

**The Evolution of Global Intellectual Property
Instruments into Trade Related Intellectual
Property Rights (TRIPS) and its Ineffective
Enforcement in Developing World-----a Case
Study**

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into Trade Related Intellectual Property Rights (TRIPS)
and its Ineffective Enforcement in Developing World-----
-a Case Study

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Attestation of Authorship

I hereby declare that this submission is my own work and that, to the best of my Knowledge and belief, it contains no material previously published or written by Another person (except where explicitly defined in the acknowledgements), nor Material which to a substantial extent has been submitted for the award of any other degree or diploma of a university or other institution of higher learning.

A handwritten signature in black ink, reading "Saeed Nasir". The signature is written in a cursive style with a long horizontal stroke at the end.

Saeed Nasir

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Abstract

This thesis aims to critically evaluate global intellectual property instruments with detailed analysis of the Agreement on Trade-Related Intellectual Aspects of Property Rights (the TRIPS Agreement) provisions in order to investigate the enforcement issues, confronted by the Developing Countries due to fragile legal infrastructure. These intellectual property laws are evolutionary and designed to protect and honour human intellectual creations since BC 400 which recognized them distinct from divine inspirations. Italian Renaissance witnessed the systematic recognition of human skill, craft, innovation and invention. Venetian Government institutionalized it by awarding patents and copyrights to skilled workers and publishers. Its primary purpose was to protect the trade and secondary was to foster intellectual creativity through reward and recognition. These rewards and recognitions, known as Intellectual Property Rights (IPRs), developed with each new invention and creation. Industrial Revolution accelerated it and developed nations entered into international conventions to protect their nationals and their interests across the borders. In 1995, the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) accommodated all the previous (IPRs) instruments and its enforcement linked with global trade. It was a dilemma for developing nations who were desirous to participate in global trading system for their economic development but could not administer (IPRs) regimes on their land due to fragile and static infrastructure. All assistance from developed countries during the transitional period could not address the problems due to alien prescriptions, applied to counter problems in the developed World. Developing

Nations need innovative, flexible and indigenous approach to administer the TRIPS Agreement. A case study of Pakistan judicial environment to address the TRIPS enforcement issue has been conducted. The methodological approach of this thesis is the interpretive paradigm of the qualitative research tradition. This interpretive paradigm or framework is applied through the two methodologies of hermeneutics and case study.

Introduction

This thesis aims to find out an effective enforcement solution of trade-related aspects of intellectual property laws in the developing world or economies by looking into compliance with international property regimes, implementation according to different ground realities of developing country and by monitoring the enforcement mechanism through ailing and colonial judicial system in a fast paced social development due to hi-tech and digital technologies. At first glance, it seems that Intellectual Property (IP) laws, enactments and regulations are fairly new but in depth review of the world greatest civilizations revealed that notion of intellectual property existed in different forms and philosophers and intellectuals of these civilizations drew a line of distinction between divine inspirations and human ingenuity by gradually developing a systematic approach towards the recognition of human intellectuals which ultimately resulted in the notion of knowledge economy.

This systematic recognition of human skill, craft, innovation and invention passed through the different phases in history. The Venetian Government is identified the first state authority to institutionalize the patents and copyrights to skilled workers and publishers, and introduced

the copyright office first time with the sufficient powers to penalize the infringers. These recognitions were gradually incorporated into national laws, then international laws and finally shaped up through multilateral settlement of international trade. Now, these laws are known as the trade related intellectual property rights known as the TRIPS Agreement accommodating all the previous instruments, being enforced through the World Trade Organization (WTO) in conjunction with other trade laws.

World Trade Organization (WTO) has inherent power of enforcing the regimes through Dispute Resolution Unit (DSU) which has got binding jurisdiction on its members. It is mandatory for the developing countries to administer IP laws, in tune with the TRIPS Agreement if they are desirous to participate in global trading system but their fragile socio-economic environment and static judicial and enforcement infrastructure coupled with awareness issues make it terribly difficult to honour the commitment with international regimes and bring changes in the absence of any solution or model, which must be conceived, sketched, and tailored according to their ever changing social needs by balancing the economic growth, social development and adherence to conditions, imposed by international covenants.

The proposed study was designed in this backdrop and Pakistan was selected for the case study of developing world. As it involved analyses

of global IP regimes in historical setting and case study of 12 weeks, its methodological approach was based on two parts: legal hermeneutics and case study. Legal hermeneutics is a method of legal interpretation of a phenomenon while taking into account the considerable social and intellectual surrounding debates. Legal hermeneutics is a form of hermeneutic methodology which is based on a constructionist epistemology and it belongs to the qualitative interpretive paradigm. Hermeneutics can be defined as “understanding the whole by understanding the parts and understanding the parts by understanding the whole”, which is called the hermeneutic circle. This first limb of methodology provided a platform to critically evaluate the international legal statutes in an historical but mainly in a political context through textual dialogue and interpretation which was applied in the case study of Pakistan through the second limb of methodological approach; case study. This case study was designed to study policy making, judicial enforcement and business conglomerates through personal interviews of concerned officials. These interviews were within the exception to ethics approval guidelines (6.6) of AUT.

Chapter 2 spells out methodological feature of this thesis. A combined approach of hermeneutics tradition (interpretation of IP laws in historical and legislative context) and case study method (for developing country)

is applied to find out the answer of the research question (how TRIPS related IPR can be enforced in a developing country).

Chapter 3 of this essay provides a comprehensive evolutionary process of the notion of intellectual property by examining this concept in the settings of the Greek, Roman, Islamic and Chinese civilizations before looking into the role of guilds and universities which contributed and strengthened the debate of IPRs which became the cornerstone of the Venetian Movement, known as the harbinger of the modern IP laws. In the end, this section examines the internationalizations of IP laws. It has four independent sections which were further divided into four sub-sections.

Chapter 4 canvasses the legal efforts of US Congress men and business lobby to incorporate United States national IP legislation into international trade agenda. It critically views the fundamental and enforcement provisions of the TRIPS Agreement with particular description of biodiversity clause and its likely implication for developing countries (potential enough to jeopardize the international trade patterns) and finally highlighting the role of the TRIPS Agreement in the economic and legal contexts for the third world countries. It has four sub-parts.

Chapter 5 describes the observations and experiences of the case study and consists of four sections. First section reveals the policy making issues in detail, second deals with judicial enforcement coupled with legal education and third one deal with the efforts of business conglomerate to stop violations of IP laws. The last one points towards the need to develop a model close to ground reality for effective enforcement of IP laws by drawing the results of case study to be viewed in the light of international regimes. It emphasizes the need to take the present study into a future research to deal with the issue, at hand, to find out the pragmatic solution of the problem, brought forward at larger scale by this study. The last chapter carries brief discussion leading to the conclusion of the thesis. In addition to this, an appendix is attached in optical disc media which carries the digital photos of pirated software, movies, and music. These photos also display the packaging and printing of pirated discs. All these photos were taken in Lahore, Pakistan.

The following chapter describes the methodological structure, planned before undertaking the research. It reveals the structure of the method and design, proposed to be applied to find out the answer of the research question. Therefore, it also carries discussion on focal point of study leading towards to formulate the research question. The nature of this research question demands the application of the qualitative

research methods which are employed through the combined methodology of hermeneutics and case study. It also mentions its ethical requirements, covered under rule 6.6 of AUT, the changes in case study methodology and the encountered problems during the course of the research trip.

Chapter 2

Research Methodology and Method

2.1 Introduction

This chapter spells out the methodology, method and design of this study. This study has been conducted through interpretive paradigm of the qualitative research tradition. This interpretive paradigm or framework is applied through two methodologies; hermeneutics and case study. As this study deals with international legal regimes and their enforcement; it necessitates interpreting international legal settings through legal hermeneutics which is based on a constructionist epistemology and belongs to the qualitative interpretive paradigm. This chapter also describes the focus of thesis, philosophical underpinnings of the methodology, collection of data and its analyses, possible locations of case study and its limitations. It also mentions its ethical dimensions.

2.2 Introduction to Qualitative Research

The history of qualitative research is long and notable in various fields of knowledge. In 1920 and 1930 its importance was established in the discipline of sociology and at the same time qualitative inquiry also got its recognition in the discipline of anthropology. After this researcher from the social science and behavioural science which includes education, history, political science, business, medicine, nursing, social work and communication engaged themselves in qualitative research.¹

Research helps in finding out replies to the problem by applying methodical system. Whereas, qualitative research in particular search answers to the problems by exploring social situations in relation to the people who makes those situations. It helps in finding out those facts which are unquantifiable about the people, by observing and talking to those people.²

Qualitative researcher is very much interested in finding out how individuals arrange themselves and their surroundings. They are also interested in knowing t how the people in any particular social setting

¹ Denzin, N.K., & Lincoln, Y.S. (Ed.). (2003). *The landscape of qualitative research* (2nd ed.). Thousand Oaks, California: Sage.

² Berg, B. L. (2007). *Qualitative research methods for the social sciences* (6th ed.). Boston: Pearson/Allyn & Bacon

give meanings to their surroundings by social roles, symbols, rituals etc. They focus themselves in the understanding of the words that people use to express themselves and the value they attach to their experiences. In this way qualitative researchers are able to know about the considerations and the perceptions of the people and are able to find out how people organize their day to day life according to those perceptions and considerations.³

2.3 Research Question

It is evident from the above discussion that developing countries lack the capacity to enforce IPRs in compliance with the TRIPS Agreement. They need adequate support from the developed nations to enhance their capabilities to deal with new laws and treaties which are legislated to regulate issues arising out of technological advancement.⁴ It is argued that IPRs protection is a complex phenomenon to be enforced with minimum standards of protection in developing countries, even if these countries are intended to do so. This thesis will deal with this problem of such countries that seek to enforce IPRs in their jurisdiction

³ Ibid

⁴ Sherwood, R. M. (1997). The TRIPS Agreement: Implications For Developing Countries. *IDEA: The Journal of Law and Technology*, 37(2), 491-554

without sacrificing their economic growth and share in international trade. It is notable that these developing nations have been confronted with serious administrative, legislative and judicial lacunae to fulfill their obligations with international IPRs in general and with TRIPS in particular.⁵ It was decided by international trade negotiators to incorporate cushioning provisions for developing nations which could give them a transitional period to reform their local IP laws. These transitional periods were given to facilitate the technology transfer and financial assistance from the developed countries to the developing countries for capacity building⁶ but upon the expiry of such transitional periods, results remained dismal.⁷

It was pointed out that all such efforts at capacity building ended in smoke as developing nations were forced to adopt institutional and financial solutions of the developed countries.⁸ Such developed nations' formulae failed to address the issues of the developing countries and economies in transition which needed local, indigenous but innovative

⁵ Sherwood, R. M., V. Scartezeni, and P.D. Siemsen. (1999). Promotion of Inventiveness in Developing Countries Through a More Advanced Patent Administration. *IDEA: The Journal of Law and Development*, 39(2).

⁶ WTO. (2003). *Understanding the WTO* (4th ed.). Geneva: WTO Publications

⁷ Supra n 36

⁸ Ibid

approaches to comply with the international obligations of IPRs.⁹ It is noteworthy that this thesis will examine this issue in the judicial and legal domain only. It is identified that a strong judicial environment is necessary to enforce IPRs but it is yet to be shown how this can be possible in a developing world judicial environment where neither bench and nor bar are well qualified to hear and argue IPRs violation cases respectively due to weak foundations of the judicial system which is still based upon the legacy of colonial rule and has not been updated or tailored to confront these new problems.¹⁰ The IP field is recognized as a constantly changing area with the frequent advent of new technologies sufficient enough to create social ripples, and one-off training sessions to judges and lawyers; therefore cannot be enough to enforce IPRs.¹¹ So, a case study of Pakistan, a developing nation with a colonial background, was carried out to assess how the IP regimes could be enforced in a static judicial environment.

All the above discussion can be crystallized as The research question of this thesis which is to investigate how global Intellectual Property regimes can be enforced with justice in such a fragile legal environment.

⁹ Supra n 01

¹⁰ Supra n 04

¹¹ Maskus, K. E. (Ed.). (2005). *The WTO, Intellectual Property Rights and Economy*. Cheltenham: An Elgar Reference Collection. Part 1, Ch 1, P.03

2.4 Philosophical Underpinning of Methodology

It is based on a constructionist epistemology and it belongs to the qualitative interpretive paradigm. The interpretative paradigm assumes relativist ontology (there are multiple realities), a subjectivist epistemology (knower and respondent co-create understandings), and a naturalistic (in the natural world) methodological research procedures.¹² In this paradigm, the researcher interacts with the participants, so that they can understand their experiences and the meaning they assign to them. Both researcher and participant are involved in the process of data collection but the researcher is in the dominant position as during analysis the interpretations depend upon the researcher.¹³

2.5 The Methodological Approach of Thesis

The methodological approach of this thesis consists of two parts: legal hermeneutics and case study. Legal hermeneutics is a method of legal interpretation of a phenomenon while taking into account the

¹² Supra n 01

¹³ Giddings, L. S., & Grant, B.M. (2002). Making sense of methodologies: A paradigm framework for the novice researcher. *Contemporary Nurse*, 13(01), 10-28.

considerable social and intellectual surrounding debates.¹⁴ It helped in leading to new understandings on the enforcement of intellectual property rights in developing world. It provided a platform to critically evaluate the international legal statutes in an historical but mainly in a political context through textual dialogue and interpretation. This critical evaluation remained helpful in understanding the potential problems, encountered by the developing world, arising due to the uniform application of international rules.

These identified problems were further explored through a case study of a developing country. This case study was helpful in developing an in-depth analysis and examination of the policy and policy-making institutions related to Intellectual Property Rights (IPRs) in the third world setting. It will aid in the understanding of the problems, needs, and goals of third world states in the IPRs domain as this method derives from law and political science. This combined research strategy aimed to interpret the relevant current facts of the history, local and national IPRs, international conventions, and agreements. It also presented sectoral studies to find out why the developing countries are not capable of legislating these international obligations into their domestic laws coupled with their inability of enforcement.

¹⁴ Crotty, M. (1998). *The foundations of social research: Meaning and perspective in the research process*. Sydney: Allen and Unwin.

2.5.1 Legal Hermeneutics

Legal hermeneutics is a form of hermeneutic methodology which is based on a constructionist epistemology and it belongs to the qualitative interpretive paradigm. The interpretative paradigm assumes relativist ontology (there are multiple realities), and a naturalistic (in the natural world) methodological research procedure.¹⁵ The hermeneutic methodological approach is concerned with the study of human action. It provides a strategy for the deeper understanding of human existence through attention to the nature of language and meaning.¹⁶

Hermeneutics is about “understanding the whole by understanding the parts and understand the parts by understanding the whole”, which is called the hermeneutic circle.¹⁷ This hermeneutic circle provides a platform for this thesis to analyze international treaties, conventions and protocols to assess the national IPRs regimes. The analysis of national regimes with ground realities, in actual, provided reflections on the mechanism of international IPRs regimes. In this way, this analytical

¹⁵ Supra n 01

¹⁶ Leyh, G. (Ed.). (1992). *Legal Hermeneutics History, Theory, and Practice*. Berkeley: University of California

¹⁷ Supra n 14

process of hermeneutic circle brings forward the understanding of both in the reflection of each other.

