economic prospects. And developing countries 2002 Washington DC

\textsuperscript{219} WHO ‘s commission on macroeconomics and health, access to essential drugs and medicine, NCMH, background paper(delivery of healthcare services in india, national commission on macroeconomics and health, ministry of health and family welfare aug 2015, available at \url{www.ncbi.nlm.nih.gov}, ncbi literature accessed on 7/5/15
Whether there is connection between intellectual property and economic development and if so how strong is the link.\textsuperscript{220} Some studies have shown that counties have historically shaped and amended their intellectual property regimes to promote domestic needs and objectives.\textsuperscript{221}

Domestically implementing the obligations set out in the TRIPS Agreement provides stability and assists domestic inventors and sends a positive signal to foreign investors. Of course implementing TRIPs also has its downside, namely by forcing countries to pay a higher price for technology.\textsuperscript{222}

Developing countries raise Intellectual property standards in order to fulfill international obligations and attract foreign investment but at the same time potentially stifling economic, financial and social development by increasing payments to the developed world for superior technologies.\textsuperscript{223} In India strengthening of Intellectual property rights (IPRs) occurred after the initial stages of increased growth and development, similarly in some of the major first generation of newly industrializing economies also, process of development is prior to strengthening of (IPRs)\textsuperscript{224}

Moreover, one of the more recent studies found increased IPRs lead to lower prices (by shifting production to lower cost locations), higher real wages

\textsuperscript{220} K.E Maskus “Incorporating a Globalized Intellectual Property Rights regime into an economic development strategy”, in K .E.Maskus (ed) intellectual property Growth and Trade (Elsvier 2008) page no 500

\textsuperscript{221} J Learner, patent protection and innovation over 150 years, NBER working paper 8977(2002) available at http;\\www.nber.org/papers/w 8977

\textsuperscript{222} Bryan Mercurio “Reconceptualising the debate on Intellectual Property Rights and Economic Development”, The law and development Review; Vol ; No1, Article 3( 2010) Available at http;\\www.bepress.com\ldr\vol3\iss\art

\textsuperscript{223} Ibid.

in developing countries and potentially increased industrial capacity in
developing countries through the introduction of advanced technologies. Developing countries are positively get affected by trade flows and it also shows the link between IPRS and trade when local laws are brought in line with the international IP norms and standards contained in the TRIPS Agreement is necessary in order to reach the frontiers of the knowledge economy and convert their economies intangible non rivalry outputs into tradable knowledge goods. Successful economic development since the 1960 demonstrates that IPRS are merely one contributing factor to economic growth with other necessary factors including governance, stability, and agriculture and industrial policy, wider trade, competition education and health policies.

Intellectual property rights could play a significant role in encouraging innovation, product development, and technical change. Developing countries tend to have IPRS systems that favour information diffusion through low-cost imitation of foreign products and technologies. Inadequate IPRS could stifle technical change even at low levels of economic development. This is because much invention and product innovation are aimed at local markets and could benefit from domestic protection of patents, utility models, and trade secrets. In the vast majority of cases, invention involves minor adaptations of existing technologies and products. The cumulative impacts of these small inventions can be critical for growth in knowledge and productive activity. To become competitive, enterprises in developing countries typically


226 J.H Rich man, Intellectual Property in the Twenty First Century, Will the Developing Countries Lead or Follow?, 46 Houston Law review 2009, page no 1116-17

must adopt new management and organizational systems and techniques for quality control, which can markedly raise productivity.\textsuperscript{228}

The adoption of stronger IPRs in developing countries is often defended by claims that this reform will attract significant new inward flows of technology, a blossoming of local innovation and cultural industries, and a faster closing of the technology gap between themselves and developed countries. It must be recognized, however, that improved IPRS by themselves are highly unlikely to produce such benefits.\textsuperscript{229} Intellectual property and development is at crossroads; developing countries are struggling to formulate a coherent strategy which incorporates IPRs and advance developmental objectives. As in parts of Asia and in Latin American countries technological development is increasing and intra-regional trade growing with each year. Some have placed great hope in the WIPO Development Agenda and its 45 adopted recommendations to enhance development dimensions of the organisation to provide a guiding hand towards an IP and development framework through the recognition that IP protection should reflect the level of development of a given country.\textsuperscript{230} WIPO Development Agenda has a major role to play in reshaping IPRs in a manner more conducive to pro development. This kind of move also represents a push-back from developing countries against aggressive interpretations of the TRIPs agreement.

