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Role of the World Trade Organization in Intellectual Property Issues

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Intellectual property rights are granted to the creators of novel inventions. In the realm of the multilateral trading system, the enforcement of these rights should be done in an adequate manner that also ensures that the rights of others are not put into a threatened position. With the intention of resolving the disputes concerning the regulations that governments put on intellectual property rights, the dispute settlement mechanism of the WTO answers a way out. In order to ensure that the intellectual property rights are safeguarded while respecting the rights of others concerned, the TRIPS Agreement (which came into effect on 1st January 1995) of the WTO comes with a comprehensive section on the enforcement of these rights. These enforcement provisions are however conditional on the dispute settlement mechanism of the WTO. This article sheds light on the kinds of intellectual property that are covered under TRIPS, the enforcement of intellectual property rights, and lastly, the role of the dispute settlement mechanism of the WTO.

Keywords: *WTO, trading system, intellectual property, TRIPS agreement.*

INTRODUCTION

The human mind is capable of enriching and developing ideas and innovations that are unique. Creativity spurs growth and stems from exposure to novel inventions. According to World Intellectual Property Organisation, creations of the mind such as inventions; literary

and artistic works; designs; symbols, names, and images used in commerce are called intellectual property. Intellectual property, thus, cannot be called a physical property as it is intangible, rather it is an outcome of a distinctive thought process. In order to protect this, intellectual property is paired with rights and is subject to the legislation in the respective countries of their origin. These intellectual property rights guarantee the innovators' protection of their original thought as a significant amount of money, time, and energy are invested into developmental thinking. Henceforth, the brainchild of an innovator can be safeguarded in the realm of increasing competition. This safeguard is provided in numerous ways that can be broadly categorized into trademarks, copyrights, patents, and geographical indications. International legislations have been, for a long time, protecting intellectual property rights.

The Paris Convention for the Protection of Industrial Property (1883)¹ was one of the earliest foundations for the protection of intellectual property in the domain of international law. Where there is a right, there is a law. Thus, intellectual property rights owe their enforcement and protection to intellectual property laws. In order to prevent the unapproved and unlawful usage of the unique creations, these laws provide sanctions. The laws that encompass intellectual property are varied in different nations. The relationship between different countries that concerns intellectual property is negotiated by intellectual property treaties and instruments of free trade. The World Trade Organisation stands crucial in this very aspect. Due to the heightened technological advancement, intellectual property is not confined to only one nation due to the ease of availability facilitated by the internet. Thus the infringement of intellectual property rights transcends borders as digital networks increase the prospects to co-work on an international platform while the law concerning the ownership of intellectual property stands in question.

Globalisation has played a pivotal role in increasing world trade because of which intellectual property has gained a new imperative status. Given the differences between legislations, for the protection of intellectual property, of countries across the globe and augmented international trade, economic relations amongst countries persist to be strained. This is because a large amount of the value of international trade is constituted by the trade of

¹ Paris Convention, 1883

original goods and inventions while increasing competitiveness. Now with the introduction of Trade-Related aspects of Intellectual Property Rights (TRIPS)², rules that are agreed upon internationally are laid down that avoid disputes and facilitate dispute settlement. Through TRIPS, the countries that are members of the World Trade Organisation are granted autonomy to achieve their domestic goals along with an ease in resolving the trade disputes concerning intellectual property, ensuring that knowledge and creativity are traded lawfully and intellectual property rights are protected by the establishment of minimum standards of their enforcement.³ In this way, distinct laws are brought within the purview of common international rules.⁴

DIFFERENT INTERNATIONAL TREATIES OF INTELLECTUAL PROPERTY AND THE ADVENT OF TRIPS

Since intellectual property rights have gained vital importance in the international trading system, TRIPS has been guaranteeing their enforcement and protection. Along with TRIPS there exist a number of other international treaties that concern themselves with intellectual property. The World Intellectual Property Organisation administers 26 treaties with respect to intellectual property protection, global protection system, and classification. Some of the conventions of intellectual property also are mentioned as a reference in the TRIPS agreement.