In this way, legal hermeneutics is applied to comprehend the full scope of the hermeneutical problem. Therefore, this methodology provided an opportunity to investigate the IPRs issues in legal domain but with political and social contexts simultaneously. So, this is the point where legal hermeneutics brings law as a discipline to be squarely interpreted within the humanist tradition.¹⁸

2.5.2 Case Study

A Case study is considered a research tool for “detailed examination of one setting, or a single depository of documents, or one particular event.”¹⁹ It helps the novices and equally experienced researchers due to its general design which is “best represented by a funnel.”²⁰ It provides the flexibility for the researchers to visit possible places and people, potential source of the data or information. It also enables them to locate any potential location by casting “a wide net...to judge the

¹⁸ Supra n 16

¹⁹ Bogdan, R. (2006). *Qualitative research for education: an introduction to theories and methods* (5th ed.). Boston, Mass.: Pearson A & B.

²⁰ Ibid

feasibility of the site or data source for their purposes.”²¹ It provides them options to distribute their time according to constraints of time and locations, decide to whom interview and at to what depth. These flexibilities enable them to find out new dimensions of the study by developing new ideas. These new dimensions necessitate the modifications of design and the adoption of friendly procedures best suited to the location or people.²²

2.6 Method and Design

The methodology of this thesis necessitates the data collection in two stages. The first stage was executed through legal hermeneutics and the second stage was carried through a case study. Finally, the collected data of both stages was analyzed accordingly to present the contrast of the findings and conclusions.

2.6.1 Data Collection and Analysis

This thesis first analyzed the relevant provisions of international conventions and treaties. It included Paris Convention 1967; Berne

²¹ Ibid

²² Ibid

Convention 1971. After this, a detailed critical analysis of TRIPS provisions related to enforcement, judicial authorities, and biotechnology clause was presented. This legal analysis included documents, discussion papers and reports of World Intellectual Property Organization (WIPO), and World Trade Organization (WTO), scholarly published articles, and relevant news item appearing in the media.

This detailed analysis remained helpful in identifying the issues and controversies which surrounded Intellectual Property Rights and their enforcement in developing countries. This identification of issues, brought forward by legal hermeneutics, tested and examined through a case study of Pakistan. This case study was intended to explore the following areas:

- policy making (Federal/Provincial Secretariat),²³
- judicial enforcement (Federal Judicial Academy)²⁴ and
- Business concerns (Anti-Counterfeit and Infringement Forum, Pakistan)²⁵ for the enforcement of IP regimes.

²³ Federal/Provincial secretariats are responsible for policy making.

²⁴ Federal Judicial Academy is entrusted with the training of judges of all ranks.

²⁵ This forum has been established by Nineteen Multinationals and Nationals companies in Pakistan to counter the menace of industrial piracy and intellectual property rights violation.

These three areas examined for data collection through interviews with the appropriate officials of these three bodies and with the examination of publicly available documents coupled with legal decisions and reports. The purpose of applying the three sources of evidence is to “construct validity and reliability of the case study.”²⁶ The evidence of all the three resources converged together for data triangulation. This converged evidence analyzed to prepare case study report but all the raw data stored in a data base for future reference of the reader. Its purpose was also to increase the reliability of the case study and to eliminate its shortcomings.

2.6.2 Modus Operandi of Interviews

These interviews were focused interviews of a short period of time (an hour) and were conducted in an open-ended and conversational manner. These interviews carried out to corroborate the propositions brought forward by the analysis of IPR regimes. It was intended to ask carefully worded questions and not to ask lead questions so that discussion must remain focused. Initially, it was decided to have tape-recorded interviews in English language but participants hesitations forced to take copy notes after due permission. These interviews were

²⁶ Yin, R. K. (2003). *CASE STUDY RESEARCH Design and Methods* (Vol. 5). California: Sage Publications.

conducted under 6.6 ethical guidelines of AUT Ethical Committee (detail in Ethics section).

2.6.3 Documentation, Legal Decisions and Reports

It is intended to examine related documents that are publicly available (in libraries and on websites) to corroborate the facts brought forward by interviews. The examination of related documents is to secure insight into the practice of policy making for the enforcement of IP regimes. Similarly, the in-depth analysis of legal decisions and reports highlighted the technical difficulties of the bar and bench while dealing with such highly technical and dynamically innovative area.

2.6.4 Analytical Framework of Case Study Evidence

This case study was of explanatory nature. Its purpose was to find out the suitable and well-documented reliable explanation for the issues, highlighted by the analysis of IP regimes, scholarly published articles and discussion paper of WTO and WIPO through legal hermeneutics. Therefore, general analytical strategy was adapted to conduct the analysis of case study data. This strategy relied on theoretical propositions, introduced by the first part of the methodology (legal hermeneutic). This analytical strategy was based on a specific analytical

technique, known as “Explanation Building.”²⁷ This technique offered the framework to compare or test the initial statement or proposition. This analytical technique remained particularly helpful in explaining a phenomenon (enforcement of IP regime in developing world) where critical insight was required to reflect on the ongoing process of public policy, rules and regulations. This analytical process of public policy propositions had the potential to “recommendations for future public policy actions.”²⁸

2.6.5 Limitations and Validity of Case Study

The following sub-sections point out limitations of case study with explanation of the backdrop of each limitation. This explanation provides the rationale for keeping these areas out of thesis coupled with the justifications as how these applied limitations increased the validity of the focused research question.

2.6.5.1 Limitation 1

- This thesis will not look into ethical and religious considerations of the developing countries

²⁷ Ibid

²⁸ Ibid

This case study attempts to deal with the effective enforcement of IP regimes in a third world country. It will specifically emphasize the enforcement dimension of IP regimes. It will put aside the cultural and religious dimension of the IP regimes. It is noteworthy that this project is specifically related to intellectual property rights of goods and services having the trade values. Therefore, Traditional knowledge arising out of cultural and religious affiliations, or products related to cultural and religious considerations, is totally an independent area of thesis and by no means affects the validity of this case study.

2.6.5.2 Limitation 2

- It will not deal with cultural and technological implications.

This case study is not intended to assess the technical impacts of new emerging technical products in a specific society. This research product is limited to the enforcement of IP regimes; how to stop the violation of IPRs of trading goods and services. It is not intended to assess the cultural change brought in by technology or modern products through the breach of IPRs.

2.6.5.3 Limitation 3

- It will not analyze the IPRs office infrastructure and qualifications for examiners and their access to databases.

This case study will not examine the structure, qualification and training of examiners appointed in IP offices. The purpose of IP offices is to register the new products by awarding a license. The IP examiner's role is not questioned in the domain of bar and bench. There may be few concerns about IP examiners' training, its quality, and their access to databases but all such concerns are not related, in any manner, to the effective enforcement of IP rights. Therefore, it can be stated that putting aside this area from this thesis will not affect the reliability and validity of case study.

2.6.5.4 Limitation 4

- It will not address Public awareness for IPRs enforcement.

This limitation is concerned with public awareness. There is no doubt that public awareness plays pivotal role in a just society. As awareness of rights is increased, violations of regulations gradually minimize. This

is more a sociological dimension than a legal dimension. This thesis is concerned mainly with the imported goods and foreign services whose IPRs are violated, and that inadequate forums, rules and regulations have been devised to curb the piracy. Therefore, the findings and conclusions are for the policy makers to plug into the loopholes in the legislation, ongoing training and updates for the bar and bench and for those who are involved in negotiating the multilateral trading agreements at international level. It can be stated with certainty that keeping this issue of public awareness out of this case study will not weaken it; rather it will introduce more reliability to the thesis.

2.7 Ethics

There are no specific ethical considerations that need to be taken into account. Only existing publicly available documents or data will be utilised. Research may involve one-off interviews of limited scope and depth with professional persons, authorities or public figures in the area of their expertise. This comes within the exception to ethics approval guidelines (6.6). Ethics application will be sought in the unlikely event that the scope of any interviews is widened beyond this scope. It is possible that no interviews will be conducted, due to the reasons given

above (the timeframe, individuals overseas, danger of reliance on the recollections of a limited sample of people).

2.8 Research Methods - Changes/Issues

The combined research strategy of this thesis necessitated data collection in two stages; legal hermeneutics and case study to developing world to be finally analyzed together to present the findings and conclusions. There is no concern or issue with the methodology and research methods except that interview notes are taken on paper instead of tape recorded. This change was discussed and agreed with supervisor due to participants' hesitation and security concern. It is notable that strict policies of military government, carried out through secret agencies and strict measures of security around public offices necessitated this change in order to collect initial data. All participants provided their details and can be contacted through telephone, postal mail or email (where available).

2.8.1 Problems or difficulties encountered

This thesis encountered few problems, seemingly insurmountable, but finally overcome by applying timely measures which were well discussed with number of people in student learning centre, university financial office, university scholarship office and student information centre. The most obvious was financial issue for overseas research trip. Numbers of financial avenues were explored but timings/deadlines of application and timings of case study could not be synchronized. Finally, New Zealand Education awarded post graduate study award for overseas research after going through the details of the thesis.

Besides this, the paucity of time in research trip hindered many potential areas which could have otherwise been addressed at ease. In addition to this, logistics and identification issue of me were of main concern. Logistics issues were solved as encountered but it was big hassle to introduce myself before people in words. Many participants and organizations asked my visiting card to respond back for additional information or maintaining the contact with ongoing research process.

Last but not the least issue was law and order situation of Pakistan which forced to change plans to visit places and people number of times.

The following chapter is the detailed description of the evolution of global intellectual property laws. It looks into the origin of the idea of intellectual property, its gradual development into systematic and sustained movements in different civilizations and finally the culmination of the advent of IP laws in Europe. It throws light on those developments, elements and factors behind this movement which played crucial role in turning the mind ingenuity into knowledge based economy. As trade developed across borders, it was realized that domestic IP laws needed to be integrated into international treaties which ultimately introduced global intellectual property regime. All these developments have been critically analyzed through the legal hermeneutics methodology which is the branch of hermeneutical tradition of research. The application of this methodology helped in analyzing the phenomenon simultaneously in historical, political, social and legal contexts to investigate the research question of this thesis.

Chapter 3

The Evolution of Global Intellectual Property (Rights and Laws)

Apart from any coherent legal definition of the term “intellectual property”, it simply refers to various “attempts to control valuable knowledge and information”.¹ It started as a movement which aimed to condemn plagiarism and “the acknowledgement of the theft ideas”² even before the fifteenth century³ but it is noteworthy that the idea to honour intellectual creations, distinct from divine inspiration, can be stretched back up to BC 400.⁴ This movement to honour human genius, intellect, invention remained fully alive in all times of history in all civilized societies in variations. This movement started acquiring different shades of regulations when inter society trade set in and developed into a fully global regime, in a globalized setting, where it is stated without exaggeration that “intellectual property rights are a matter of life or death”.⁵ The most illustrious case can be quoted here is the patent protection of ‘acquired immunodeficiency syndrome (AIDS) which made

¹ K.Sell, C. M. a. S. (2006). Intellectual Property rights: A Critical History. London, Lynne Rienner Publishers, P. 43

² Ibid

³ Ibid

⁴ Maskus Book, PG 1 comment

⁵ supra n 1

the availability of this drug “prohibitively expensive”⁶ for countries like Ghana, India, Brazil and South Africa.

This movement witnessed landmark milestones in the evolution of intellectual property rights and codification of intellectual property laws up till now when IP rights are “married”⁷ with multilateral trade agreements. The following lines enumerate the IP evolution in civilized societies, pivotal points in IP movement crystallizing the internationalization of IP laws before outlining the TRIPS agreement and case study in the subsequent chapters (4 & 5).

3.1 Evolution

It is identified that Intellectual Property (IP) awareness predates “written history.”⁸ It was practiced in the form of marking the goods. These markings aimed to refer to reliability, skill and design of a particular craftsman and to “adjudicate disputes regarding ownership.”⁹ It is noted that this marking practice started with the practice of branding the

⁶ Ibid

⁷ Sherwood, R. M. (1997). Intellectual Property Systems and Investment Stimulation: The Rating Systems in Eighteen Developing Countries. *IDEA: The Journal of Law and Technology*, 39(2).

⁸ Supra n 1 44

⁹ Ibid

animals which is considered “the earliest form of proprietary marking.”¹⁰ This 6000 years old practice is amply supported from the widespread evidence of cave-painting. It is established by the researchers that these markings were “undoubtedly trademarks in the modern sense”¹¹ due to their primary purpose of denoting origin, to identify goods, to refer to reliable skill, and to avoid disputes.¹² These markings were engraved or stamped on pottery and household item,¹³ and even on bricks with “name of the ruling king and the owner of the building where bricks were used.”¹⁴ In the same way, stone cutters used to record their or contractor name to calculate the wages for their masons or team.¹⁵

These marking can be segregated into three categories; family markings used to identify certain clan or group, trading marks to identify goods prior to formal writings and mass literacy, and the compulsory marks which “carried the authority of the state or ruler.”¹⁶ It is notable that third category extended authority to specific guilds under royal charter, practiced till to date, with the only difference of formal regimes of law referring the legitimacy of certain skilled community and related social

¹⁰ Ibid

¹¹ Gerald.

¹² Ibid

¹³ excavation from prehistoric sites in Europe and Asia

¹⁴ Azmi, I. M., Sypros M. Maniatis, and Bankole Sodipo (1997). *Distinctive Signs and Early Markets: Europe, Africa, and Islam*. London, Sweet and Maxwell

¹⁵ Ibid

¹⁶ Ibid

significance.¹⁷ It is maintained that these markings were regarded as source of recognition in the Greek city-states not only in above mentioned categories but also in cultural and intellectual spheres.¹⁸ This practice—ideas about owning ideas----- in ancient civilization is described in forth coming lines.

3.1.1 The Greek Civilization

The Greek civilization was embedded with sublime intellectual thoughts and treasured poetry. It is interesting that the Sophists, teachers of thinking and doing¹⁹ were the advocates of “freelance teaching activities”²⁰ and earned “significant rewards”²¹ by not claiming the ownership of the contents of their teachings. These teachings were produced before audiences to be copied further before others in the absence of publication technology.²² The Sophists allowed their ideas to be circulated in written form and “lost control over who could read and benefit from their knowledge.”²³ It is identified that the Sophists did not consider this “knowledge or information itself as ownable commodity”²⁴

¹⁷ Ibid

¹⁸ Supra n 145

¹⁹ Supra n 1 45

²⁰ Ibid

²¹ Ibid

²² Ibid, Masterson 1940

²³ Ibid Blank 1985

²⁴ Ibid

and preferred the manuals and texts as their publicity vehicle for their teaching activities.²⁵

In the Greek society, the concept of intellectual property emerged in the present sense of recognition through poets and most prominent one was Simonides who first propagated the idea to be the “creative.”²⁶ He promoted the poem as “a clearly defined product”²⁷ and the first one to demand a fee for the poems. Before the propagation of this thought and even before the Greek civilization, artists, poets, singers and even intellectuals were patronized by the patrons and used to be paid only on the demand performances.²⁸ It is notable that their performances were either in close royal chambers or in public galleries but not restricted to be copied or performed. Therefore, Simonides and likeminded poets were termed as greedy when demanded fee for specific work.²⁹ In short, apart from the moral debate of this idea--to be paid for creative work—(which falls outside the scope of this essay), Simonides thoughts were followed by other poets like Pindar to receive recognition in monetary form for poems.³⁰ This practice was followed by artists as well by signing or markings their paintings as it was regarded the “reliable

²⁵ Ibid

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

²⁹ Ibid

³⁰ Genteli, B. (1988). Poetry and its Public in ancient Greece, From Homer to the Fifth Century Baltimore: Johns Hopkins University Press.

evidence of recognition....of artistic activity.”³¹

These poets and artists projected the “consciousness of high quality of one’s own work and technical achievements at a level that would be hard to surpass.”³² The realization of this consciousness triggered the contractual relationship between the artists and the purchasers which recognized the work as high quality work. This realization projected poetry or painting as an art or product to be sold in the market-place.³³ It is noteworthy that this idea of contractual relationship was devoid of any modern sense of intellectual property but it is widely acknowledged that this consciousness³⁴ of the idea of creativity promoted the notion of ownership of knowledge.³⁵

In short, it was the art of poetry in the Greek society in the fifth or sixth centuries B.C. to be commodified and generated “market-oriented activities and problems” in the modern sense of intellectual property rights.

