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RESEARCH ARTICLE

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SIMPLICATIONS OF TRIPS AGREEMENT ON HEALTH AND HUMAN RIGHTS

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Manuscript Info

Abstract

The paper analysis between human rights and the Right to health in the respects. It considers human rights by reappraising in particular, Article 27 of the Universal Declaration of Human Rights, Article 15(1) the International covenant on Economic, social and cultural rights, and the report of the High Commissioner on Human Rights on the impact of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), it looks at the right to health, specifically in relation to whether a rights-based approach to health can be used as a mechanism to facilitate access to medicines , re examining Article 25 of the Universal Declaration of Human Rights and Article 12 of the International covenant on Economic, Social and Cultural Rights. It discusses the implications of the right to health for intellectual property rights with reference to the experiences of using a human rights-based discourse to asserts the right to health in the context of pharmaceutical product patents compulsory licenses and access to medicines. Particularly anti-retroviral drugs for people living with HIV/AIDS in South Africa and Brazil. The Declaration acknowledges that HIV/AIDS, Tuberculosis, Malaria and other epidemics are grave public health problems afflicting developing countries. It also reaffirms the right of the WTO members to use, to the full the provisions in the TRIPS Agreement, which provide flexibility for this purpose. TRIPS being a trade agreement, States obligation under the International Law of Human Rights take precedence over other obligations under International law including trade agreement then after giving the significant initiatives at the World Health Organization (WHO) with Human Rights Implications. The WHO resolution on public health, innovation and essential health research and the WHO global strategy and plan of action on public health.

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Introduction:-**Implications of TRIPS Agreement on Health and Human Rights**

Learning about intellectual property rights (IPR) takes considerable study and continual review of legal literature. However, certain terminology and concepts used in this area are easily learned and assimilated. This basic knowledge is very important in identifying and managing intellectual property (IP). In contrast with real property (land) or physical property, which one can see, feel and use, IP is intangible. IPs are ideas and thoughts, or products of the mind. As long as these ideas or thoughts are not expressed in a tangible form, they remain protected and cannot be used by others. With any type of property there are property rights. When IPs are can be protected. IPRs have been created to protect the right of individuals to enjoy their creations and discoveries. IPRs can be traced back to the fourteenth century when European monarchs granted proprietary rights to writers for their literary works.

With the growing recognition of IPR, the importance of worldwide forums on IPs is realized. Worldwide companies, universities and industries want to protect their IPR internationally. In order to reach this goal, countries have signed numerous agreements and treaties and developed organizations to oversee their application. These agreements and treaties include the General Agreement on Tariffs and Trade (GATT), the World Intellectual Property Organization(WIPO), and the Trade-related Aspects of Intellectual Property Rights (TRIPS) treaty.

Human rights and intellectual property, two bodies of law that were once strangers, are now becoming increasingly intimate bedfellows. For decades the two subjects developed in virtual isolation from each other. But in the last few years, an explosion of international standard setting activities that beginning to map previously uncharted intersections between intellectual property law on the one hand and human rights law on the other.

Human rights concerns have been asserted in a number of contexts as counter weights to the expansion of intellectual property rights. Human rights issues are relevant in a range of issues that intersects with intellectual property protection, including: freedom of expression; public health; education and literacy; privacy; agriculture; technology transfer; human rights. At the same time, creators of intellectual property are asserting human rights bases fro the protection and expansion of intellectual property rights.

The TRIPS (Trade- Related Aspects of Intellectual Property Rights) Agreement was negotiated in the context of the Uruguay Round of multilateral trade negotiations under the General Agreement of Tariffs and Trade. TRIPS Agreement is the most comprehensive multilateral agreement that sets detailed minimum standard for the protections and enforcement of intellectual property rights and as a result it is a significant step in harmonizing national intellectual property (IP) systems. The Agreement is one of the agreements annexed to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations which came into force in 1995. This means that all members of WTO are bound by the obligations under the TRIPS Agreement.

The World Trade Organization's, TRIPS Agreement, marks the beginning at which Intellectual Property Protection enters into the global period an represents a significant change in the evolutionary direction of Intellectual Property Protection. However, since the implementation of the TRIPS does not adequately reflect the fundamental nature and indivisibility of all human rights, there are apparent conflicts between the Intellectual Property Rights regime embodied in the TRIPS agreement and International Human Rights Law. The current interpretation and implementation of the TRIPS Agreement raises obvious and very serious human right issues.

On 17 August, 2000, the UN Sub-Commission for the Protection and Promotion of Human Rights, adopted a resolution unanimously on "Intellectual Property Rights and Human Right" noting, inter alia, that: "There are actual or potential conflicts that exist between the implementation of TRIPS and the realization of economic, social and cultural rights in relation to, inter alia, impediments to the transfer of technology to developing countries, the consequences for the enjoyment of the right to food of plant variety rights and the patenting of genetically modified organisms, "biopiracy" and the reduction of communities' control over their own genetic and natural resources and cultural values, and restrictions on access to patented pharmaceuticals and the implications for the enjoyment of the right to health".