1. Paris Convention for the Protection of Industrial Property- Article 2.1⁵ of the Agreement requires WTO Member States to comply with Articles 1-12 and 19⁶ of the Paris Convention (1883) in connection with Part II, III, and IV of the TRIPS Agreement. 11 countries signed this convention on March 20th, 1883, subsequent to a diplomatic conference in Paris in 1880. All kinds of intellectual property including patents, industrial designs, trademarks, utility models, service marks, geographical indications, and trade names are covered by this convention.

² Agreement on Trade-Related Aspects of Intellectual Property Rights, 1995

³ 'Intellectual Property: Protection and Enforcement' (WTO)

<https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm> accessed 18 May 2022

⁴ Wilfred J. Ethier, 'Intellectual Property Rights and Dispute Settlement in the World Trade Organisation' (2004) 7 (2) *Journal of International Economic Law*, 449-458

⁵ Paris Convention, 1883, art.2.1

⁶ Paris Convention, 1883, art.1-12 and art.19

2. Berne Convention for the Protection of Literary and Artistic Works (1971)⁷-Article 9.1⁸ of the TRIPS Agreement calls for Members to conform with Articles 1 to 21⁹ of the Berne Convention (1971) and its Annex. However, Members do not have any right or duty beneath the TRIPS Agreement with regards to the rights furnished for in Article 6¹⁰ of that Convention, i.e. moral rights, or rights springing up therefrom. Berne convention protects the authors' rights and works.
3. Treaty on Intellectual Property in Respect of Integrated Circuits (1989)¹¹- This treaty was adopted in Washington on May 26th 1989. It is mentioned in Article 35¹² of the TRIPS Agreement that the Members of WTO are required to comply with Articles 2 to 7¹³ (leaving Article 6.3¹⁴), Article 12, and Article 16.3¹⁵ of the Treaty.

It is not that these conventions and treaties were lacking substantive provisions for the TRIPS to complete, but with the advent of TRIPS, a considerable difference has been noticed in two major ways- First, a common noticeable aspect in all other treaties is the point of national treatment. That is, if someone belonging to the UK has to apply for a patent in the US, he has to comply on the same terms as someone belonging to the US has to. However, members of WTO have to comply with the mutually decided minimal standard of protection of intellectual property under the TRIPS agreement. In this way, it inculcates a sense of harmonisation. Second, the members agree on a formal dispute settlement mechanism of the WTO which is the DSU (Dispute Settlement Understanding). Given that the earlier conventions protected the mutual self-interest of the member states, the TRIPS agreement has substantively changed tradeoffs between countries.¹⁶

⁷ Berne Convention, 1971

⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights, 1995, art.9.1

⁹ Berne Convention, 1971, art.1-12

¹⁰ Berne Convention, 1971, art.6

¹¹ Treaty on Intellectual Property in Respect of Integrated Circuits, 1989

¹² Agreement on Trade-Related Aspects of Intellectual Property Rights, 1995, art.35

¹³ Agreement on Trade-Related Aspects of Intellectual Property Rights, 1995, art.2-7

¹⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights, 1995, art.6.3

¹⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights, 1995, art.12 and art.16

¹⁶ Wilfred J. Ethier (n 4)

PROVISIONS OF TRIPS

The World Trade Organisation describes TRIPS or the Trade Related Aspects of Intellectual Property Rights as the most comprehensive multilateral agreement on intellectual property. It came into effect on 1st January 1995. Through this agreement, member countries can accomplish their goals and objectives so as to secure intellectual property rights while being consistent with the provisions of TRIPS. Along these lines, innovation can be protected and incentivised at the same time. The main objectives of the Agreement include-