³¹ Vukmir, M. (1992). The Roots of Anglo-American Intellectual Property Law in Roman Law. *IDEA: The Journal of Law and Techonology*, 32(02).

³² Ibid n 30

³³ Supra n 1 46

³⁴ Infra 32

³⁵ Supra n 1 46

3.1.2 The Roman Civilization

Roman civilization inherited the ideas of owning the ideas from the Greek civilization and continued as per Greek practice particularly in the “use of craftsman’s marks.”³⁶ It is notable that these marks reflected the honesty and integrity of manufacturer but without legal status. In such situation, there was no legal recourse open to the manufacturer against the violator of the marks. The Roman law allowed the purchaser for legal action against fraudulent goods but no such evidence is available to reflect the link between fraudulent sale of goods and infringement of industrial marks³⁷ but it is established fact that Lex Cornelia de iniuriis prohibited the use of another name for profit.³⁸

The counterfeited sale of Roman industrial goods reflected the legal lacuna in this regard. Roman oil lamps were famous and traded through the empire under the famous marker of *Fortis*. These lamps were “extensively counterfeited across Europe”³⁹ and finally Fortis was recognized as a lamp of particular type instead of “an indication of manufacturer.”⁴⁰ Similarly, in the first century A.D., Roman pottery was imitated in Belgium to be exported to the ignorant Britons who could not

³⁶ Ibid

³⁷ Ibid

³⁸ Ibid

³⁹ Supra n 14

⁴⁰ Ibid

decipher the Latin infringer's marks. These two cases clearly forward the evidence that infringement of industrial goods were existed, which were traded across the frontiers, due to lack of knowledge and awareness.⁴¹

It is notable that Roman Publishing industry presented an opposite approach and developed the Greek Idea of Simonides to the maturity of literary concept. It is identified that the roots of protected publishing of texts particularly were originally emerged in Alexandria in the first century B.C. before moving to Rome around fifty years before A.D. 100 to be further strengthened with the Greek concept of earning from publication.⁴² It is evidenced that Cicero displayed a particular business interest in the sale of his book by making "publishing arrangements were on royalty basis."⁴³ It has been regarded commendable that Roman publishing industry was mature enough to apply the concept of intellectual property "atleast in prototypical terms."⁴⁴ These prototypical forms of intellectual property rights, in Roman society did not generate any known or reported cases and all the further academia discussion in this realm is based "at best conjecture" by taking into account the recognition of other forms of intangible property like services of slaves which could be transferred to other owners or transferred to inheritance.

⁴¹ Ibid

⁴² Supra n 1, 47

⁴³ Masterton, S. C. (1940). Copyrights: History and Development. *California Law Review*, 28(05)

⁴⁴ Supra n 1

It is argued that this “recognition of intangibles would be picked later to underpin early modern (Roman law-influenced) copyright law.”⁴⁵ This discussion does not indicate any formal body of intellectual property laws or reported case laws except the idea of recognition of the ownership of knowledge or the trade of “knowledge-derived items”⁴⁶ in the Roman society. It is noted that Roman law was mainly used as an instrument to resolve disputes in their relations with each other and did not apply “for the social control of commerce.”⁴⁷ Therefore, it can be argued with certainty that no case law could ever be possible to be reported from Roman civilization or even after the decline of Roman Empire.

The first ever reported case which is frequently cited has been identified in Ireland in sixth century. Though, at that time, there is no evidence of the existence of copyright laws or cases, but echoing resonance of this case, makes it the first ever case to be reported, recorded with certainty, and often-quoted. It is concerned with Saint Columba who made copies of a psalm books, belonged to his teacher Finnian of Movile. Finnian objected and dispute was heard by King Diarmed who decided that

⁴⁵ VerSteeg, R. (2000). The Roman law Roots of Copyright. *Maryland Law Review*, 59

⁴⁶ Supra n 1

⁴⁷ Ibid

original and copy belonged to Finnian and concluded in following words:

“To every cow her calf, and accordingly to every book its copy”⁴⁸

It is concluded that even in the absence of intellectual property regimes even in its rudimentary form, the awareness to own the idea or the ownership of knowledge to be used commercially was existed in Roman Civilization which remained alive even after the fall of Roman Empire and was further practised, and applied by the “newly constituted guilds”⁴⁹ which tried to “establish rights of control (and exploitation) to protect their specialized knowledge on the behalf of their members, and against those outside the guild.”⁵⁰

It is worthwhile to view this concept of owning the ideas in other great civilizations of the world before viewing the role of such guilds in the protection of knowledge, ideas and skills.

3.1.3 The Chinese Civilization

The Chinese Civilization produced few world philosophers like

⁴⁸ Stearns, L. (1992). Copy Wrong: Plagiarism, Process, Property and the Law. *California Law Review*, 80(02)

⁴⁹ Ibid

⁵⁰ Ibid

Confucius but could not develop, entertain, import or inherit “any notion of human ownership of ideas or their expressions.”⁵¹ It is identified that it was not their ignorance of this concept rather it was their dislike against this concept; to make commerce from human genius or ideas. The Confucius despised this idea by saying “I transmit rather than create; I believe in and love the Ancients.”⁵² He popularized the idea that greatness is not in innovation but rather in the ability to “interpret the wisdom of the ancients and ultimately God.”⁵³ His thought that learned people greatness lied in the ability to “unearth, preserve and transmit”⁵⁴ the wisdom of the past hampered the idea to write for profits and authors focused on moral improvement for others and future generation.⁵⁵

It is noted that book trade was flourished in the eleventh century but without the ideas of copyright and property rights of the published works. It was not possible to own the contents of the books and even the particular written expressions of the author were not protected. Their premise was that all characters (Chinese) had come from Nature and no

⁵¹ Vaver, D (2006). Intellectual Property Rights Critical Concepts in Law (Vol. I). New York: Routledge.

⁵² William, A. P. (1995). To Steal a Book is an Elegant Offense: Intellectual Property Law and Chinese Civilization. Stanford: Stanford University Press.

⁵³ Supra n 51

⁵⁴ Ibid

⁵⁵ Supra n 52

human being put such a claim on them for not being further owned by fellow human beings. It was only the paper, inked manuscript or book which used to be traded.⁵⁶

3.1.4 The Islamic Civilization

Islamic civilization also remained alien to the notion of intellectual property of the Greek and the Roman for many hundred years. Their premise was that God is the fountain of all knowledge and Koran, the Holy Book, is the carrier of all other knowledge.⁵⁷ This civilization claimed that “a text that embodied the words of Allah belonged to no one.”⁵⁸ It is identified that the transmission of this text was mainly through oral transmission instead of through written text. The written text existed right from the start but only to check and recheck “against the oral memory to ensure the accuracy.”⁵⁹ It is notable that printing technology could not be adopted in the Middle East due to their popular belief that the oral recitation was the best mean to preserve the written manuscript and the only the best way to keep it pure across the generation. Therefore, the era of printing technology in the Middle East

⁵⁶ Ibid

⁵⁷ Supra n 51

⁵⁸ Ibid

⁵⁹ Ibid

started in the nineteenth century with the advent of news paper press.⁶⁰

It is identified that a notion of legal authorship was existed particularly for Islamic scribal practices but a concept of intellectual property remained a distant reality. This legal authorship prohibited the unauthorized “appropriation of the.....teacher through false attribution of written texts.”⁶¹ It is notable that teacher did not own the ideas whereas stealer of ideas were treated as thief and subject to theft punishment due to his or her intention not to steal the book---ink and paper---but the ideas in the book which were not considered “tangible property.”⁶² Here, we can see the diametrically opposed approach of Islamic civilization to Chinese Civilization.

After examining the notion of intellectual property in Chinese and Islamic civilizations, the forth coming lines examine the role of guilds in protecting the knowledge, craft and skill in the Middle Ages.

⁶⁰ Robinson, F. (1993). Technology and Religious Change: Islam and the Impact of Print. *Modern Asian Studies*, 27(01)

⁶¹ Amin, S. H. (1991). *Law of Intellectual Property in the Middle East*. Glasgow: Royston

⁶²Jamar, S. D. (1992). The Protection of Intellectual Property under Islamic Law. *Capital University Law Review*, 21(04)

3.2 The Role of Guilds

3.2.1 Situation before Guilds

In the middle Ages, Guilds played an active role in protecting their knowledge eventually to pave the way for the transition towards intellectual property. These guilds were recorded in all civilizations and cultures but it is appropriate to consider only those guilds which mainly contributed in developing the notion of intellectual property into a solid framework. These guilds were mainly located in the heart of Europe. It is notable that before guilds--- during the Dark Age, the knowledge was mainly deposited into monasteries in the form of “manuscripts and the monk’s learning.”⁶³ These manuscripts were highly valued due to sanctity of the knowledge but no significance was accorded in making the copies or importance was given for the time spent on such efforts.⁶⁴

3.2.2 Advent of Universities

In the twelfth century, all these treasured knowledge were transferred to the new intellectual institutions, known as Universities. It is noteworthy

⁶³ Masterton, S. C. (1940). Copyrights: History and Development. *California Law Review*, 28(05)

⁶⁴ Ibid

that university regulations were framed only to ensure that no one can claim any proprietary rights over such valuable resource of knowledge and information. It is well argued that nature of such regulations helped the university members to loan the manuscripts to make copies with clear intent and purpose and universities were not allowed to refuse to loan the desired or requested copy.⁶⁵ Therefore, it is identified that any idea of the Roman civilization to protect the copyright could not be groomed in the higher seats of learning known as Universities.⁶⁶

3.2.3 Contribution of Guilds

But it is noteworthy that notion of protecting the trade mark, coming from ancient times, Greek and Roman civilization, was developed, strengthened and consolidated by the Guilds. These guilds started to assert different methods to identify their goods from others and started to establish their monopolies and found the ways to enforce them. Though, this character of the guilds were not their hallmark but this started changing in the thirteenth century when guilds were successful in getting the charters for guild-sanctioned goods.⁶⁷ In August 1282, the City Council of Parma, enacted the following statute which itself speaks

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ Long, P. O. (1991). Invention, Authorship, "Intellectual Property," and the Origin of Patents: Notes toward a Conceptual History. *Technology and Culture*, 32(04)

the changing attitude of the guilds.

“For the protection of guilds and artisans.....no persons in the trade or guild shall use The mark of any other personpenalty of ten pounds of Parma for each and every offence.....regardless of any compromise or award of arbitration”⁶⁸

It is interesting to note that almost entire Europe followed this enactment and passed “similar statutes covering the products of different guilds during this period.”⁶⁹ After two centuries (fourteenth century), it was common practice of guilds to have such legislation as one group of guild (weavers) followed another group (goldsmith) in order to receive charters from Henry II in 1320.⁷⁰

3.2.4 Monopoly of Guilds (strict legislation)

This practice, to establish the monopoly of their trade or craft, was further strengthened by other rules related to guilds membership, practicing rules and the assertion of their occupation as intellectual property according to competition in market.⁷¹ Guilds concentrated on

⁶⁸ Supra n 1

⁶⁹ Supra n 1

⁷⁰ Ibid

⁷¹ Ibid

establishing the system for the recognition of their collective knowledge through separate use of marks like Merchants' marks were assigned to shipment (ownership proof) and production marks exactly like modern trademarks under tight regulations.⁷²

It is noteworthy that guilds exercised strict control over their practicing members and initially membership to guilds did not recognize individual efforts in skill and crafts but in early fifteenth century, guilds began to acknowledge such efforts through regulations. As silk manufacturer adopted the rule that "if anyone of said guild has had some pattern or figure designed, no one else shall have such figure or pattern worked"⁷³ or woolen manufacturer adopted further strict regulation that "designs and patterns for figured serge....trying by means of **fraud** and **deceit** to **steal** such patterns..."⁷⁴

It is not difficult to conclude from the words "fraud", "deceit", and "steal" that social recognition was completely developed by that time to regard "knowledge as property."⁷⁵ This trend to recognize individual efforts contributed in understanding the "concept of innovation that lies at the

⁷² Ibid

⁷³ Prager, F. D. (1944). A History of Intellectual Property from 1545 to 1787 Journal of the Patent Office Society, 26(11)

⁷⁴ Ibid

⁷⁵ Ibid

centre of contemporary intellectual property law.”⁷⁶

3.2.5 Forming the Basis for the Venetian Movement

These guilds also developed rules and regulations to halt the production of cheaper and fake goods carrying marks similar, registered to guilds, and also initiated infringement action for serious crime which carried strict penalties. The strict penalties even included the chopping off hand in the time of Charles V in the sixteenth century. In this way, guilds managed to monitor “quality and reliability”⁷⁷ and controlled the “ruinous competition”⁷⁸---similar to the World Trade organization (WTO) in this era.

It is notable that individual members leaving the guilds took away their knowledge coupled with the guild knowledge to cross the border in order to introduce innovation in other jurisdiction. This practice remained unabated and triggered the Venetian Movement which crystallized the birth of contemporary intellectual property. The following lines examine this movement before heading towards internationalization of intellectual property laws.

