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The Globalization of Intellectual Property Rights and Innovation in Patent Protection

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ABSTRACT

J. Bhagwati explained Globalization as an extension of capitalism throughout the world. "Globalization means different things to different people" (Bhalla, 1998). The term is used generally to refer to a phenomenon defined or measured by flows of trade and investment between countries (Bhalla, 1998; James, 1998). Globalization as referring to "the process whereby capitalism is increasingly constituted on a transnational basis, not only in the trade of goods and services but, even more important, in the flow of capital and the trade in currencies and financial instruments" (McChesney, 1998) It is related to economic, political, technological and cultural exchanges of good and services between countries. It is the integration and amalgamation of global economies through the influence of developed countries and multinational corporations that are driven by technological change. Under Globalization the goods and services are exchanged at a faster rate and investors are interested more in the country where Intellectual Property Rights are strong and offer wider range of protection. Thus during the past decades, countries across the globe have strived for strong Intellectual Property Right, and its enforcement worldwide. The most important initiative that could be seen for global harmonisation is that of TRIPS (Trade Related aspects of Intellectual Property Rights) signed in 1994 to become the core element of World Trade Organisation. Thus, this paper analyses the impact of TRIPS (Trade Related aspects of Intellectual Property Rights) on the global change from generation to generation and distribution of such knowledge with the tint of Innovation in patent protection in relation with public health. Government worldwide and Multinational corporations alleges that strong and uniform intellectual property rights will lead to better protection of innovation globally. 21st century is described as the age of Globalization, a big word with several meanings and a phenomenon which is constantly affecting the human beings in every aspect of life. Globalization with significant economic, social integration on global level has also brought consequences on migration, technology, corporations, institutions and Public Health. Ensuring that the vehicles of Globalization are oriented towards development and promotion of human rights through appropriate law and policies. State has a responsibility to respect, promote and protect human rights in the face

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of Globalization.

I. INTRODUCTION

"One of the biggest mistakes one can make when considering the globalization of intellectual property law is to assume away the increasingly contentious politics of the phenomenon. This is not to say that the emerging politics of international intellectual property law are simple, easy to understand, or unchanging - quite the contrary is true. However, we should resist the understandable tendency to reach for a quick, technocratic set of Procrustean tools that assume away the 'messiness of the world' and make it seem that concepts such as 'sovereignty' and 'property' should be, are, or always have been, particularly stable constructs" (Aoki, 1998b)

The history of Globalization in relation with Intellectual Property Rights goes back to 1959, when Germany and Pakistan signed the world's first investment Treaty (BIT). BITS are contract between two countries that govern the investment relationship between each other and their respective citizens. These Trade agreements are form of binding international arbitration that protect assets from being misappropriated and further gives out the compensation for the same. Similarly, in today's time the importance of protection of Intellectual Property which is one of such assets has become the need of the hour across the transnational boundaries. Following this, TRIPS (Trade Related aspects of Intellectual Property Rights) came into the picture 1994, which added and provided the baseline for the protection related to Intellectual Property Rights. Today, BITS and TRIPS forms the two layers of nations Intellectual Property Rights Regime protection mechanism.³ Although, these form the base but are not uniform in nature for every nation and lack in equal standards which is not the fault of the agreements but the dichotomy of developed and developing nations as when capital exporters and capital importers are the key negotiators of the deal, their goals and terms for that agreement are at odds, as the strong protection of Intellectual Property Rights will be wanted by the dominant nations and vice versa for the weak ones due to asymmetric distribution of power across nations. Thus this factor of dominance of one nation over the another forms the hinderance in reaching the uniform mechanism of Intellectual Property Right protection.

Intellectual Property Right is a component of global economy, subject to individual creativity and a tool of economic and monopolistic interest for economies. It has become a pillar of any business organisation along with manufacturing, innovations, marketing , sales and technology.