Even WIPO is dependent upon its effect on policy makers and trade officials. TRIPs Agreement is the international standard and it is not going to disappear

\textsuperscript{228}Keith.e.Maskus, intellectual property rights and economic development, Prepared for the series “Beyond the Treaties: A Symposium on Compliance with International Intellectual Property Law”, organized by Fredrick K. Cox International Law Center at Case Western Reserve University.

\textsuperscript{229} Supra note 82, page no,19

\textsuperscript{230} For more on the WIPO Development Agenda, available at, http://www.wipo.int/ip-development/en/agenda
or undergo substantial revision, hence, unlike the early industrializing countries, countries can no longer use weak regime of intellectual property rights, developing countries must therefore seek to positively and strategically position their laws and policies in such a way that they are abide by TRIPs and facilitate economic development. 231 It seems clear that every development strategy should be formulated in the spirit of paragraph 1 of Article 8 of the TRIPs. 232 Every development strategy involves all the flexibilities, in the TRIPS Agreement. It is with a hope that developmental IP strategy will maximize competition.

Developing countries have scope to shape and formulate IP and Development policy: granting patent protection, in this granting of patents members are free to determine whether, and to what extent, they will protect business methods as patentable subject matter. They can tailor their laws to meet their developmental and other needs. 233 Members have therefore considerable discretion to tailor the novelty requirements in their domestic laws in a manner which promotes development. Similarly, setting a high standard for inventive step and obviousness can assist developing countries in promoting Intellectual Property Rights, as a developmental tool rather than harmful monopolistic right. In this regard, India has taken the affirmative decision to draft provisions which defines what is not patentable, in section 3(d) of the Indian patent act limits patent protection for pharmaceutical derivatives only, if it enhances the efficacy of the known substance( new forms of an existing drug does not

231 F.M.Finger, the WTO’s Special Burden on Less Developed countries, 19 the Cato journal 3( 1999),425-437(accessed on 30th Jan 2015 at ) 12 pm
232 Article 8 of TRIPs states that; members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with provisions of this agreement.
233 Article 27.2 of TRIPs
There are other ways in which developing countries can use IPRs to their developmental advantage involve such measures as fast as possible patents should be published and ensuring easy and fast procedures at reasonable cost, countries should also use such measures and formulating liberal policy on reverse engineering. Providing all facilities for locals to invent around patents by providing for, utility and design patents, which encourages companies (and particularly small and medium sized enterprises) to undertake minor incremental adaptations and innovations, have shown to increase innovation and access to new information in such diverse conditions (example, Brazil, and other countries). Article 6 allows members the freedom to incorporate national, international or regional exhaustion of rights. Exhaustion of Intellectual Property Rights was also affirmed by Doha Declaration on TRIPs and Public Health. Adopting a system of international exhaustion means once the first sale of the goods anywhere in the world exhausts IPRs, would allow for the importation of so-called grey market (also known as “parallel importation”) goods. This is very beneficial system as that goods sold in a foreign market may be less expensive than those sold domestically. But strangely this provision is not much used by developing or least developed countries.

Another key step towards building a developmentally based intellectual property framework will be to take advantage of the explicit exceptions contained in the TRIPs Agreement. Developing countries must draft legislation which allows for government use of a patented without the consent of the rights holders (public and non-commercial use) these compulsory

235 Doha Declaration on TRIPs and Public Health( 2001) para, 5(d)
237 See TRIPs Agreement Article 31
licenses can also issue when the owner of the patent fails to work such patents locally. Developing countries must frame their laws, in such way of providing ample scope for the issuance of compulsory licences under the broadest conditions allowable under Article 31 of TRIPs Agreement.