⁷⁶ Ibid

⁷⁷ Ibid

⁷⁸ Ibid

3.3 The Venetian Movement

3.3.1 The State of Venice and the Glass Trade

It is established fact in history that ideas about the owning the ideas were existed in different forms, in different layers, in the different given time, and acknowledged to the varying degree, as it is evident from the above mentioned discussion, but the crystallizing of all such raw, rudimentary or half-baked ideas were legally and formally transformed in Venice in the fifteenth century.⁷⁹ It is notable that Venice was not a state at that time as state-concept gradually grew in the following years. There was no “formal constitution and no clear separation of authority among legislative, administrative, and judicial bodies.”⁸⁰

The state of Venice was famous for glass products since eleventh century and Venetian craftsman skill was acclaimed across the countries. The government of Venice encouraged the export of glass products but literally banned the export of the craft. As the trade grew, guilds appeared, regulated the craft through Council enactments,

⁷⁹ Mandich, G. (1940). Venetian Patents. *Journal of the Patent Office Society*, 30(03)

⁸⁰ Supra n 1

individualized efforts were recognized, in the same tune, government started to recognize the glass making crafts and by the end of thirteenth century, patents were granted to the various dimension of glass making crafts.⁸¹

3.3.2 Venetian Landmark Legislation in IP Realm

Individualized efforts of guilds members forced the Venice government to regulate the patent laws through legislation. As tradesmen left Venice, similarly many tradesmen from other countries (broken members of certain guilds), came to Venice, this flow of professional skills across the border lines forced the Venetian government to introduce laws to assimilate the new tradesmen and their skills coupled with to protect their local crafts and trade.⁸² The Venetian government passed its first enactment on March 19, 1474 which outlined the legal, institutional and political framework in the area of intellectual property law.⁸³ This enactment is identified the first formal intellectual property law and gave unique position to Venice which accorded a collective treatment to patents in generalized terms of law as compared to the “process of

⁸¹ Maskus, K. E. (Ed.). (2005). *The WTO, Intellectual Property Rights and Knowledge Economy*. Cheltenham: An Elgar Reference Collection

⁸² Ibid

⁸³ Supra n 79

individual petition and grant.”⁸⁴ Therefore, this enactment attracted unprecedented analysis from the researchers of history, law, political science, economics and sociology. Its landmark importance necessitates its place in this essay as well and is quoted in the following lines.

“There are in this city and in its neighbourhood, attracted by its excellence and greatness, many men of diverse origins, having most subtle minds and able to devise and discover various ingenious artifices. And, if it should be provided that no-one else might make or take to himself to increase his own honour the works and devices discovered by such men, those same men would exercise their ingenuity, and would discover and make things which would be of no little utility and advantage to our state. Therefore it is enacted by the authority of this body that whoever makes in this city any new and ingenious device, not previously made within our jurisdiction, is bound to register it at the office of the *Provveditori di Comun* as soon as it has been perfected, so that it will be possible to use and apply it. It will be prohibited to anyone else within any of our territories to make any other device in the form or likeness of that one without the author's consent or licence, for the term of ten years. But if anyone should act thus, the aforesaid author and inventor would be free to cite him before every office of this city, by which office the aforesaid infringer would be compelled to pay one hundred ducats and his artifice would be immediately destroyed. But our Government will be free, at its total pleasure, to take for its own use and needs any of the said devices or instruments, on these conditions, those others than the authors may not employ them.”⁸⁵

3.3.3 Analysis of Legislation

The analysis of the above underlines concept forms the core concept of modern IP laws. First time, in the history of IP concept or notion, it was prohibited that “no-one else might” was allowed to increase his wealth or honour by relying on the genius of others. It clearly reflected the

⁸⁴ Supra n 1

⁸⁵ Phillips, J. (1982). The English Patent as a Reward for Invention: The Importation of an Idea. *The Journal of Legal History*, 03(01)

recognition of “idea of owning the idea” which the Greek civilization ignited. It was the due recognition of human knowledge, manifested in inventions and devices, to be effectively used in the economy of the state. It can be argued that it provided the raw concept of the idea of “knowledge Economy” of the present times.

It also first time in the history of IP laws and rights provided the concept of registration of “ingenuity” of the “subtle minds” and established an IP office, known as “office of the *Provveditori di Comun.*” It clearly displayed that IP was recognized a discipline to be regulated by the central government and also outlined the stage of perfection to be achieved before to be registered. It also clamps restrictions to remodel such effort in the same jurisdiction.

It is also evident from the analysis of above lines that this legislation introduced “licensing system”, the pivotal point of modern present day IP regulations. It tried to achieve a balance between the recognition of subtle mind, and the use of that ingenuity for the betterment of society. This subtle balance is yet to be achieved even in the contemporary application of IP laws. This enactment affirmed the right of authors and inventors to report to the office for infringement of their right and also accepted the infringement as an offence which carried heavy punishment and even to “destroy artifice immediately.” This regulatory

enforcement idea is almost blindly followed in our contemporary IP laws where fake goods are destroyed.

It is also noteworthy that patent grant was subject to time limit often years. It also provided the distinction between “private reward and public availability of knowledge”⁸⁶ as it delicately balanced the availability of knowledge “through a state-sanctioned public realm”⁸⁷ with the “rights of the innovator to benefit from their intellectual endeavour and the notion of reward for efforts.”⁸⁸

3.3.4 Profound Impact of Legislation

It is noted that this legislation introduced the key concepts of IP to recognize the individual efforts, to regulate knowledge flow under government office and top of all to regulate the economic and competition matters in commerce. Venice became major economic city with a potential to attract “artisans and entrepreneurs of various sorts”⁸⁹ but the passage of time, this trend reversed due to development of other trade centers in Europe like London and Paris, the artisans, skilled workers and craftsmen started leaving Venice but with fairly mature and

⁸⁶ Supra n 79

⁸⁷ Supra n 1

⁸⁸ Ibid

⁸⁹ Supra n 73

well-developed sense of intellectual property. It is argued that other trade centers also developed the same “basic rules developed in Venice.”⁹⁰

In this way, the Venetian Movement became the harbinger of introducing new concepts in the IP realm by integrating the “three specific social areas: the technological, the legal/political, and the philosophical (conceptualization of the individual knowledge producer)”⁹¹ which were further expanded through globalization to be centrally incorporated into international IP laws coupled with further consolidation into the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) at the World Trade Organization (WTO). The forthcoming lines view the international regime in brief before viewing the TRIPS issues in detail in the next chapter.

3.4 Internationalization of IP laws

As trade grew across borders, new trade centers appeared mostly in the central Europe, similarly, the awareness provided by the Venetian Movement, propelled into full swing with the coming years to the

⁹⁰ Ibid

⁹¹ Supra n 1

formation of new IP laws. Initially, each state and country regulated IP laws on its own like the Venice state but with the development of the constant growing body of international law, due to varying factors in international relations, IPRs issues across the borders, necessitated the global cooperation and concerted efforts.

As trade grew across borders and continents,⁹² developed countries developed international IP instruments to enforce IPRs on the same patterns in each jurisdiction to protect their nationals.⁹³ The major international agreements were Paris Convention 1967, Berne Convention 1971, Rome Convention 1961, Geneva Convention 1971, Brussels Convention 1974, WIPO Copyright Treaty 1996,⁹⁴ and Convention for the Protection of New Varieties of Plants 1961.⁹⁵ The purpose of tailoring all such regimes was to enforce intellectual property rights across borders. These treaties were revised from time to time and administered by World Intellectual Property Organization (WIPO), which is a United Nations' specialized agency established in 1967.⁹⁶

⁹² Lougheed, A. G. K. a. A. L. (1992) *The Growth of the International Economy*: London.

⁹³ Stegemann, K. (2000). *The Integration of Intellectual Property Rights into the WTO System*. Oxford: Blackwell Publishers Ltd

⁹⁴ WTO. (2003). *Understanding the WTO* (4th ed.). Geneva: WTO Publications

⁹⁵ Supra n 81

⁹⁶ Ibid

The Paris Convention 1967 and the Berne Convention 1971 are the two significant international treaties to be examined before to have detailed critical appreciation of the TRIPS Agreement in chapter 4.

3.4.1 The Paris Convention 1967

The Paris Convention for the Protection of Industrial Property can be termed the oldest and the very first international statute on IP subject. It was first signed in 1883 at Paris by 14 countries.⁹⁷ It was revised and amended in 1900,⁹⁸ 1911,⁹⁹ 1925,¹⁰⁰ 1934,¹⁰¹ 1958,¹⁰² 1967,¹⁰³ and in 1979.¹⁰⁴

It introduced the concept of “national treatment” first time and required contracting parties to facilitate the registration of patent from the nationals of other states without any prejudice. It required them to take all necessary steps for the nationals of other states to enjoy IP rights of their invention and product, like their own citizens, without imposing the

⁹⁷ WIPO Treaties-General Information
<http://www.wipo.int/treaties/en/general/>

⁹⁸ Brussels, Belgium, December 14, 1900

⁹⁹ Washington, USA, June 02, 1911

¹⁰⁰ The Hague, The Netherland, November 06, 1925

¹⁰¹ London, UK, June 02, 1934

¹⁰² Lisbon, Portugal, October 31, 1958

¹⁰³ Stockholm, Sweden, July 14, 1967

¹⁰⁴ Stockholm, Sweden, September 28, 1979

conditions of residency or the requirements to domicile there.¹⁰⁵ It also incorporated the concept of priority right,¹⁰⁶ popularly known as “Paris Convention Priority Right” or “Union Priority Right” in a multilateral legislation in its Article 4 which is an exhaustive article. It stated in 4 a (1) in the following words

Any person who has duly filed an application for a patent, or for the registration of a utility model, or of an industrial design, or of a trademark, in one of the countries of the Union, or his successor in title, shall enjoy, for the purpose of filing in the other countries, a right of priority during the periods hereinafter fixed.

Its Article 4 B describes the impact of priority right by declaring that “any subsequent filing....countries of the Union...not be invalidated by...another filing....such acts cannot give rise to any third-party right or any right of personal possession.” It also provided the option of dispute settlement in its article 28 which stated to settle the dispute first through negotiations and then proceed to the International Court of Justice (ICJ) by following the court procedures. It also provided the option for the

¹⁰⁵ Article 2 of the Paris Convention, National Treatment for Nationals of Countries of the Union, http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html

¹⁰⁶ It is right which initiated the time limit for the grant of any patent, industrial design or trademark. It starts from the filing of the application with the respective authority and lasts for 6 months for trademarks and industrial designs and 12 months for utility models.

member “countries concerned agree on some other method of settlement.”¹⁰⁷ It can be attributed the most comprehensive treaty in international IP regime as it also provided transitional provisions for the new countries but developed nations found that international management of IP would not be possible unless it had not been weaved with international trade legislation or linked with it or brought in under one organization.

3.4.2 The Berne Convention 1971

The Berne Convention for the Protection of Literary and Artistic Works is also an international treaty to protect the copy right, popularly known as the Berne Convention. It was adopted in Berne, Switzerland in 1886 and was revised in 1896,¹⁰⁸ 1908,¹⁰⁹ 1928,¹¹⁰ 1948,¹¹¹ 1967,¹¹² 1971, and in 1979.¹¹³ It closely followed the path of the Paris Convention and now being administered by the WIPO.¹¹⁴

¹⁰⁷ Article 28 of the Paris Convention,
http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html#P409_66408

¹⁰⁸ Paris, France, May 4 1896.

¹⁰⁹ Berlin, Germany, November 13, 1908.

¹¹⁰ Rome, Italy, June 02, 1928

¹¹¹ Brussels, Belgium, June 26, 1948

¹¹² Stockholm, Sweden, July 14, 1967

¹¹³ Paris, France, July 24, 1971.

¹¹⁴ Supra n 97

It required like Paris Convention to recognize the copyright works of the nationals of other contracting parties like their own citizens.¹¹⁵ In this way, it also established the popular concept of the national treatment, now considered the significant principle of the international trade. It also dealt with the “country of origin” rule in comprehensive manner in its article 5 and also introduced the different term of protections in its article 7 for literary works, photographic and cinematographic works of the dead and living artists. In short, it introduced the minimum standard of protection across borders in copyrights. It also introduced the rule of the shorter term in its article 7.8 by stating that “the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.”¹¹⁶

It is pertinent to mention here that both these treaties were entrusted to the World Intellectual Property Organization, a specialized agency of the United Nations in 1967 but the concerns of the developed countries surfaced up in 1970 about the mechanism, administered by the WIPO to protect IPRs across borders. Resultantly, their technological based industries suffered huge loss as the WIPO failed to introduce adequate and substantive standards for the protection of IPRs. Therefore,

¹¹⁵ Article 3 of the Berne Convention

¹¹⁶ Article 7.8 of the Berne Convention, http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

developed countries triggered such negotiations into the world trade negotiations to create such a mechanism that IPRs go hand in hand with the world trade. These negotiation proposals were in fact the extension of domestic laws, designed to curb the violation of IP laws but could not be applied across border due to legislative lacuna. Therefore, concerted efforts were applied to have international umbrella to protect IPRs globally with an enforcement mechanism.

The upcoming chapter is the description of such effort which resulted into the trade related aspects of intellectual property rights, known as the TRIPS Agreement and administered by the World Trade Organization. It has seven parts in total which cover basic principles, standards concerning the availability, scope and use of intellectual property rights, enforcement of IPRs, acquisition and maintenance of IPRs and related inter-parties procedures, dispute prevention and settlement, transitional arrangements, and institutional arrangements.

As the detailed critical appreciation of all parts is not our purpose, therefore, the following chapter critically views those provisions which deal with enforcement and judicial process keeping in view with our research question. Before this, a detailed discussion is devoted to rationale of the United States legislators which ultimately led the bloc of the developed countries to frame this agreement. Besides this, it also views in brief the bio-technology clause in the TRIPS Agreement due to

its inherent potential to affect or jeopardize the international trade as developing countries need the maximum protection of their traditional knowledge which has been exploited, marketed and profited by the multinationals of the developed countries. In addition to this, a small section is devoted to economic and legal implications on the developing countries. It needs to be mentioned here that the critical analyses of relevant provisions is made to highlight the demands of this agreement on the developing countries and how developing countries are coping with such demands have been brought into the limelight through a case study of Pakistan given in chapter 5 of this thesis. The following chapter has been researched through the methodology of legal hermeneutics which helps in making the sequential, detailed and narrative analyses of the TRIPS provisions coupled with its legislative history, ridden with vested interests. It enables us to understand the layered meanings of legal principles through gradual and step by step approach of unfolding the legal phrases and words.

Chapter 4

Intellectual Property Rights and Multilateral Trade Agreements

Intellectual Property (IP) laws were rendered almost ineffective at international trade horizon due to inherent legislative lacuna particularly in the arena of enforcement in the developing nations who were excessively relying on the industrial development, technological advancement and innovations in digital dimensions but were not able to pay back the rewards of human ingenuity due to ineffective enforcement of IP laws on their soils. It was noticeable in the areas of agricultural products and pharmaceutical industries apart from electronics items. International intellectual property rights (IPRs) started dominating the international trade scene since 1995. These rights have been linked with multilateral international trade agreements for enforcement purpose. These are known as Trade Related Aspects of Intellectual Property Rights (TRIPS)¹. It is noteworthy that the TRIPS Agreement is enforced under the umbrella of WTO, a powerful organization to monitor trade issues with the mandate to enforce its policies and to punish the

¹ WTO (2003) *Understanding the WTO* (4th ed.). Geneva: WTO Publications

violators². The TRIPS Agreement is considered the third pillar of the World Trading system with the purpose to introduce the minimum standard for protection and enforcement of IPRs across the globe³. The coming lines encompass its negotiating history and purpose, main provisions and enforcement standard for third world countries.

4.1 The TRIPS Agreement

It is notable that the TRIPS Agreement does not provide a sui generis system for the protection of IPRs but to establish and enforce minimum international standard for the protection of intellectual property.⁴ It accommodates the “historical and juridical roots”⁵ of other international agreements like the Paris Convention and the Berne Convention which also provided the provisions of “national treatment” for foreign products in the areas of trademarks, industrial designs, patents and copyrights. It is noteworthy that this national treatment provision does not require

² Ibid

³ Ibid

⁴ Richards, D. (2004). Intellectual property rights and global capitalism: the political economy of the TRIPS Agreement. Armonk, N.Y.: M.E. Sharpe.