The resolution "affirms that the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is author is, in accordance with article 27(2) of UDHR and article 15(1) (c) of ICESCR, a human right, subject to limitations in the public interest".It further "declares, however, that since the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of

all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications the right to self determination, there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement , one the one hand, and international human rights law, on the other”.

International Bill of Human Rights

Following international instruments constitute the body of international human rights law:

1. Universal Declaration of Human Rights, 1948
2. International Covenant o Economic, Social and Cultural Rights, 1966
3. International Covenant on Civil and Political Rights, 1966
4. Optional Protocol to the International Covenant on Civil and Political Rights
5. Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty

The Universal Declaration of Human Rights (UDHR) is the most general embodiment of today’s international human rights norms. Its provisions have been incorporated into national constitutions, regional conventions, and international covenants- the most important of which are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economics, Social and Cultural Rights (ICESCR). Intellectual property occupies an ambiguous status in terms of these rights categories, insofar as the right to property is protected under the ICCPR, whereas “the [author’s] right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production,” is one of the cultural rights enshrined in the ICESCR. Moreover, intellectual properties of cultural significance to minority groups may be seen as aspects of the right to cultural identity under the ICCPR, which further complicates their status. Nonetheless, such categorical ambiguities should not be great cause for concern; the United Nations has repeatedly stated that the two sets of rights are interdependent and indivisible, and most contemporary commentators agree that the distinctions between the categories have been overstated. Although economic , social, and cultural rights have been juridically marginalized in comparison to civil and political rights, both in terms of the institutional frameworks developed for their implementation and in terms of their judicial interpretation, failure to monitor the violation of economic, social and cultural rights has less to do with the legal obligations established by the ICESCR than with political problems of resolve.

Key Human Rights at threat under the TRIPS Regime

Adoption and implementation of TRIPS Agreement has posed threat to the following human rights;

1. Right to Health;
2. Right Food and Food Security;

Right to Health

Preamble of World Health Organization (WHO) declares that the enjoyment of highest attainable standard of health is one of the fundamental rights of every human being. Health is defined in WHO’s Constitution as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity Article 25 of the Universal Declaration of Human Rights (UDHR) provides, in paragraph one that “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of employment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control...”.

‘Right Health’ actually does not mean ‘Right to be healthy’ but rather the Right to a variety of facilities and conditions necessary for the realization of the highest attainable standard of health (ICESCR, General Comment 14). Another similar view of ‘Right to Health’ may be ‘The right to the highest attainable standard of health in international human rights law is a claim to a set of social arrangements-norms, institutions, laws, an enabling environment- that can best secure the enjoyment of this right.(WHO).

Art.12 of the OCESCR reads as follows;

1. The State parties to the present covenant recognize the right of everyone to the enjoyment of highest attainable standard of physical and mental health.
2. The steps to be taken by the State Parties to the present covenant to achieve the full realization of this right shall include those necessary:
3. The provision for the reduction of the still-birth rate and of infant mortality and for the healthy development of child;
4. The improvement of all aspects of environmental and industrial hygiene;

5. The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
6. The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Un Declaration on Social Progress and Development under Art.19 imposes an obligation on State Parties to make provision for free health services to the whole population and of adequate and curative facilities and welfare and welfare medical services accessible to all.

Content of Right to Health

The UN Committee on International Economic, Social and Cultural Rights – the treaty body responsible for implementing and monitoring ICESCR- has published a General Comment 14 to ICESCR that outlines the content of the international right to health. This General Comment is extensive and quite specific and intended to apply to nations that have ratified the ICESCR. It addresses the content of the right to health and the implementation and enforcement of the right to health. It also provides remedies for individual parties who have been denied the human right to health.

General Comment 14 begins with some observations about the normative content of the right to health. Specifically, it states that;

1. “the right to health is not to be understood as a right to be healthy” and that
2. “the right to health contains both freedoms and entitlements”.

The General Comment 14 specifies the freedoms and entitlements as follows:

The freedoms include the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to system of health protection which which provides equality of opportunity for people to enjoy the highest attainable level of health.

General Comment 14, then observes that the right to health extends not only to timely and appropriate health care but also the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.

These provisions of General Comment 14 indeed prescribe a broad and inclusive conception of the content of the human right to health.