Developing countries can also utilize the flexibilities available to protect Intellectual Property Rights, and Article 30 of TRIPs Agreement can be utilized by these nations without disturbing the provision (limited), without conflicting with any provisions for exploitation of the patent and without violating the interest of the patent holder’s rights. A particular useful exception in the area of public health is the so called Bolar provision (early working provision) which allows generic manufacturers to import, manufacture and test a patented product prior to the expiry of the patent in order to gain regulatory approval to market the product, thus facilitating the production and sale of the product soon after the expiry of the patent. Another available flexibility related to market approval is the extent to which countries protest test. Members should protect against unfair commercial use of confidential data, are some of the other measures which comes under general Exceptions to owner’s right.

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238 TRIPs Agreement, preamble, Article 7( objectives) and Article 8( principles)
239 Under Article 39.3 of TRIPs
5.4- LEGAL IMPLICATIONS OF TRIPSON INDIA

Developing countries resisted the inclusion of TRIPs in the Uruguay Round on two grounds. First, IPRs have nothing to do with trade. Secondly, world intellectual property organization (WIPO) already has agreements on IPRs. For many reasons the arguments were rejected and TRIPs was finally adopted as a single undertaking. Under the TRIPs, the WTO is engaged in monitoring and adjudicating the legality of domestic rules and policies on IPR that are not primarily entrusted with the organization.

Today’s state of economic globalization and foremost liberalization can be understood only with regard to the governing multilateral institutions in trade and finance and the involvement of national governments. Because of globalization scope for national policymaking has been reduced as, exogenous constraints and the emergences of transnational corporations (TNCs) as National actors have diminished the scope of policy making of nations. Today’s economic globalization has introduced two trends, which are important in order to identify the implications of TRIPs Agreement for national intellectual property protection in the context of economic development: the internationalization of production and the development of a global knowledge based economy, which have led to the internalization of R&D.

Intellectual property regulation in general and intellectual property protection in particular have become a matter of concern beyond national borders; for

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241 K.D. Raju, Intellectual Property law: WTO and India, New Delhi: New era law publications, 2005
242 Rodrik dan(1999), the new global economy and the developing countries: making openness work policy essay no.24(Washington, D.C., Overseas Development Council).
243 See supra note241, page no54
business and politics in industrialized countries and subsequently in developing countries. Because, world witnessed process of globalization, TRIPs Agreement and its implication for developing countries are strongly linked to globalization and it is crucial part of it also.244

During the first three years of the Uruguay round of trade negotiations, India led the opposition to the inclusion of patent and intellectual property rights in a GATT accord. India and other developing countries viewed the GATT framework as a tool by which wealthy nations would impose strong IPRs as the cost of much needed access for the developing countries. Upon its signing the Uruguay Agreement along with 116 other countries in 1994, India became a member of the WTO from January 1, 1995 and became obligated to amend its domestic IP laws. India was given ten years to implement its new laws.

Post –TRIPs era is associated with increased expenditure on R&D and US patent applications by domestic firms in India. In this period it is also witnessed greater and more original patenting by Indians in the United States. These stronger IPRs were responsible for generating greater incentives to invest in innovative activities by domestic firms and for facilitating the transfer of technology between firms.245

Strengthening of IPR induced by the TRIPs has resulted in increased R&D, leading to more patenting activities by Indians do suggest a market rise in domestic innovative activity.