⁵ Ibid

signatories to “provide any particular standard of protection.”⁶ These agreements were administered by the specialized agency of the United Nations, known as the World Intellectual Property Organization (WIPO) with a mandate to help nations to develop national laws compliant to the norms provided by these international agreements which could not be “universally embraced”⁷ as many countries preferred not to become signatory due to popular belief that implementation and enforcement at national level would reduce the “countries’ abilities to reap benefits of technological transfer and development.”⁸

Though few member countries tried to evolve consensus on minimum standard of protection but resistance within the organization blocked all such attempts.⁹ It is identified that such “inadequacies of the WIPO”¹⁰ provided the motivated inspiration to the developed world to negotiate such a system which could effectively liberalize the trade coupled with effective enforcement through dispute settlement mechanism.¹¹ All such aims made the GATT/WTO a preferred choice for those countries who advocated to have strengthened enforcement system of IPRs across the globe. Though, it is not possible to view the background interest of all

⁶ Ibid

⁷ Ibid

⁸ Ibid

⁹ Ibid

¹⁰ Ibid

¹¹ Ibid

developed nations or alliances which forced them to start negotiations for the TRIPS Agreement due to limited scope of this thesis but it is worthwhile to consider the United States trade interests. The forthcoming section views the three principles of the United States legislators which provided the platform to the US negotiators to ignite such negotiations which could incorporate or link protection of IPRs with international trade.

4.2 Three Principles of United States Legislators to Incorporation of IP laws into Trade laws

It is crystal clear and established reality that the “driving force behind the TRIPS Agreement was US dollars.”¹² The American companies particularly multinationals were fast losing their huge profits due to “infringements of their IPR by foreign producers.”¹³ This infringement was mainly occurred in the developing world which devoured around US\$15-200 billion annually due to pirated and counterfeit goods and national US legislation was ineffective to protect their nationals’

¹² Bhala, R. (2000). *International Trade Law: Theory and Practice*. Danvers: Lexis Publishing.

¹³ Ibid

economic interests across the borders.¹⁴ The US congressmen, upon the pressure of business concerns proposed legal strategies to integrate national intellectual property laws into global trade system. Their strategies addressed the three areas namely integration by balance of concession; integration based on shared principles; and integration by means of linked dispute settlement.¹⁵

It is noteworthy that all the three situations focused on United States domestic intellectual property rights in general and section 301 of the Trade Act of 1974, as amended by the 1984 trade and tariffs Act and the 1988 Omnibus Trade and competitiveness Act in particular.

4.2.1 The First Principle

The first principle “balance of concession” was, in fact, incorporated into an international trade agenda through the negotiations of Uruguay Round (1986-1994).¹⁶ It is pointed out that hectic diplomatic efforts backed by strong business groups paved the way for TRIPS draft (based on domestic legislation s. 301) in December 1991.¹⁷ The underlying philosophy made it clear that all developing countries would

¹⁴ Ibid

¹⁵ Supra n 01

¹⁶ Ibid

¹⁷ Ibid

join WTO only to take advantage of multi trading system and to avail dispute settlement mechanism and could be the best monitored for IP violations instead to being forced into bilateral agreement with U.S to access her markets, regulated by her local intellectual property laws whereas other developed or OECD countries were extending mutual respect to the domestic laws of their partner country.¹⁸

4.2.2 The Second Principle

The second principle “shared principles” reflected the international trade through the TRIPS Agreement. This principle focused on the relevant provisions of GATT to be incorporated into the TRIPS. This strategically-devised principle, in fact, described the influence of TRIPS and GATT on national policies, evaluated its impact and concluded that seemingly two opposite legislation could complement each other if the principles of GATT were applied in TRIPS.¹⁹

4.2.3 The Third Principle

The third principle “linked dispute settlement” displayed how the intellectual property rights were enforced before the TRIPS in United

¹⁸ Ibid

¹⁹ Ibid

States. It is pointed out that WTO dispute settlement could be used by aggrieved member to retaliate against the violator of international trade norms and in this way, a platform would be available to force the IP violator countries to honour IPRs.²⁰

In this way, a systematic approach was tailored and weaved to apply national regulation on infringer countries through the complex of international trade rules. The forth coming section critically evaluates the fundamental and enforcement provisions of the TRIPS Agreement coupled with its negotiating history linking back to GATT to identify the crucial factors behind its negotiations. This section also looks at the provision of traditional knowledge, known as biodiversity clause as it has the inherent potential to destabilize the entire international trade architecture.

4.3 The Trips Agreement (Negotiating History)

The establishment of the World trade Organization (WTO) after the conclusion of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) propelled several new non-trade issues to be discussed in forth coming international trade and economic

²⁰ Ibid

negotiations.²¹ It is noted that the United States officially insisted to include “intellectual property rights (IPR) as a topic of GATT negotiation.”²² The forthcoming lines view these negotiations objectives in brief as detailed examinations of negotiations proposals from different countries or blocks are too broad to be discussed in this thesis.

4.3.1 Situation before TRIPS

TRIPS negotiations are the outcome of new area negotiations in the Uruguay Round which mainly concerned with trade in services and trade-related investment measures. Therefore, the TRIPS Agreement is said to be a “new instrument on IPRs in international trade.”²³ Its preamble conveys a particular purpose of balancing the rights and duties in the smooth flow of international trade with clear mandate to require the signatories to provide “effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems.”²⁴ It also recognizes the need to provide “effective and expeditious procedures for the multinational prevention and settlement of disputes between

²¹ Supra n 4, P 25

²² Ibid

²³ UNCTAD-ICTSD. (2005). *Resource Book on TRIPS and Development*. Cambridge: Cambridge University Press.

²⁴ Preamble to TRIPS

governments²⁵ with transitional arrangements for the fullest participation in the process to be unveiled while focusing on the “special needs of the least-developed country Members....maximum flexibility in the domestic implementation of laws and regulations....to create a sound and viable technological base.”²⁶ All these preamble wordings convey a sense of inadequacy in the GATT legal system of 1947 in this area which points out that there were no such provisions in any form, existed before TRIPS. At the same time, it is not possible to assume that all such IPR negotiations concluded in “historical vacuum”²⁷ due to the existence of the WIPO administered treaties. It is primarily the weak implementation of such treaties.

The Paris Convention and the Berne Convention were conceived before the TRIPS Agreement at the international level to regulate the protection of IPRs and were administered through UN specialized agency the WIPO but developed countries started raising their concerns since 1970 about the adequate protection of their interests in “technology-based and expressive industries.”²⁸ The central point of their concern was that the WIPO failed to provide such a mechanism which could adequately protect IPRs across borders and enforce obligations for trading partners.

²⁵ Ibid

²⁶ Ibid

²⁷ Supra n 23

²⁸ Ibid

This concern was heightened to the point when the developed nations started to force to establish “new rules on a New International Economic Order (NIEO)”²⁹ which could establish such a mechanism to facilitate technology transfer from developed nations to the developing countries by “closely regulating the exercise of (IP) rights.”³⁰ It is interesting to note that the developed countries found the objectives of (NIEO) to be in conflict with their own interests (strengthening the protection of IPR in the WIPO and in the GATT) and preferred not to pursue this agenda through the early years of 1980.³¹

It is worth mentioning the industrial lobby of the developed countries remained successful in creating a coalition in negotiations on a mandate for the Uruguay Round to “pursue the objective of moving IPRs regulation from WIPO to the GATT”³² with an end to establish high standard of IPRs through a strong multilateral enforcement system. It is again interesting to note that the objective of the GATT negotiations was to liberalize the world trade without any concern of intellectual property protection. Therefore, GATT negotiators confronted a big question to consider IPRs issue so closely related to the trade to be included in the

²⁹ Ibid

³⁰ Ibid

³¹ Ibid

³² Ibid

trade negotiations.³³ The big question was that in the presence of the UN specialized agency the WIPO, entrusted with defining and administering international IPRs, how the GATT could have overlapping mandate? Therefore, the TRIPS related provisions were initially included in the GATT negotiations (Uruguay Round mandate) without having the realization that it could result in an independent agreement. In fact, it was expected in the start of negotiations that a “new code” like a Tokyo Round type might be secured for the developed nations and the selected participatory developing nations.³⁴

The developing nations continued to resist this very idea to incorporate IPRs in the GATT but their resistance was tackled through concessions in the areas of agriculture and textiles coupled with the threats of trade sanctions and to the extent of scrapping the entire GATT negotiations.³⁵ It is notable that developing countries could never afford to have such a mechanism which deprives them to avail the benefits of trade liberalization. Therefore, their approach towards the incorporation of IPRs provisions in the GATT scheme remained dependent upon the stance, taken by developed nations in trade negotiations.³⁶ The major

³³ Ibid

³⁴ Ibid

³⁵ Abbott, F. M. (1989). Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multinational Framework. *Vanderbilt Journal of Transnational Law*, 22(04), 683-745.

³⁶ Ibid

players (the United States, the European Community, Japan and Switzerland) formed the coalition for the TRIPS during the Uruguay Round to display firm approach towards “broad strategic objectives throughout the negotiations.”³⁷

It is evident from the above discussion that the situation before the TRIPS forced developed countries not only to include IPRs negotiations with trade negotiations but also to withdraw from the entire international trade scheme if negotiators of the developing nations do not accept the TRIPS scheme. The forthcoming lines view the negotiating proposals of the developed countries in brief first and then developing countries in the next section which reflects their positions about the objectives of the agreement.

4.3.2 Negotiating Proposals of the Developed Nations

In developed nations, the United States displayed keen interest in pushing the TRIPS agenda at the Uruguay Round. It submitted its initial proposal for negotiation on the TRIPS in November 1987. It carried a section which outlined the objective of the agreement. It stated that the objective of the proposed agreement (intellectual property agreement)

³⁷UNCTAD-ICTSD. (2003). *Intellectuals Property Rights: Implications for Development*, <http://www.iprsonline.org/unctadictsd/policyDpaper.htm>

was to “reduce distortions of and impediments to legitimate trade in goods and services caused by deficient levels of protection and enforcement of intellectual property rights.”³⁸ It also stated the purpose of such agreement which would be to “create an effective deterrent to international trade in goods and services which infringe intellectual property rights through implementation of border measures.”³⁹ It also sought to establish such norms and standards which not only could provide “adequate means of obtaining and maintaining intellectual property rights but also to provide a “basis for effective enforcement of those rights.”⁴⁰ It further stated to ensure to have such measures for the protection of IPRs which could not create barriers to legitimate trade coupled with the application of dispute settlement procedures to IPRs with particular emphasis on enforcement mechanisms.⁴¹ It went further by imposing certain conditions even on non-signatory countries to “achieve, adopt and enforce the recognized standards for protection on intellectual property and join the agreement.”⁴² These submissions clearly aimed to have such a system of international intellectual property rights which could be dovetailed with legitimate international trade with enforcement mechanisms. It can be stated with certainty that the TRIPS agreement, in its present form, accommodates all such objectives.

³⁸ the United States Proposals for Negotiations to the Trips Agreement

³⁹ Ibid

⁴⁰ Ibid

⁴¹ Ibid

⁴² Ibid

The European Community submitted its guidelines to the TRIPS Negotiating Group later in 1988 which mostly addressed the general purpose of the agreement. These submissions are not specific like the US camp but mainly focused on “trade-related substantive standards”⁴³ making it necessary with a “basic degree of convergence”⁴⁴ with international intellectual property rights.⁴⁵ It is noteworthy that the EC guidelines sought not to substitute “existing specific conventions on intellectual property matters”⁴⁶ but suggested to “elaborate further principles...to reduce trade distortions or impediments.”⁴⁷ It further stated that such exercise should be specific to “an agreement on the principles of protection”⁴⁸ and should be designed in such a way which could attract the respect of all contracting parties.⁴⁹ It clearly spelled out that there should not be any negotiations aiming “at the harmonization of national laws.”⁵⁰ It also indicated to consider the initiatives taken by the WIPO without prejudices and also indicated the intention for not preferring a “code” approach.⁵¹

⁴³ The EC Guidelines and Objectives

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ Ibid

It is crystal clear from the above analyses that the main aim of the TRIPS negotiations was to create a frictionless international trade system without any distortions and impediments based on the issues of intellectual property in goods and services across borders. There is a clear indication that such IP protection was needed to protect emerging international trading system. In this way, IP rights were linked with international trade. A special emphasis was also given to the dispute settlement mechanism and enforcement mechanism. Though, the guidelines of the EC was also concerned with not to substitute existing agreements (Paris and Bern Conventions), respect of the contracting parties, consideration of the WIPO initiatives and not targeting the national laws but it mainly concerned to conceive such a scheme which could supplement the smooth flow of international trade. It can be attributed the more comprehensive approach but it was not different from the US approach in its form.

The forth coming section views the approach taken the developing world.

4.3.3 Negotiating Proposals of the Developing Nations

It is no mystery that the developing world resisted not only the proposals and guidelines of the developed world to the TRIPS negotiating group

but also put up strong resistance to this very proposed scheme intended to link IPRs with international trade. Their premise was that industrial countries owned more than 99 per cent of the World's patent with monopolistic approach whereas socio-economic needs of the developing countries necessitate not bringing IPRs into the domain of international trade. The most comprehensive and focused approach was adopted by India in its detailed paper, submitted to the negotiating group in July 1989 after exact one year of the EC guidelines. This paper not only elaborated the developing country point of view but also secured a substantial support from the delegations of the developing world.⁵² In this way, this paper represents the views of the developing world.

The Indian paper in its very outset mentioned the US action, taken under its trade laws and outlined "the serious reservations...about the relevance and utility of the TRIPS negotiations"⁵³ in the environment of continued "bilateral coercion and threat".⁵⁴ It mentioned in its strongest words that the "restrictive and anti-competitive practices of the owners of the IPRs" needed to be considered such trade-related elements sufficient enough and alone to distort or impede international trade.⁵⁵ It proposed that wider developmental and technological contexts needed

⁵² Supra n 23

⁵³ Indian paper July 1989

⁵⁴ Ibid

⁵⁵ Ibid

to be considered to define trade-related elements coupled with to consider where they properly belonged.⁵⁶ It emphatically stated that by “merely placing the label ‘trade-related’ on... issues could not be brought within the ambit of international trade.”⁵⁷

It further stated in no –uncertain terms that the socio-economic, developmental, technological and public interest should be prioritized before considering any principle or standard related to IPRs. All such proposed principles or standards needed to “be carefully tested against...needs of the developing countries.”⁵⁸ This paper termed it unfair to consider IPRs solely from the owners’ point of view. It reminded the delegates that the intellectual property system was “monopolistic and restrictive” in its features which ran against the spirit of the free trade. It conveyed that this situation might create “special implications for the developing countries”⁵⁹ due to the fact that 99 per cent ownership of the world’s stock belonged to the developed nations. It laid stress on the freedom of member states to frame their intellectual property protection system according to their own needs and conditions. It went further even to the extent to suggest that this freedom of “host countries

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Ibid

should be recognized as a fundamental principle⁶⁰ in the negotiating process.⁶¹

It clarified that in the case of developing countries, socio-economic, industrial and technological development should be considered while framing substantive standards on intellectual property and reminded the negotiation group that the World had already established a specialized agency to deal with substantial issues of IPRs. It proposed that the group should focus on “the restrictive and anti-competitive practices of owners of IPRs” by suggesting such standards and principles which could eliminate such practices and make international trade not to be “distorted or impeded.”⁶² It concluded in recommending that within the framework of the GATT, it would not be appropriate to frame “new rules and disciplines pertaining to standards and principles concerning the availability, scope and use of intellectual property rights.”⁶³

The close analysis of the Indian submissions in the above lines make the case of the developing world more clear that they wanted to keep two system independent of each other---international trade and international intellectual property regimes. They remained against this

⁶⁰ Ibid

⁶¹ Ibid

⁶² Ibid

⁶³ Ibid

though the GATT rules should be linked with the IPRs due to their different socio-economic needs, developmental issues, and technological dominance of the developed world and stressed on the freedom of the host countries. It is pertinent to mention here that this Indian position bagged support of the developing world inspire of the extensive debate. These debates continued further and appeared in the form of the Anell draft, the Brussels Draft and finally in the Dunkel Draft. The analyses of these drafts are not possible here due to the limited nature and scope of this thesis.