1. The premier is the enforcement of minimum standards that will ensure the protection of the various kinds of intellectual property by the member countries. There are certain obligations that the Paris and the Berne Conventions put on the members and certain additional obligations that the members have to apply. They cover the kind of rights that are conferred, the subject matter that is to be protected, and the minimum duration of that protection.
2. The second predominant feature includes basic principles of non-discrimination that are covered under articles 3,4 and 5 of the TRIPS agreement. This feature covers two aspects- National Treatment¹⁷ (treatment of foreign nationals and country's own nationals in an equal way and not favouring one over the other); Most favoured nation¹⁸(no discrimination between people belonging to countries that are trading partners). There is an added general principle of the TRIPS which is that the protection of intellectual property should also ensure that innovation and transfer of technology are promoted.

Following are the kinds of intellectual property that are protected by the TRIPS agreement and the standards for their protection-

Copyrights - The right of authors with respect to their literary or artistic works is generally termed as copyright. The rights of performers and broadcasting companies are additionally covered under the term. The minimum standards for the protection of copyright that were

¹⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights, 1995, art.3, art.4, and art.5

¹⁸ *Ibid*, art.4

referred to in the Berne Convention were on the whole considered adequate.¹⁹ The TRIPS agreement adds certain obligations that include- (i) in order to cover rental rights, international copyright rules have to be expanded, and (ii) the right to prevent unauthorized recording, reproduction, and broadcast of live performances (bootlegging) for no less than 50 years is available to performers; (iii) under the literary works section of the Berne Convention, computer programs will also be protected²⁰.

Trademarks - The goods and or services of one enterprise are differentiated on the basis of the trademark. A trademark is a sign or group of signs. The TRIPS agreement clearly talks about the kinds of signs that can be judged as trademarks and thus entitled to be protected. It also lays down the rights that are guaranteed to the owners of such trademarks. An evident statement has been made in the agreement that says that service marks must be protected in the same way as trademarks used for goods.²¹

Geographical Indications - A name or indication associated with a place is once in a while used to become aware of a product. This “geographical indication” does now not only say the place the product comes from. More importantly, it identifies the product’s exclusive characteristics, which are the result of the product’s origins. Using the indication when the product used to be made someplace else or when it does no longer have the ordinary characteristics can misinform consumers, and can lead to unfair competition. The TRIPS Agreement says individuals have to furnish methods to stop such misuse of geographical indications. For wines and spirits, the TRIPS Agreement provides greater degrees of protection, i.e. even the place there is no danger of the public being misled. Some exceptions are allowed, for example, if the term in a query is already covered as a trademark or if it has ended up as a regularly occurring term.²²

Patents - Products and processes are considered to be inventions that are eligible for patent protection for at least 20 years. Such novel technological inventions are granted patent protection under the TRIPS Agreement. In case the government believes that the sale of a

¹⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights, 1995, art.9.1

²⁰ *Ibid*, art.10-12

²¹ *Ibid*, art.15-21

²² *Ibid*, art.22-24

particular invention will threaten public order or morality, then it may deny the grant of patent to it and disallow its sale. Other things that may be eliminated from the protection of patents are the processes (diagnostic, surgical, and therapeutic) that are used for purpose of producing inventions, plants and animals (barring micro-organisms), and certain biological processes. The minimum rights that are guaranteed to the owners of the patents and exceptions to these rights are also mentioned under the TRIPS agreement. In the case a competitor wishes to produce a product of a patent holder or use the process that the particular patent holder has used, the government may grant him “compulsory licences” that permit him to do the same without the consent of the patent owner.²³

The layout of Integrated Circuits - The Washington treaty on Intellectual Property in Respect of Integrated Circuits holds within itself the protection of the layout designs of integrated circuits. The TRIPS agreement simply inserts additional provisions for example protection for a minimum of 10 years.²⁴

Undisclosed Information - This heading comprises text data and trade secrets. It is necessary to protect the text data that is presented to the government encompassing a novel chemical for market approval against unfair use. Trade secrets include information that is commercially useful and kept secret by its owner. Such a piece of information is protected under the TRIPS agreement so as to prevent its unauthorised use.²⁵