In the TRIPs negotiations, controversy over the balance of rights and obligations between property holders and governments, to be incorporated by the developing countries in their national legislation, is the crucial area of conflict. The manner in which this is resolved is important for the developing

244Carsten Vogel “the impact and the implications of TRIPs in a knowledge- based global economy: A Developing country’s perspective”, Asia- pacific trade and investment review, Vol.2, No1 May 2006
245See supra note 82 page no 29
countries because the degree of monopoly will be ultimately determined by
the actual balance that the licensing provisions will establish\textsuperscript{246}. India has a
vast domestic market as well a vast reservoir of technical, managerial and
entrepreneurial skills. It is in our long term interest to have an intellectual
property protection system that recognizes both the need for encouraging and
rewarding innovation as well as key public interest concerns.\textsuperscript{247}

Developing countries like India had a transition period of five years (with
effect from 1\textsuperscript{st} January, 1995), an additional period of five years was also
available for extending product patent protection in areas of technology not
protected so far. This would mainly in the areas of pharmaceuticals and
agricultural chemicals. TRIPs bring compulsory uniformity as regards to
national patent laws of member countries in three aspects:-

Firstly, TRIPs requires that patent protection to be available to both products
and processes, which conform to the requirements of patentability. According
to Article 27 of the TRIPs Agreement, all member countries have to grant
patents in all fields of technologies, whether products or processes, earlier the
countries including India, allowed for reverse engineering to create the product
through different process. The TRIPs agreement has provisions regarding
burden of proof in cases of process patents. In the case of infringing of a
process patent it is for the defendant to prove the process to obtain an identical
product is different from the patented process.

Secondly, TRIPs mandatorily requires that the term of protection of patents be
not less than 20 years. Thirdly, TRIPs requires member countries to allow
patents in areas of technology not protected so far, that would mainly be in the
areas of pharmaceuticals and agricultural chemicals.

\textsuperscript{246}Dinesh Abrol Intellectual Property Rights in the Uruguay round :a review of the Indian
debate, (PP.no,134-150)
\textsuperscript{247}A.V.Ganesan Intellectual Property Rights and the Uruguay Round Negotiations pp.no(116-
121)
If one examines the TRIPs Agreement, in all its pros and cons, one finds that it does not hold a bright future for the developing countries, including India, as the provisions for the TRIPs agreement, are tilted heavily in favor of the rich nations of the world.  

The GDP of India is on an upward swing since the last few years and therefore India is a great market for products. Implementation of TRIPs has as expected, helped foreign inventors, mostly from the US. The trend of rising foreign applications in India and the consequent fall in the number of Indian applications in the Indian patent office demands a concentrated focus on R&D with in the country. Domestic R&D investment is considered most crucial for innovation and development; in a country. R&D in India, over the years, has mostly been funded by the government. About 75-80 percent of the domestic R&D is undertaken by the Public sector, 20-25% by private enterprises and around 3% by universities.

The next major concern was the status of patented drugs that are exported to various third world countries. Indian drugs are the principal source of cheap drugs for poor developing countries specially the African nations. 66.7% of Indians exports go to the developing countries, this can be threat for export accounts, to counter this problem a new Section 92A introduced, which allowed for the manufacture and export of patented drugs to countries having insufficient or no manufacturing capacity to address public health. At the same time it must be accepted that product patents have benefited other segments of the Indian pharmaceutical industry. It is important not to overlook

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248 K.D.Raju, “WTO-TRIPs obligations and patent Amendments in India: A critical stock taking” journal of intellectual property right vol.9, may 2004, p.226-241
251 See Supra Note 20 page 515
the international competitiveness of Indian firms in innovative research, which will benefit Indian public health in the long run.  

5.5 - **RIGHT TO DEVELOPMENT VIS-À-VIS IMPLICATIONS**

The major impact of TRIPs Agreement is the harmonization of national intellectual property regulation with global “minimum standards in virtually all areas of intellectual property protection” including rules for enforcement and administration in all WTO member countries. This is possible because of institutional environment of GATT and the World Trade Organization (WTO) made this unprecedented intervention in national regulation feasible.

The general long term objective of developing countries remains the establishment of a sound development base. At the same time there is a continuing drive to obtain maximum economic benefits for developing countries from their enormous resources in indigenous creation, arising from traditional knowledge and indigenous arts, creative crafts and folklore. By adopting policies on science and technology that facilitate their acquisition and use on appropriate terms remains present and important, as do the efforts to improve infrastructures to develop human resources which operate intellectual property system.