After viewing the negotiating history and positions of the developed world and the developing nations, it is appropriate to view those provisions of the TRIPS Agreement, related to the enforcement, judicial control, and border measures before analyzing the traditional knowledge, economic and legal impact on the developing nations followed by the next chapter of the case study.

4.4 The TRIPS Agreement (Fundamental Provisions)

It is evident from above discussion that it was the efforts of American lobby to incorporate national IP provisions into international trade

agenda but it is also pointed out that developing world can reap the benefits if they consider themselves not only IP consumers but also IP producers as IP can be created anywhere where creative human capital is available.⁶⁴

The Article 7 of the TRIPS Agreement states the overall objective is to “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.”⁶⁵

It is identified that the articles 3 and 4 “are of the cornerstones of the TRIPS agreement.”⁶⁶ It is obligation of all members under the article 3 to accord to the nationals of other members “treatment no less favourable than it accords to its own nationals with regard to the protection of intellectual property”⁶⁷ but also included the exceptions provided in the Berne and Rome Conventions.⁶⁸ In its essence, it

⁶⁴ Supra n 12

⁶⁵ Article 7 of the TRIPS Agreement

⁶⁶ Supra n 12

⁶⁷ Article 3 of the TRIPS Agreement

⁶⁸ Blakeney, M. (1996). *Trade Related Aspects of Intellectual Property Rights*. London: Sweet & Maxwell

emphasized “the continuation of a long established principle of intellectual property protection.”⁶⁹

The Article 4 creates the central principle of the international trade; Most Favoured Nation. It provides that “with regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.”⁷⁰ It is noted that presence of the concept of MFN in the TRIPS Agreement (IP convention) is “an innovation attributable to the trade law.”⁷¹

It is argued that both these cornerstones do not establish a specific level of protection as the TRIPS Agreement is not the first one IP convention to control cross-border IP protection but it “supplements and strengthens the earlier accords.”⁷²

⁶⁹ Ibid

⁷⁰ Article 4 of the TRIPS Agreement

⁷¹ Supra n 68

⁷² Supra n 12

4.5 The TRIPS Agreement (Enforcement Provisions)

Enforcement Provisions are mentioned in Part III of the agreement and “establish extensive requirements”⁷³ for effective enforcement both at and inside each member country’s borders.

4.5.1 Provision of Civil Remedy in TRIPS

It is noted that in section 1 of the TRIPS Agreement provides a requirement for each government or member country to provide an enforcement procedure which should be fair and transparent. This procedure also includes the provision of access mechanism for intellectual property holders for effective judicial procedure to deal with the violation of IPRs and its enforcements against the violators.⁷⁴ It is notable that if administrative enforcement is provided, it falls in the category of civil remedy, dealt in article 49 of the Trips Agreement but should be consistent with the standard, codified in article 2 of the TRIPS Agreement which deals with judicial proceedings.⁷⁵ The forthcoming lines view these sections individually to find out the integrated approach of these sections (49 & 2) to deal with enforcement procedures.

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Supra n 100

4.5.2 Article 49 Administrative Procedures

Article 49 of the TRIPS Agreement provides “civil remedy”⁷⁶ which can be “ordered as a result of administrative procedures on the merits of a case, such procedures shall conform to principles equivalent in substance to those set forth in this section.”⁷⁷ It is identified that Article does not operate in isolation but requires the administrative procedure to conform the equivalent principles, specified in article 2 of Part III (dealt in next section). It is notable that application of this administrative procedure is not required to be identical with section 2 but rather conform to “principles equivalent in substance.”⁷⁸ It allows dealing every single case on its merits as close analysis of these words reveal that there is considerable room provided in this section to adopt the characteristics of administrative procedures.⁷⁹ It conveys the underlying approach of informalism which allows determining the principles in such a way to form the different options as equivalence requires in substances and not in detail.⁸⁰

⁷⁶ Article 49

⁷⁷ Ibid

⁷⁸ Resources Book TRIPS, UNCTAD

⁷⁹ Ibid

⁸⁰ Ibid

This administrative procedure needs to be determined under the general obligations, provided in Article 41 of the TRIPS coupled with section 2 of the agreement. Article 41 requires member countries to enforce procedure (codified in the TRIPS) in such a manner which can allow “effective action” against any act of infringement of intellectual property rights covered.....to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures are meant to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.”⁸¹ It needs to be mentioned here that in developing countries, these administrative enforcements are of significance importance as enforcement is related to destabilize the ongoing trade process.

After having analysis of this administrative procedure, we need to look at judicial provisions available in section 2 of part III of the agreement. The following lines present exhaustive overview of this section.

4.5.3 Section 2 Judicial Procedures

Section 2 provides civil and administrative procedures for member countries to establish enforcement mechanisms for remedial measures. This section consists of 08 articles (42-49) which covers all the

⁸¹ Article 41

dimensions of judicial procedure to ensure fair and equitable trial outlining the detailed steps concerning representation of parties through competent counsels, protection of confidential information, procedure to present and examine evidences, basis to issue injunctions by the courts coupled with providing the parameters of these injunctions, authorization to judicial authorities to award damages to infringer, to arrange expenses to be paid to complainant and in certain circumstances to recover profits from infringers, provision of jurisdiction to judicial authorities to deal with the infringed goods by keeping them outside the channels of commerce without any compensation to infringer by applying the rule of proportionality between the seriousness of the infringement and the remedies and the allowance to infringer in exceptional cases.

This section also provides a discretion to member countries to empower the judicial authorities to order the infringer to disclose the identity of the third party, involved in infringement, to the right holder, the provision of adequate compensation or indemnification of the defendants (like payment of attorney's fee), provision to exempt public authorities and officials from liability where actions are the result of intended good faith in the course of administration of that law.

It is noteworthy that these rules were negotiated without any controversial entangling of the member countries. As it has already been pointed out, the main propelling force to integrate IPR issues with international trade lies with the developed nations, the inclusion of detailed rules on IPRs enforcement were advocated by the USA and the EC. Though, both presented separate and independent submissions, but these submissions were identical in their spirit to include “essential elements of enforcement procedures”.⁸² These submissions were the reflective of the concerns of the business community of the developed world who wanted enforcement and maintenance of IPRs issues in the Trips Agreement. It is no strange phenomenon that these rules did not attract much controversy. The main reason of these uncontroversial negotiations was the realization and acceptance of the significant differences in enforcement rules already existed among legal systems and national laws of the developed countries.

Here, it can be adduced that the provision of minimum standard of IP protection in the TRIPS was due to weak infrastructure and lack of resources of the participating developing countries. Therefore, the developed countries tended to include result oriented rules instead to have specific rules for enforcement as the efforts for specific rules could have ended up in smoke due to differences, mentioned above. This

⁸² Basic framework of GATT----statement of EC, USA, Japan

consideration forced the negotiators to frame general enforcement rules simply to prevent infringement and developed many weak provisions by providing a considerable degree of discretion to the member countries while framing the judicial mechanism to provide remedies. It is notable that developing countries remained successful in getting their proposal accepted for not being forced to establish a separate judicial system for IPR enforcement but how much their interest is protected and up to what degree is still a point to be debated in coming years.

4.5.4 Section 3: Article 50: Provisional Measures (Judicial)

Section 3 has only one article which deals with provisional measures. Primarily, this section is concerned with provisional judicial measures. It is noteworthy that this article particularly deals with such infringements that are about to happen.⁸³ This article establishes the minimum requirement for proceedings and empowers the judicial authorities for provisional measures which allow them to act to achieve certain results instead to act under certain conditions. It provides a considerable freedom to the member countries to determine the certain requirements according to their national laws. It is notable that this article gives “prompt and effective”⁸⁴ authority to the judiciary.

⁸³ Article 50.3 of the TRIPS

⁸⁴ Article 50.1 of the TRIPS

This authority can be applied to prevent an infringement of IPRs. It can be applied to block the goods entry into the markets after the custom clearance as per member jurisdiction and to grant “Anton Piller” orders where defendant is required to allow plaintiff or his representative to enter his/her premises for the removal of infringed goods or to secure evidences (copies or photos) to prove infringement. It also empowers the judicial authorities “to adopt provisional measure *inaudita altera parte*.”⁸⁵ The rationale behind this authority to provide relief where any delay may affect or cause irreparable harm to the right holder or there is a “demonstrable risk of evidence being destroyed.”⁸⁶ In this power, the element of “delay” is important and crucial.

This article also grants powers to the judicial authorities to require reasonable available evidence from the applicant with certain degree of certainty to establish their right and to prove that their right is being infringed or about to infringe. In the same way, it empowers judicial authorities to require a security or equivalent assurance from the applicant to protect the defendant and to prevent abuse.⁸⁷ In this way, it

⁸⁵ Article 50.2 of the TRIPS

⁸⁶ Ibid

⁸⁷ Article 50.3 of the TRIPS

provides an approach of check and balance, similar to approach provided in section 2.⁸⁸

This article also provides relief to those parties where measures have been taken *ex parte*. The affected parties are entitled to receive notice without delay after taking provisional measures. The wording of this provision suggests that notice may be given before taking the provisional measures. It also entitles the affected party/defendant to be heard upon his/her request within reasonable after the notification to modify, revoke or confirm the provisional measures.⁸⁹ It is notable that the article 50.5 is a “non-mandatory provision”⁹⁰ which indicates that applicant may furnish necessary information as required. The wording of this provision suggests that executing authority may not necessarily be a judicial authority; it may be a police or customs or any other force entrusted to regulate the border trade. This provision does not specifically carry the word “judicial authorities” like 50.1, 50.2 and 50.3.

These provisional measures are designed to provide sufficient relief to the defendants to protect him/her from the misconduct or abuse of the applicant. These measures entitle defendant or affected party to request to revoke or cease the provisional measures if applicant does not

⁸⁸ supra n 23

⁸⁹ Article 50.4 of the TRIPS

⁹⁰ Supra n 23

effectively pursue in the court or if proceedings are not initiated within reasonable time/period. It empowers judicial authorities to determine this reasonable period within the parameters of the national laws. In case of no period determination, it recommends that period shall “not to exceed 20 working days or 31 calendar days, whichever is longer.”⁹¹ Similarly, the paragraph 7 of this article entitles the defendant to apply for compensation if provisional measures are revoked or not pursued due to any omission of the applicant or lapsed within the time limit prescribed in para 6 or if there is no infringement or threat of infringement. It specifically demands from member/states to authorize judicial authorities to order the applicant for compensation upon the request of the defendant/ aggrieved party.⁹²

In the end, the last para 08 requires member countries not to “empower administrative authorities to grant provisional measures.”⁹³ It is worded exactly on Article 49. The purpose of these provisions is to draw a line of distinction between administrative and judicial procedures and powers. These (procedures) must not be identical whereas the principles (substances) should be the same.

⁹¹ Article 50.6 of the TRIPS

⁹² Article 50.7 of the TRIPS

⁹³ Supra n 23

The analysis of article 50 clearly reveals that the TRIPS agreement gives sufficient degree of discretion to judicial authorities to prohibit infringement. These discretionary powers can be exercised even upon the threat of infringement. It empowers them to adopt provisional measures *ex parte* but at the same time, it provides sufficient degree of relief to the defendant if applicant is found to initiate the procedure to abuse the defendant. In this way, it provides a check and balance approach. It also empowers judicial authorities to initiate this process and require member countries to empower judiciary to deal such issues. It categorically uses the phrase “judicial authorities” except 50.5 and also attempts to draw a line of distinction between judicial and administrative procedures. It is notable that few third world states like China, Mexico and Peru empowered their administrative authorities to apply such provisional measures.⁹⁴

4.5.5 Section 4: (Article 51): Border Enforcement Measures

Section 4 deals with border enforcement measures and consists of 10 articles (51-60). It truly signifies or materializes the underlying policies of the developed world and embodied in the preamble of the TRIPS agreement recognizing “the need for a multinational framework of principles, rules and disciplines dealing with international trade in

⁹⁴ Ibid

counterfeit goods.”⁹⁵ It is identified that this section has been developed mainly on the national laws of the developed countries.⁹⁶ It allows customs intervention after the importation of the goods but before the release of goods into channels of commerce and applicable only to the counterfeit trademarks and pirated goods. It is noteworthy that this intervention applies to the importation of goods and not on the exportation of such goods but it provides the flexibility to the member states to apply same procedures to the exportation of goods. This is post-TRIPS requirement and members are not obligated to apply it on their borders.⁹⁷

It is notable that article 51 requires customs authorities to hold the counterfeited or pirated goods upon application but the right to investigate, whether the suspected goods are counterfeited and pirated or not, has been vested with “competent authorities, administrative or judicial.”⁹⁸ It is notable that few countries (mostly developing) empower their customs authorities to apply provisional measures under this article. These countries interpret “administrative” or “competent” authorities to include their customs authorities. It is notable that this article is silent over here but if it is read with article 50.8 and 49, it is

⁹⁵ Preamble to the TRIPS Agreement

⁹⁶ Supra n 23

⁹⁷ Ibid

⁹⁸ Article 51 of the TRIPS

clear that the TRIPS provisions intend to create a difference between administrative and judicial authorities. Therefore, in almost all developed nations, this competence to determine the suspected goods status rests with the judicial authorities.⁹⁹

It is also noteworthy that article 51 is concerned with counterfeit trademarks and pirated goods only and provides mandate to the member countries to frame rules or adopt procedures related to these only. Other IP violations like passing off and palming off are singled out under this article. It is maintained that violation is easily detectable even through naked eye in the case of counterfeit trademark and pirated goods. It is also noteworthy that this article requires the right holder to show “valid grounds for suspecting” to initiate customs intervention as this article is not drafted differently from article 50.2 which provides *unaudited alter parte* approach but on the basis of “irreparable harm” whereas this article does not require this requirement. This article has been supplemented with two footnotes which deal with customs union and parallel imports issues which fall outside the scope of this essay.