Further, General comment 14, provides that the health care system of a states party must have certain institutional characteristics to realize the right to health. These include the availability, accessibility, acceptability and quality of needed health care services and facilities. “Availability” means that the states party has sufficient facilities and services for the population given the country’s state of development. Services include those that affect the underlying determinants of health, such as safe and potable drinking water. “Accessibility” to health care facilities and services include the four dimensions: non-discrimination, physical accessibility, economic accessibility (affordability), and information accessibility. “Acceptability” means that services and facilities must be respectful of medical ethics and culturally appropriate as well as being designed to respect confidentiality and improve the health status of those served. “Quality” means that services must also be scientifically and medically appropriate and food quality.

TRIPS Agreement and Public Health

Implementation of the TRIPS Agreement gives rise to concerns regarding access to affordable medicines. It is feared that patent protection for pharmaceutical products and processes will have the effect of reducing or eliminating competition from generic production of medicines. The Agreement obliges WTO Members to adopt and enforce high standards of intellectual property rights protection, which are derived from the standards used in developed countries. Implementation of the TRIPS Agreement- by recognizing and strengthening protection of intellectual property rights over pharmaceutical products and processes-may lead to high prices, low access to medicines and a weakening of the mostly generic pharmaceutical industries in the developing countries.

Art.27(1) of the TRIPS declares that patents shall be available for any invention, whether products or process, in all fields of technology, provided that they are new, involve an inventive step and capable of industrial applications. Granting products patents will have an adverse effect on drug industries which manufacture life saving drugs which are essential for maintaining the health of the public especially in cases like HIV/AIDS patients.

The issue of access to essential medicines replays the original debate between developing and developed countries regarding the TRIPS Agreement. Developed countries continue to maintain that high levels of intellectual property protection provide the necessary incentive for investment in research and development, which is the best guarantee of access to essential medicines for all countries. In contrast, developing countries maintain that strict constructions of the TRIPS Agreement fail to recognize the legitimate interests of intellectual property rights users, especially in the context of crises such as HIV/AIDS. A Declaration on TRIPS and Public Health was issued by a consensus of all WTO members at the Doha Ministerial meeting in Qatar in November, 2001. The Declaration provides in part:

“We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all”.

The Declaration acknowledges that HIV/AIDS, tuberculosis, malaria, and other epidemics are grave public health problems afflicting developing countries. It also reaffirms “the right of the WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose”.

India as a party to ICESCR has an international obligation to protect peoples’ right to health. Article 15 (1) (b) of the ICESCR recognizes “right of everyone to enjoy the benefits of scientific progress and its applications”. From the international covenants on human rights it is clear that accessibility and availability of drugs are recognized as important components of right to health. The Supreme Court of India recognized the enforceability of right to health within the scope of Art.21 of the Indian Constitution in *Vincent Painkurlangara V Union of India*. The Supreme Court often interpreted fundamental rights in consonance with international treaties. Hence, the implementation of product patent should not result in the denial of rights guaranteed under the Constitution of India and the ICESCR. According to Sec.2 (d) and Sec.2 (f) of Protection of Human Rights Act, 1993 rights under the ICESCR are the rights that the National Human Rights Commission (NHRC) is required to protect. Health is a reflection of a society’s commitment to equity and justice. Health and human rights should prevail over economic and political concerns.

Right to Food and Food Security

Food security and the capability of the developing nations to feed its population has been a matter of concern and has remained as a great concern to developing countries even today. Right to food is a human right, protected under international human rights and humanitarian law. Article 25 of UDHR and article 11 of ICESCR are the more authoritative international human rights provisions on the right to food. The right to food is a basic human right as well as a basic human need. It is a component of the right to an adequate standard of living. It is also closely linked to the right to life.

Right to Food has been authoritatively defined in general comment No. 12 of the Committee on Economic, Social and Cultural Rights as follows: “The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement”.

According to the General Comment No.12, the right to food also implies three types of obligations-the obligations to respect, protect and to fulfill. The obligations to respect existing access to adequate food requires States parties not to take any measure that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfill (facilitate) means that States must pro-actively engage in activities intended to strengthen people’s access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfill (provide) that right directly.

Intellectual Property Rights (IPRs) may by itself not have been a problem as a concept. What has become a contentious issue is the nature of the meaning and interpretation it has taken on in recent times, its contemporary application and its extrapolation beyond mechanical and literary inventions to the biological science and agriculture. This apparent imposition has tended to marginalize weak developing countries as well as impact negatively on their agriculture and food security.

Since their independence, many developing countries have experimented with different policy options of agricultural development to achieve food security. In the sixties, the international/national agriculture policy was predicted on the research achievements of the green revolution and the development of high yielding varieties (HYV). The strategy was the adoption and use of improved crop varieties (Mono-culture) complimented with organic fertilizer, water management and crop protection chemicals, to endure increased yields and food self-sufficiency. The strategy was underpinned by the establishment of internationally funded agricultural research institutes and a virile foreign aidprogramme by friendly developed countries.