Recently, however, there has been an evolution of the conditions in which development aims are pursued. The numerous challenges of the new century call for new approaches for solving those challenges. Intellectual property in itself has always been an integral part of general part of general economic, social and cultural development worldwide. The new challenges of the century

\[252\] Discussed in detail in 4th chapter

emphasize all the more how globally interlinked these national and regional intellectual property systems have become. Hence concerted action at global level is required to combat these challenges to enable these developing countries to participate in and benefit from technological advances.

Industrial property has long been recognized and used by industrialized countries, and is being used by an ever increasing number of developing countries as an important tool of technological and economic development. Most of the countries have laws to protect industrial property for two main reasons, related to each other, one is to give statutory expression to the moral and economic rights of creators in their creations, and the other is to promote, as a deliberate act of government policy, creating and the dissemination and application of its result and to encourage fair trading: this contributes to economic and social development.

An equitable and modern patent system is always positive indication for any nation, by providing recognition and material benefits to the inventor, constitutes an incentive for inventiveness and innovative activity. This is also favorable for creating transfer of technology by means of security it provides for the patentee. Developmental objectives of the country are reflected in the patent system of any country.

Significantly, the UNDP Human Development Reports treat human rights and human development as conceptually distinct but sharing a common vision and purpose- to secure the freedom, well-being and dignity of all people everywhere.

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255Supra note 236 page no165
Human rights overlaps with other rights are the right to Development.\textsuperscript{257} In its Declaration on the Right to development, the UN General Assembly affirmed: \textit{the right to development is an alienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized (Article 1)}.\textsuperscript{258}

States have the primary responsibility for the creation of national and international conditions favorable to the realization of the right to development (Article 3). As a development agenda is being elaborated, interpreted and implemented in WIPO in relation to IP, there is much that human rights and human development perspectives could do to enrich the discussion. While promoting the protection of IP throughout the world’ is within the mandate and objectives of WIPO,\textsuperscript{259} the very purpose of a development agenda evolving at WIPO would be towards broadening the prevalent understanding of ‘IP and development’ to embrace further considerations of ethics and social justice, particularly in assessing the differential development needs and cultural contexts of countries and stakeholders. The Agreement between the UN and WIPO of 17 December 1974 refers to WIPO as ‘being responsible for taking appropriate action in accordance with its basic instrument, treaties and agreements administered by it, inter alia, for promoting creative intellectual activity and for the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development’. (Article1).

\textsuperscript{257}See office of the High Commissioner on Human Rights (OHCHR,) ‘Background on the Right to development’, \url{http://www2.ohchr.org/english/issues/development/right} (accessed on feb 2015)


In a world increasingly connected by trade, investments and ICTs, the social impact of IP is global. While recent decades have seen the linking of IP to the international trade regime through TRIPs Agreement and FTAs, will the coming decades see clearer linkages between IP and human development? Technology is one of the key requirements in the present world. Acquisition of advanced technologies is crucial to the development of a nation. Economic studies link increased IPRs to international technology transfer from developed nations through foreign direct investment and licensing, increased incentives to invest in local research and development and increased local knowledge and capabilities.

Another very important and interconnected aspect of the development framework should be finding ways to limit the monopoly powers and abusing of Intellectual property rights by increasing the competitive environment within their territories. The challenge for developing countries is therefore to create and implement policies which understand that IPRs are not an end itself but they are only means. The goal is not simply to protect IPRs, but foster creativity and innovation in a manner which promotes human endeavors and encouraging development.

The right to development and right to health, and Development of any Nation are indisputable, but then development should not be meant only to attain economic progress therefore issues rises for addressing the problem of right to development and the consequential impact on right to life and right to health.