The analysis of the enforcement provisions in above section significantly indicates that the TRIPS agreement entails a balanced approach for right holder and infringer. It also provides the basis or platform or broad

⁹⁹ Supra n 23

principles to the member states to model their domestic laws within such parameters. Occasionally, it imposes the limits like “21 days or 31 calendar days” or specific to counterfeited trademarks or pirated goods. It also draws a line of distinction between administrative and judicial authorities and attempts to segregate their mandate in this regard.

Apart from enforcement, another complicated issue is of traditional knowledge confronted by the developing countries. Traditional Knowledge has assumed paramount importance in medical security and food security. It has been commercially exploited by the developed world to meet medical and farming needs. This commercial exploitation comes with a tag of huge economic benefits. These benefits have been multiplied in magnitude with the advent of new scientific fields like biotechnology and biodiversity. This biotechnology gave birth to biodiplomacy in the realm of international legal regimes. International trade also introduced knowledge-based economy which requires the implementation and enforcement of intellectual property rights. At this point, conflict, tension and debate ignite as who owns traditional knowledge and on what basis. As developed nations own 99% of the world's patent, similarly, developing countries are hugely concerned over the utilization of their indigenous sources to be used in pharmaceuticals by the developed countries without dispensing their share in the profit. Traditional Knowledge has attracted enough

voluminous scholarship in recent years to generate a definitional dilemma but the scope of this paper is limited to view all such scholarly debates.

The forthcoming section views traditional knowledge issue only in the context of the TRIPS agreement and views its article 27.3 in brief which is popularly known as “bio technology clause”

4.6 The TRIPS Agreement and Traditional Knowledge (Biodiversity Clause)

The TRIPS Agreement deals with patentable subject matters in its article 27. It is specified in 27 (1) that patent rights shall be available and enjoyable “without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced”¹⁰⁰ but this right is conditional with the provisions of paragraph 2 and 3. Its provision 3 (b) deals with the exclusions from patentability and addresses “the most controversial issues covered by TRIPS”¹⁰¹ as it allows members states to exclude from patentability and at the same

¹⁰⁰ Patentable Subject Matter, Article 27 (1), TRIPS

¹⁰¹ UNCTAD-ICTSD (2005). *Resource Book on TRIPS and Development*. Cambridge: Cambridge University Press.

time obliges the member states to protect micro organisms and essentially biological processes. This clause is also known as “biotechnology clause”¹⁰² and attracted voluminous analysis from different quarters for the protection of Traditional Knowledge. This controversial discussion also affected the review process of this clause and triggered diametrically opposed debate between the developed and the developing countries.¹⁰³

Article 27.3 (b) allows members to exclude from patentability

“Plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.”¹⁰⁴

As it is discussed above¹⁰⁵ and it appears from the above highlighted bold phrases, it is crystal clear that it addresses the complicated and controversial issues by triggering ensuing debate between developed

¹⁰² Ibid

¹⁰³ Ibid

¹⁰⁴ Part II, “STANDARDS CONCERNING THE AVAILABILITY, SCOPE AND USE OF INTELLECTUAL PROPERTY RIGHTS”, Section 5, “PATENTS”, Article 27, Provision 3, sub para (b), URUGUAY ROUND AGREEMENT: TRIPS . http://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm#5

¹⁰⁵ Supra n 12

and developing countries.¹⁰⁶ It allows member states to “exclude from patentability”¹⁰⁷ and at the same time obliges them to “protect microorganisms and certain biotechnological processes.”¹⁰⁸ This clause has the inherent potential to affect the issues of genetic diversity and food security while implementing and enforcing IPRs of the TRIPS standard.¹⁰⁹ It is not possible to comprehend the full scale of debate related to this area in this thesis due to different nature of research question. Its purpose is just to point out a related dimension in the enforcements of the TRIPS Agreement in developing world.

4.7 The TRIPS and the Developing Nations (Economic and Legal Issues)

It is crystal clear now from above discussion that International intellectual property rights (IPRs) started dominating the international trade scene since 1995. These rights have been linked with multilateral international trade agreements for enforcement purpose. Therefore, these are known as Trade Related Aspects of Intellectual Property

¹⁰⁶ Ibid

¹⁰⁷ Ibid

¹⁰⁸ Ibid

¹⁰⁹ Ibid

Rights (TRIPS). The TRIPS Agreement is considered the third pillar of global trade structure. Its purpose is to strengthen the national intellectual property rights and to set the minimum standard for protection and enforcement of these rights across the globe in frictionless manner. This agreement covers five main issues namely the application of the basic principles¹¹⁰ of the trading system into intellectual property regimes; protection of the intellectual property rights; enforcement of these rights, settlement of disputes among the member states; and to make special transitional arrangement¹¹¹ for the developing nations to be fully equipped to enforce the new system. TRIPS accommodated the previous international intellectual property conventions¹¹² in full and also prescribed new adequate measures to cover those areas which could not be addressed by the previous international conventions.¹¹³

This chapter highlighted the efforts of the developed world to protect their IP interest through international legislation. Their concerted efforts resulted in extending the scope of national legislation into the

¹¹⁰ Supra n 01

¹¹¹ Ibid p. 46 Transition Arrangements : 1, 5 or 11 years or more,

¹¹² The Paris Convention for the Protection of industrial Property (patents, industrial designs) and the Berne Convention for the Protection of Literary and Artistic Works (copyright)

¹¹³ Maskus, K. E. (Ed.). (2005). *The WTO, Intellectual Property Rights and Knowledge Economy*. Cheltenham: An Elgar Reference Collection

international laws. It viewed the TRIPS Agreement, its fundamental and enforcement provisions in detail with particular focus on biodiversity clause due to its inherent potential of jeopardizing the international trade patterns. This discussion brought forward the economic and legal constraints of the third world by signing and ratifying the TRIPS Agreement. This section provides a stage to conduct case study of the developing country which is presented in the next chapter.

The following chapter presents the case study observations at length. It views the IP policy making in recent years, judicial enforcement and the efforts of multinationals in IP violation contexts. Its last section spells out the derived results from the interviews, conversations, discourse and observation. It is basically reconstruction of all results, gained through multiple sources of evidence. This chapter is researched through case study methodology which is the second methodology of this thesis as outlined in chapter 2. It presents the dilemma/situation of the developing country having colonial background in the contrast of the observations/results of chapter 4. This dilemma is clearly understood when these observations of case study are judged against the international standards of enforcement. This is the point where hermeneutic circle solves the problem through understanding the whole (international law, the TRIPS Agreement) by understanding the parts (national enforcement of the developing country) and understanding the

parts (domestic problem) to understand the whole (future strategy). In the end, it points the direction for the future researcher to devise such a process/model for the developing country by taking into account all the ground realities which can facilitate the IP laws in the proper mode, enunciated by the TRIPS Agreement.

Chapter 5

Case Study of Developing Country

In the backdrop of above described complicated scenario of IP enforcement issues, a research trip was undertaken for Pakistan to investigate how global Intellectual Property regimes can be enforced with justice in such a fragile legal environment. This research trip was the second limb of the research methodology of this project which envisaged focusing on three areas namely policy making, judicial enforcement and business concerns for the effective enforcement of the trade related intellectual aspects of property rights. Therefore, the available time of 12 weeks were adjusted accordingly to communicate with concerned personnel to collect information. The first area was policy making which also included related legislation in the area of intellectual property.

5.1 Policy Making in Intellectual Property

It is noted that policy making is the task of Federal Secretariat, a huge administrative body entrusted with the tasks to carry out policy making, policy implementation and policy compliance.¹

5.1.1 Intellectual Property before 2005 (policy and law)

Intellectual Property (IP) issues were managed through IP office before April 2005. It was simply a paralyzed office due to non-availability of experts and funds, bureaucratic bottlenecks and administrative strictness, and simply dysfunctional due to ignored office. It is identified that before April 2005, IP management was also fragmented.² Copyright was dealt by ministry of education, patent was issued by ministry of commerce and trademarks were awarded by ministry of industries. All this fragmented management was disjointed at the different places and locations of Pakistan.³ In fact, Pakistan government continued with this set up since 1947 on the same pattern as it was existed in colonial period. It is noteworthy that sub-continent was governed by United Kingdom through Government of India Act 1935 and separate isolated

¹ Government of Pakistan Pakistan, (2006). *Government of Pakistan*, from <http://www.pakistan.gov.pk/>

² Muhammad Anwar Khan, IP Consultant, IPO, Pakistan

³ Ibid

laws, formulated after mostly World War I to carry out colonial administrative functioning.⁴

Intellectual Property issues were managed in subcontinent through Copyright laws 1914 which was legislated and approved by United Kingdom in 1911 and remained enforced in sub-continent till 1947 (partition time).⁵ It is noteworthy that Government of Pakistan enforced same Copyright laws 1914 in its territorial jurisdictions until 1962 when new Copyright Ordinance 1962, promulgated by non-democratic government. This piece of legislation did not incorporate the new realities and issues, and introduced same concepts of 1914 act and maintained the poor governance of IP policy at different and disjointed location under different ministries and divisions and section.⁶ This law dealt with literary, dramatic or musical work, cinematographic work, artistic work and music recording. It could be attributed a comprehensive piece of legislation in terms of protecting artistic work but it did not outline the procedure of awarding the copyright and did not prescribe the strict fines or penalties.⁷ It is pointed out that patents, copyrights and trademarks offices, at different location and under different heads, were dysfunctional due to poor management and poor funding. It could

⁴ Ibid

⁵ Ibid

⁶ Ibid

⁷ Ibid

be argued that new legislation of 1965 was bit comprehensive if it could have been applied under experts.⁸

This situation of IP management remained on the same patterns till 2000 when copyright piracy in Pakistan created powerful ripples in the developed world. It is identified that piracy of books and software contributed a lot in the defining image of Pakistan and international watchdogs started expressing their concerns in an uneasy terms. This situation continued till 2005 when United States conveyed its strongest ever message and decided to raise the issue at World Trade Organization.⁹ The following lines view these uneasy situations in different stages of the time periods.

5.1.2 Intellectual Property Scenario (2000-2005)

This period is identified when global drivers particularly multinationals remained successful in registering their protests to respective countries (developed countries) and international organizations also moved with register able concerns and approached Pakistan foreign offices and government. The stream of foreign protests were multiplied with each passing day and major trading partners of Pakistan like Japan, The

⁸ Ibid

⁹ Yasin Tahir, Director General, IPO, Pakistan

European Union and Germany started expressing their discomfort at the highest levels.¹⁰ The following few observations of international watchdogs¹¹ were simply hard to ignore in this era of globalization.

- “Pakistan is one of the World’s worst markets for books, as piracy of published material is rampant”----(International Intellectual Property Alliance-IIPA)
- “Pakistan is the 4th largest exporter of pirated discs: 13 million pirated discs exported from Pakistan per month to more than 46 countries”----(International Federation of the phonographic Industry---IFPI)
- “Software piracy in Pakistan is as high as 82%”---(Business Software Alliance—2005)
- “US companies have concerns about continuing problems with pharmaceutical patent infringement and trademark counterfeiting in Pakistan”-----(US Department of Commerce)
- “Intellectual Property issues still remain among the top investment climate barriers to FDI in Pakistan”----(Foreign Investment Advisory Services—FIAS of the World Bank)

¹⁰ Ibid

¹¹ Ibid

The above-quoted observations on international bodies and concerns of the developed nations started making public appearances since 2005 with the warnings of trade sanctions which were definitely a hard pill to swallow for the government. Internally, this piracy and counterfeiting goods were devouring a major portion of economy (no statistic available) but the rapid deteriorating situation due to defining image of “pirated heaven country”¹² started affecting growth rate of Pakistan economy, hampering direct foreign investment, affecting Pakistan’s exports due to tougher requirements of Market access regulations, disintegrating with global economy and hitting the consumer confidence in quality and price.¹³ This piracy issue also severely hit Pakistan tax revenue and also affected “critical sectors like food, drugs and medicines.”¹⁴

All this situation continued unabated till 2005 with the only exception that government responded to all these concerns by redrafting the IP laws and implemented Registered Designs Ordinance 2000, Registered Layout-Designs of Integrated Circuits Ordinance 2000, Patents Ordinance 2000, Trademarks Ordinance 2000 but no steps were taken to ensure the implementation, compliance and enforcement of these enactments in practical terms apart from the question of the proper

¹² Ibid

¹³ IPO, Pakistan, <http://www.ipa.gov.pk/Contents/AboutIPO.aspx>

¹⁴ Supra n 9

relevance of these ordinances which were drafted, presented and promulgated in hasty manner by incompetent experts just to pacify the foreign pressures.¹⁵ This eye-wash not only speaks the volume of in competency of legal personnel at law ministry but also aggravated the situation at international trade horizon to the extent when US ambassador expressed strongest ever concern with Prime Minister of Pakistan in the start of 2005 with the drastic step of United States to put Pakistan in the Priority Watch List.¹⁶ Resultantly, Government of Pakistan took immediate, drastic steps on war footing at the highest level (prime ministerial level), described in the following section.

5.1.3 Intellectual Property Scenario (Post -2005)

It was identified in early 2005 that IP management in Pakistan is fragmented and IP office is almost a defunct office, ridden in administrative and bureaucratic issues, was not capable to deliver the good, being expected at international level. In April 2005, The Government of Pakistan promulgated “Intellectual Property Organization Ordinance 2005” to establish autonomous body to dispense with IP issues. Its status was of “regulatory-cum-service organizations under the

¹⁵ Ahmed Ali Afani, Inspector, Federal Investigation Agency, Islamabad and Muhammad Siddique, Additional Director, Training, Revenue Division, Central Board of Revenue, Karachi

¹⁶ Ibid

administrative control of the Cabinet Division”¹⁷ which would be an autonomous corporate entity under the direct control of Prime Minister with phenomenal financial grants of 20.00 Million Rupees (NZ\$ 500,000) in 2005 and 40.00 Million Rupees (NZ\$1000, 000) for 2006.¹⁸ IPO-Pakistan was allowed to generate its own revenue apart from international donation. It is estimated that independent revenue generation would hit 190.00 Million Rupees in 2010.¹⁹ At administrative level, it provided central administration and finished the fragmented control of different ministries by introducing integrated administrative control through one central office with regional sub-offices (under-development phase).²⁰

IPO-Pakistan took commendable steps in very short span of time and grouped all activities under one umbrella by triggering new legislation, raids (with the cooperation of FIA), training programmes and awareness seminars. All efforts were directed to pirate CD/DVDs which were main concern of US multinationals. These efforts bore fruit when US government closed GSP investigation petition, triggered by US Business Alliance, and removed Pakistan from the Priority Watch List.²¹ It is noteworthy that before 2005, 13 million pirated CDs/DVDs were being

¹⁷ Supra n 9

¹⁸ Ibid

¹⁹ Ibid

²⁰ Ibid

²¹ Ibid

exported to 46 countries per month.²² This effort which gave short-term results, as relapsation (old practice) appeared again to the dismay of the Prime Minister of Pakistan.²³

5.2 Judicial Enforcement

This was the second area to be examined in the research trip. Its purpose was to evaluate the competence of bar and bench to deal with the new issues, advanced forward on daily basis, by IP infringers and violations. It is identified that even the best of legislation is rendered ineffective if not properly enforced, understood, and applied²⁴ and has the inherent potential to create anarchical lawlessness.²⁵ As it was intended to include bar and bench together for this thesis, the following independent sections provide the picture of this area.