The controversy with the extension of the concept of intellectual property rights to agriculture is highlighted by the simplistic economic importance and interpretation that is sometimes assigned to it. The contradiction is accentuated by the globalization of the concept and the problematic assertion of the TRIPS Agreement suggesting that "Intellectual Property Rights are individual rights". In the African or any other developing national context, this mere assertion does not make it s. In most parts of the continent, improved varieties(land races) of foods crops cultural stories and practice, traditional knowledge etc; are considered as community owned rather than individual property. For example, a bio-resource prospector may collect, identify and create nomenclature for a series of Africa food and medicinal plants and through compilation and authorship of the resultant publication claim exclusive intellectual property rights which excludes the originators from its use.

This scenario can be cited for several instances where resource flow from Africa are transferred by external entrepreneurs, authors and inventors through IPR regimes resulting in products priced beyond the reach of those from whom the knowledge originated. There could be worse problems associated with the distributive effect of harmonized IPR regimes. Multinationals are creating new plant varieties using germplasm obtained from developing countries and these new plant varieties may be sold back to these countries resulting in royalty (revenue) out flow from the south to the north in relation to products that would not have been possible without the contribution of the south. In this case, globally harmonized IPR regimes have major implications for access and equitable sharing of benefit. As globalized intellectual property regimes set minimum standards of protection, traditional territorial notions of sovereignty are eroded contrary to the basic tenets of the convention on Biological Diversity (CBD). This is because those who hold large blocks of intellectual property are not sovereign nations but multi-national corporations. With Africa holding less than 1% of the worlds intellectual property rights, it may well be true to infer that the development path of African States will be determined by those IPR owners who together have exclusive right to the worlds stock of knowledge and the technologies associated with it. What is true for African countries in relation to exploitation of intellectual property is also true for almost all the developing countries.

Conclusion:-

Unless human rights advocates provide an effective intellectual and organizational counterweight to economic interests, the intellectual property landscape will be reshaped in the years ahead without adequate consideration of the impact on human rights. The development of a global economy in which intellectual property plays a central role underscores the need for the human rights community to claim the rights of the author, creator and inventor, whether an individual, a group or a community, as a human right. It is equally important for human rights advocates to protect the moral interests and rights of the community to secure access to this knowledge. Yet another human rights consideration is whether relevant laws identifying rights to creative works and scientific knowledge and determining the nature of the subject-matter which can be claimed as intellectual property are consistent with respect for human dignity and the realization of other human rights.

The resolution passed by the UN Sub-Commission for the Protection and Promotion of Human Rights, reminds all governments of the primacy of human-rights obligations over the economic policies and agreements. Furthermore, it makes a number of recommendations, among them that the WTO and particularly its Council on TRIPS take existing state obligations under international human rights instruments fully into account during its ongoing review of the TRIPS agreement. The resolution also requests governments to protect the social function when shaping national and local legislation.

It is pertinent to note here that the remark made by the US Supreme Court Justice Louis Brandeis in *International News Service V Associated Press*: the general rule of law is, that noblest of human productions- knowledge, truth ascertained, conceptions and ideas-become, after voluntary communication to others, free as air to common use.

Article 103 of the UN Charter expressly states that in the event of a conflict between States' obligations under the UN Charter and their obligations under "any other international agreement", their obligations under the UN Charter shall prevail. Furthermore, the International Court of Justice has confirmed this hierarchy in international law in its 1992 ruling in the *Aerial Incident over Lockerbie Case*. TRIPS being a trade agreement, States' obligations under the international law of human rights take precedence over other obligations under international law, including trade agreements.

References:-

1. Professor Laurence Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence's* Research Paper No. 2003-27 and Program in Law and Public Affairs Princeton University. <http://ssrn.com/abstract=459120>
2. Forum on Science and Technology for sustainability, http://ksgnotes1.harvard.edu/BCSIA/forum.nsf/proj/iprs_humanrights visited on 13/3/2005.
3. Coobe J Rosemary, 6 *Ind. J. global Leg. Stud.*59, Fall, 1998.
4. <http://www.unhchr.ch/html/menu2/6/cescr.htm>.
5. The Right to the Highest Attainable Standard of Health, U.N.
6. Ibid.
7. Ibid.
8. Ibid.
9. Manual On Good Practices In Public-health-sensitive Policy Measures And Patent Law, <http://www.twinside.org.sg/title2/manual.htm>.
10. GathiiThuo James, The Legal Status of The Doha Declaration of Trips and Public Health Under The Vienna Convention on The Law of Treaties, *Harvard Journal of Law & Technology*, Volume 15, Number 2 Spring 2002. 1987 (2) SCC 165.
11. Letter from the Affordable Medicines Treatment Campaign to India' National Human Rights Commission, available at http://hrw.org/english/docs/2004/10/22/india9556_txt.htm.