The development agenda post- 2015 is being debated at a time when sustainable development is in the political foreground as a result of the UNCSD or Rio20. The relationship between health and sustainable development was well captured in the original Rio Declaration in 1992. Where principle one speaks of “human beings as the central concern of sustainable development”


261 C. Correa ,Reforming the Intellectual Property Rights System in Latin America, 23 the world Economy 6 (2000),page 851
Health is one of the key contributors to the achievement of sustainability goals leading to development. Health is also a way of measuring progress in any country.

From a developing country’s perspective, implementation of the TRIPs Agreement has imposed costs on a large scale, but not just in terms of its immediate implementation and enforcement capacities. The agreement also adjusts continuous transfer payments directly and indirectly in terms of license fees and prohibiting imitation for industrial development and for producing cheap consumer goods. However, in furtherance of globalization TRIPs constrains domestic policy choices for economic policy, TRIPs Agreement defines the scope and types of IPRs and indicates the rules for enforcement and administration in national intellectual property systems. The emergence of the international intellectual property regime also comprises implications for policymakers in developing countries that go beyond the commitment to implement an international agreement. Developing countries should seek ways to both comply with the obligations and maximize the flexibilities of the TRIPs Agreement.

TRIPs Agreement might have paved the way by ensuring respective protection standards; however, a comprehensive strategy for economic development that integrates intellectual property regulation in a package of policies, including education and general technology policies as well as proactive policies towards FDI and trade, remains essential. They should frame such environment which is conducive for both as an obligatory part of fulfilling TRIPs and as well utilizing as developmental tool. Ideally, developing countries would benefit from the increased standards (and corresponding

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262 Carsten Vogel the impact and the implications of TRIPs in a knowledge-based global economy: A Developing country’s perspective, Asia-Pacific trade and investment review, Vol.2, No1 May 2006
removal of flexibilities) in exchange for the promise of greater market access for goods to developed country markets. In the background of Article 1.1 of the TRIPs Agreement is clear in stating that members may only implement more extensive protection than is required “provided that protection does not contravene the provisions of this Agreement.” Above all developing countries should resist developed countries, following the path to over protection of these rights. Developing countries must confront these issues and new innovative laws which work within the existing TRIPs framework but also fit within strategies’ of work towards economic development. In this regard, retaining and making use of the flexibilities are critical to any IP and Development strategy. Maximizing flexibilities will undoubtedly attract scrutiny both from IP maximalist trading partners and domestic interests, but it is the only option for countries seeking to prevent the protection of IPRs from becoming a completely one sided proposition which benefits developed countries at great cost to the developing world.

In isolation IP laws and regulations cannot bring or assist for development and hence certain policy choices and standards may be necessary to further developmental agenda, but they are certainly not sufficient. Instead, governments seeking to develop an IP and development purpose, including a proper regulatory framework, trade, investment, education and health. Sustainable growth and development will only be achieved when governments recognize the inter-connectedness of sectors in coordinating government policy.

After, the implementation of TRIPs in its totality, India had amended all its IPR laws and patents which are playing crucial role in the world economy. In

263 G.B.Dinwoodie, the international intellectual property law system: new actors, new institutions, new sources,10 Marquette intellectual property law review 2( 2006),214;
264Bryan mercurio, Reconceptualising the debate on intellectual property rights and economic development
India patent act was first passed by the British’s in 1856 and it was pro transnational companies and also not much favouring inventive activities in India. After government appointed two committees to modify patent act. After all suitable modifications an act came into effect, for socialist pattern of economy in the year 1970. After the passing of this act, pharmaceutical industries in India started flourishing; government had also started a few public sector pharmaceutical industries to support medicines at cheap rates in India. Because of reverse engineering concept all most all the medicines produced at any part of the world was manufactured. Indian pharmaceutical industries used the frail process patent regime and flourished, exported medicines at cheap prices to the third world nations also. But after the patent act(amended) of 2005 , introduction of product patent has brought fears in the mind of all developing countries and underdeveloped countries, that it may affect robust growth of pharmaceuticals and may have negative impact on prices.