²² A letter of DG-IPO to Customs, Pakistan on the Directive of Prime Minister

²³ Ibid

²⁴ M.Even, W. (Ed.). (1980). *The Sociology of Law A Social-Structural Perspective*. New York: The Free Press, A division of Macmillan Publishing CO., Inc.

²⁵ Ibid

5.2.1 Judiciary and Intellectual Property

It is evident from above section that IP-related laws are existed in Pakistan despite their ineffectiveness in dealing the issue but it is a tragic fact that no forum is available for judges to get themselves familiarized with IP laws. In Pakistan, Judiciary is divided into broadly two main categories; lower judiciary and higher judiciary. Lower Judiciary, at district level, is consisted of fresh law graduates. Their recruitment is tailored through a written exam and interview by senior/higher judiciary. Higher judiciary is composed of those seasoned law practitioners who have at least standing of 10 years in the High Court Bar and no extra qualification or special qualification is needed. Both tiers of Judiciary need only law graduation.

It is noteworthy that Federal Judicial Academy (FJA), the only institute entrusted with the task to impart training to newly-appointed and newly-promoted judges of the lower judiciary. It was established in 1997 and had developed four training curriculum, each with the duration of eight, four, three and one week duration. These curriculums are rich source of information but no built training for technical laws. Intellectual Property course is not the part of syllabus but can be initiated in one week

workshop, if need arises.²⁶ This academy has not developed any training curriculum for the higher judiciary and no courses are designed even on demand. This institute is understaffed and has only three full time faculty members.²⁷

5.2.2 Law Practitioners and Intellectual Property

It is not very strange that law practitioners are confined to the practice of local stuff as subjects of international law are not the part of syllabus. The only qualification is law graduation and no concept of post graduate qualification is existed as extra qualification does not have any edge for being considered to the post of judge, and no earning potential increased. This law graduation carries mostly the generalized legal courses like criminal, contract, constitutional, tort, evidence, family and Islamic laws. It is pointed out that no need was ever felt to go beyond these courses as clientage is limited to above-mentioned areas. Environmental, international trade or IPRs are considered an alien concept.²⁸

²⁶ Federal Judicial Academy, FJA, <http://www.fja.gov.pk/curriculum.htm>

²⁷ Ibid

²⁸ Interview with 20 lawyers holding LLB qualification and engaged in local practice but well-known.

5.2.3 Legal Education and Intellectual Property

It is again not a strange fact that legal education met unjust treatment over the years from the concerned officials. Legal education is imparted at graduate level up to three years. It is noted that it is normally delivered and examined in Urdu language which eroded its credibility to the limits. There is no express demand from law practitioners for post graduate courses or qualifications as earning or appointment is not at all related to extra qualifications. It is noted that IP is not the part of syllabus either at graduate or postgraduate level. At Punjab Law School, there is an independent qualification or IP laws after law graduation but again low turnover of serious students jeopardized this effort. The Multan law school did its best to include IP paper as optional subject but university syndicate did not endorse its need.²⁹ Lahore University of Management Sciences introduced law graduation based on contemporary subjects and included IP paper as optional but bureaucratic disinterestedness marred the entire effort to date.³⁰

²⁹ Principal, Multan Law College

³⁰ LUMS Staff member

5.2.4 Issues of Traditional Knowledge

It is evident from the description (4.6) that the TRIPS Agreement is particularly related to traditional knowledge. Its biodiversity clause generated substantial trade issues for developing nations. It is very sad dimension of reality that experts are available to understand the complicated issues of traditional knowledge who understands the TRIPS negotiations but again lack of seriousness at government level is sufficient enough to deprive Pakistan its due share in international trade, based on indigenous knowledge.³¹ Apart from the TRIPS, other international treaties and regional treaties need serious treatment from functionaries of Pakistan.³² It is pointed out that experts wanted to utilize arbitration facility of WIPO or dispute resolution facility by WTO but due to non-availability of legal experts makes it not only difficult but also impossible to approach these bodies to register their concern.³³ A case of Basmati patent was quoted which Pakistan almost lost due to mishandling, lack of resources and knowledge in the field of international trade.³⁴

³¹ Director, Creative Industries, PhD candidate in TK

³² Ibid

³³ Ibid

³⁴ Ibid

The forth coming lines review the concern and worries of businesses concerns for IP violation.

5.3 Business Concerns and Intellectual Property Rights

It is identified that business community is fully aware of IP violations as infringers deprive them of their substantial profit. Therefore, business concerns joined hands together after being disappointed from the government quarters and established “Anti-Counterfeit and Infringement Forum, Pakistan”³⁵ for the enforcement of IP regimes. The following lines view the concerns of the business community.

5.3.1 Multinational Giants

Multinational are the most affected due to IP violations and top of the list is Microsoft Corporation, Pakistan. It is the worst hit in doing business in Pakistan as pirated software severely destabilized their profit.³⁶ In spite of their best efforts, there is no let-up in the situation. Microsoft Pakistan

³⁵ This forum has been established by Nineteen Multinationals and Nationals companies in Pakistan to counter the menace of industrial piracy and intellectual property rights violation.

³⁶ License Compliance Manager, Microsoft Pakistan

is offering 90% rebate or in some cases 97% to educational institutes but even then pirated software is much cheaper and abundantly available. It is identified that all efforts of IPO-Pakistan, FIA and Customs are directed towards to the exportation of pirated CDs/DVDs and not a single step was taken to confiscate the counterfeit goods/software inside Pakistan neither any raids were undertaken at the selling markets.³⁷

Nestle Pakistan is another company in the same boat. Nestle engaged itself in mineral water operation and established its door-to-door network since 1990. This operation earned sky rocketed profit due to not availability of clean drinking water but in recent years, their production sharply declined due to counterfeit bottles of water.³⁸ It is disturbing fact the infringers are powerful lobby and even multinational is powerless. The fake bottles, filled with unhygienic water are largely available under the trademark of Nestle, Pure Water.³⁹

5.3.2 Information Technology

Information technology is the worst hit field due to IP violation. All such concerns either in government or in private shared the same concern.

³⁷ Ibid

³⁸ Factory Manager, Water, Islamabad, Nestle, Pakistan

³⁹ Ibid

Their central issue is the lack of enforcement of complex legislation, non-availability of attorneys who can understand IP issue in national and international contexts.⁴⁰ Apart from piracy issues, other related laws like privacy laws or cyber laws are the aggravating factors in this sector. It is pointed out that most of the companies decided to close down their services and move to UAE where at least legal protection is available to such concerns.⁴¹ It is identified that all their technical issues are the result of IP violations. They are unable to get patent licence, copyright or trademark from IPO-Pakistan as application process, filing, dealing and examining all are in the hands on unprofessional people or those who were not constantly trained according to changing pace of technology.⁴²

5.3.3 Agricultural Sector

It is noteworthy that before the advent of digital age, Agricultural sector was the most affected sector in IP violations. Multinationals involved in supplying pesticides, seeds and fertilizers faced this situation but it is quite interesting that pirated goods are almost negative in this sector.⁴³ These companies devised an indigenous solution after getting disappointment from law enforcement agencies, ridden in complex

⁴⁰ Business Development Executive, Information security, NETSOL and Research Associate, Pakistan Software Export Board

⁴¹ Ibid

⁴² Ibid

⁴³ Sales Co-coordinator, Farmers Equity Pakistan (Pvt) Ltd, FEP

issues of legislation and enforcement or apathy of judiciary. These companies entrusted the task to their sales person to create awareness among clients/prospective clients on door to door basis by providing mobile facility of filming on the door step of the farmer.⁴⁴ This practice/solution changed the situation in less than anticipated times and even illiterate farmer is more aware of fake and counterfeited goods and knows what is meant by IP violation, how to recognize counterfeit goods and how it can affect the. Resultantly, fake and counterfeited agro goods started disappearing from the marker due to non availability of customers.⁴⁵ They worked on consumer awareness instead of entangling themselves in enforcement issues and remained successful in curbing faked goods almost to zero.

The forth coming section point out the issues, brought forward by this case study.

⁴⁴ Ibid

⁴⁵ Ibid

5.4 Results---Identified Issues & Need to Devise Future Strategy for Effective IP Enforcement

This section presents spells out the issues, brought forward from the above section which presented the findings of the research trip. These issues can be attributed the major stumbling blocks in the effective enforcements of the TRIPS in Pakistan and need to be addressed through an integrated approach/model, designed according to indigenous circumstances instead to apply foreign tailored solutions to the different ground realities. The basis of this model is to consider the fundamental issues in their context to ensure the effective participation of international IP regimes.

It is drawn out that *IP education and awareness* among the masses is the fundamental issue and can be termed the one and the only one single obstacle in IP enforcement. It is observed and found that the basic concept of Intellectual Property is still alien to the main stream of the society. There is idea of law violation or crime associated with piracy or violation of IP laws. It is no common secret where the pirated goods are manufactured and further sold. All such markets, bustling with sellers and purchasers, are protected by business associations and local leaders. In the same tune, not availability of legal experts,

attorneys and policy makers at each level is the major cause. This non-availability is also due to absence of IP education and awareness. It is not taught; therefore not applied and practiced.

It is identified that in the recent years, Government of Pakistan took few drastic measures upon the insistence of the United States but *limited capacity* for investigation, evidence collection, forensic analysis and prosecution surfaced insurmountable obstacles. It became very difficult job for investigative personnel to understand first new phenomena due to incoherent legislations, disconcerted efforts and inadequate training to cope with such crimes.

Prosecution issues stands at the top of the list. If law enforcing agencies round up criminals, it becomes difficult task for them to present the findings before the courts due to existing gap for registering the crimes in legal provisions, not availability of prosecution lawyers coupled with lack of forensic experts and access to scientific information. In the same tune, alleged criminals also found it difficult to hire lawyers due to not awareness of IP concepts, inconsistent and incoherent legislation and again non-availability of such lawyers who can handle such cases. It also makes it difficult for the courts to determine IP violation which increases the magnitude of the problem at many folds. Ignorance of alleged criminals, ignorance of prosecution, ignorance of defence and

ignorance of judges generate an appalling situation. The limited capacity of the courts is in rife at district courts. It speaks about the volume of *limited skill of human resources in IP, equipment and logistics*.

IPR enforcement management, marred by limited capacity, helps the *relapsation of counterfeited goods*. It is identified that law enforcing agencies remained successful in closing down the bulk production units of pirate optical discs which resultantly dried up the export of optical discs at one stage but in the absence of monitoring and vigilance, relapsation is the strong possibility. It is noteworthy that all such efforts aim at the export and focal point of enforcement remain international airports but not a single crackdown or series of crackdown are directed towards local sellers. These local sellers sell optical discs with impunity and purchasers also purchase in bulk to smuggle out not from airports but from other means. It is also noteworthy that whenever local traders/sellers confront pressure of enforcement, it is always met by tough *resistance of trade unions and associations* of workers involved in counterfeited manufacturing goods.

Institutional piracy also speaks of lax efforts of awareness and enforcement. It is being increased despite the availability of huge funding from the donors and discounts from the software sellers. The

presence of institutional piracy even at those projects funded by international donors is alarming and cause of concern but inadequate legislation pave the way for this factor and even government employees defy the fractured legislation with ease.

It is noted that existing legislation needs to be *compliant with international treaties and conventions*. As Pakistan inherits parliamentary form of government, international regimes need to be incorporated into domestic legislation through Parliament. This process involves multiple layers of stages, backed by experts, professionals, and politicians but being the new and emerging field, it becomes difficult for the professionals to meet all the hurdles of legislative stages. This tedious process also eclipsed by the adequate understanding of law professionals working in the Ministry due to total lack of knowledge in this field. The initiation of the bill compliant to the TRIPS agreement can be termed a major procedural obstacle.

It is also identified that involvement of three to four enforcement agencies with *different jurisdictional mandate* create confusing scenario which consequently help towards the increase of IP violation. This situation becomes the breeding ground in increase of organized crime/cyber crimes. It is also found that in the absence of one central point of enforcement, IP enforcement, monitoring and surveillance

become the impossible task. In addition to this, in the absence of strict punishments and fines, fear of enforcement is totally absent. IP violation is *cognizable offence* which is also a contributory factor for the defiance of law.

It can be argued from the above identified results that IP enforcement, compliant to the TRIPS agreement need such an approach which can accommodate the ground realities and indigenous demands. Such approach can formulate a process/model reliable enough to enforce IP laws in sustainable manner. Any such effort could be the subject of later research.

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6. Conclusion

The case study of Pakistan for the enforcement of IPRs is the reflective of any third world state having colonial background, huge population, low literacy level, institutional inertias with instable governments due to lack of strong constitutional basis. But in this case, Pakistan becomes prominent due to availability of modern technology, a huge number of foreign educated people using the best of these technologies and reliable infrastructure to some extent. It becomes a country simultaneously standing on the volcano of dangerous issues but having the access to all high-tech innovations. These dangerous issues and usage of high-tech are, in fact, the symbols of two separate segments of the society which brings two identities of this county. One gives the impression of stable, fast developing country but other one gives the horrible picture of failed state. In any such scenario, laws and regulations and their implementations through sound institution of judiciary is the only viable vehicle to integrate the social fabric by implementing the laws in letter and spirit. It is pertinent to mention here that independent judicial organ is one of the pillars in the parliamentary form of the government which not only provides check and balances but also provides guidelines to lawmakers and people alike through judicial decisions. It is very unfortunate that Pakistan, though having a high-

tech technology, is devoid of independent judicial organ. Its judiciary is still battling with constitutional issues and not be expected to enforce IP laws as the demand of the international community.

It has been identified in chapter 4 that IP enforcement is entrusted to administrative authorities in China, Mexico and Peru. It is established reality that in all developing countries having colonial legacy, inherited strong, stable and sustainable administrative establishment. This administrative set up is the real driving force due to its massive size, huge local and foreign aids, and enough excessive powers to override the judiciary. It is the Herculean task to establish the norms of the developed society within a year or even a decade as any suggestion to bring change to the powerful bureaucracy is always met with tough resistance. It can be attributed the most probable cause that China, Mexico and Peru empowered their administrative authorities instead of judicial authorities to enforce IPRs.

It can be concluded that it is not possible to enforce IPRs in any developing country where judiciary is fragile enough to be rooted overnight to make establishment strong. It is not equally possible to change the system within years as it needs to inculcate modern values over the years and years through concerted efforts of educating all the social groups. It seems the best strategy to develop any system which

serves the purposes of local people and also satisfies the requirements of the international regimes, imposed through the TRIPS agreement. Any such system or process or model is not possible without the active support of the administrative organ. In Pakistan, Intellectual Property Organization of Pakistan can play its role in the enforcement of IPRs due to its strong mandate, firm and established administrative structure which is not prone to any instability, capability to constantly keep pace with the new and modern technological requirements (attached to IPRs) and the potential to enforce IPRs by clubbing all the enforcement agencies. This humble conclusion can be the basis of turning this suggestion into a reality from the future researcher.

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