DISPUTE SETTLEMENT MECHANISM OF THE WTO

The dispute settlement system of the World Trade Organisation was established during the Uruguay rounds of Multilateral Trade Negotiations. The Understanding of Rules and Procedures Governing the Settlement of Disputes²⁶ commonly referred to as the Dispute Settlement Understanding and abbreviated “DSU” embodies this mechanism. By such an establishment, the protection of the security of world trade is ensured. A common ground for the stemming of disputes is the instability of trade in goods and services which is usually carried out by private economic actors on an international level underlying long-term

²³ *Ibid*, art.27-33

²⁴ *Ibid*, art.35-38

²⁵ *Ibid*, art.39

²⁶ Understanding on Rules and Procedures Governing the Settlement of Disputes, 1995

transactions. The dispute settlement mechanism in this way helps in the resolution of the disputes by employing the rule of law and thus ensuring that the world trade remains stable. This is done in a speedy, effective, and rule-based method by enforcing the WTO Agreement.

A member of the WTO can ask for a speedy settling of disputes by the DSU if another member has allegedly not complied with the provisions of the WTO Agreement. The members who form the parties to a dispute have to arrive at an agreement that is agreed upon by both of them. This is one highlighting feature of the Dispute Settlement Understanding. However, if a solution cannot be mutually agreed upon, the panels and the Appellate body inspects and scrutinizes the grounds upon which the complaint is made by following a procedure that is based on rules. When a member country has proved to not comply with an obligation that it was supposed to comply with, then the retaliation is in the form of withdrawal of concessions guaranteed in trade. Then again, this feature is secondary.²⁷

The primary and preferred step will be the extraction of the provision which stands in inconsistency with the WTO agreement. In this fashion, it can be observed that the ultimate aim of the Dispute Settlement mechanism is to constrain punishment rather than to assist it in any manner. Largely, the WTO dispute settlement mechanism involves three major steps : (i) the meeting and discussion among parties; (ii) adjudicating by panels or, if the case requires, by the Appellate Body; and (iii) the implementation of the ruling, which includes the possibility of countermeasures in the event of failure by the losing party to implement the ruling.

Part III of the agreement of TRIPS covers the procedures for the enforcement²⁸ of intellectual property rights. These provisions ensure that the rights that are guaranteed to the holders are protected and safeguarded so that their infringement can be prevented. These procedures have to be simple enough to comprehend and not carry unnecessary costs while making sure that fairness prevails. The complainant should have a right to a due process of law being followed that is based on the principles of justice, equity, and transparency after making a complaint about the violation of his right. Not only there are safeguards against violations of rights, but

²⁷ *Ibid*, art.3.7

²⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights, 1995, Part III, art.41-61

also against violations of the procedures. Thorough provisions are detailed regarding the right to information, evidence disciplines, and the defendant's indemnification. Under the agreement, there are three remedies that judicial authorities may award- (i) with the purpose of stopping an infringing act of a party, an injunction may be granted (ii) if there has been any injury that is brought about by that infringement, compensation may be granted (iii) the goods that are considered to be infringing may be destroyed or removed from commercial channels. Other provisions in the TRIPS are the prevention of imports of counterfeited or pirated goods that the governments may warrant by granting the backing of the customs authorities to the holders of the intellectual property rights. If these provisions are not complied with, the dispute settlement mechanism then comes into play.

CONCLUSION

As the escalation in world trade is apparent, so is the increase in the need to advance technology. With such advancement, infringements related to intellectual property are evident. The dispute settlement mechanism of the WTO does help in these circumstances. Nevertheless, each system has its fortes and flaws. If a developed country undergoes withdrawal of trade concessions due to TRIPS violation, it seriously risks the effectiveness of its domestic markets. Thus, it is crucial to comply with the provisions of TRIPS as the dispute settlement mechanism does not grant interim relief to the complainant so as to protect its trade interest while the procedure is still subsisting.