³ Alan M Anderson and Bobak Razavi, 'The Globalization of Intellectual Property Rights: TRIPS, BITs, and the Search for Uniform Protection' (2010) 38 Ga J Int'l & Comp L 265

It has attained the standard of being the powerhouse in any business strategy where role of Intellectual Property team on appropriate data of patents, trademark boosts the multinational corporations. Intellectual Property Rights protection in a country could lead to higher productions and prove to be a boom under globalising world. IP is often divided into two fields: industrial property which includes protection by means of patents, trademarks and industrial designs and copyright which protects the works of authors and other creators of works of the mind. Drahos (1997) identifies three stages in the evolution of IP: (i) The first stage is the national or territorial era at which there were no international regimes; (ii) The Paris and Berne Conventions at the latter part of the 19th Century ushered in an international regime which was still territorially based and extended the rights of creators through treaties; (iii) U.S.-led pressure by the mid-1980s elevated IP onto a higher plane on the international global economic and regulatory trade agenda. The establishment of the WTO and its TRIPs is illustrative of this third phase in the evolution of IP.⁴

II. PHASES OF INTELLECTUAL PROPERTY RIGHTS IN GLOBALIZING WORLD

National Phase: Intellectual Property Rights was primarily related with protecting the rights of domestic authors and inventors within a country's border. The Republic of Florence issued first protected author's right to a famous architect named Filippo Brinelleschi on 19 June 1421. The basis of the first lasting patent institution of Intellectual Property protection is found in a 1474 statute of the Venetian Republic under this regime, The rights of inventors were recognized, an incentive mechanism was included, compensation for infringement was established, and a term limit on inventors' rights was imposed.⁵ A fourteen year monopolies of Intellectual Property Rights was granted by the English Statute of Monopolies in 1621. Further, the first statute of modern copyright was given to the Statute of Anne in 1710. United States lead in imposing the strong Intellectual Property Rights regime on the global trading system.

International Phase: Charles Dickens, a British author petitioned the US Congress in 1836 for protection on non-US authors due to wholesale piracy of the English publishing industry. Meanwhile Berne Convention in 1886 and Paris Convention in 1883 took place for mutual protection of Intellectual Property Rights. The Berne Convention deals with the protection of works and the rights of their authors. It is based on three basic principles and contains a series of provisions determining the minimum protection to be granted, as well as special provisions

⁴ Globalization of intellectual property rights: Implications of the TRIPs agreement for access to HIV/AIDS drugs in Africa John Agada-John Gathegi-Johannes Britz-Peter Lor
<<https://asistdl.onlinelibrary.wiley.com/doi/full/10.1002/meet.2009.1450460149>> accessed on 15 October 2019

⁵ Adam Moore-Ken Himma -< <https://plato.stanford.edu/entries/intellectual-property/>> accessed on October 20, 2019

available to developing countries that want to make use of them. The three basic principles are the following: (a) Works originating in one of the Contracting States (that is, works the author of which is a national of such a State or works first published in such a State) must be given the same protection in each of the other Contracting States as the latter grants to the works of its own nationals (principle of "national treatment"), (b) Protection must not be conditional upon compliance with any formality (principle of "automatic" protection), (c) Protection is independent of the existence of protection in the country of origin of the work (principle of "independence" of protection). If, however, a Contracting State provides for a longer term of protection than the minimum prescribed by the Convention and the work ceases to be protected in the country of origin, protection may be denied once protection in the country of origin ceases.⁶ Whereas the Paris Convention applies to industrial property in the widest sense, including patents, trademarks, industrial designs, utility models (a kind of "small-scale patent" provided for by the laws of some countries), service marks, trade names (designations under which an industrial or commercial activity is carried out), geographical indications (indications of source and appellations of origin) and the repression of unfair competition.⁷ At this point the developing nations were not so happy with the Intellectual Property Rights agreement as the developed nations were at the dominant position. Later, when WIPO was negotiated in the 1960s, developing countries played a larger role, but continued to oppose higher IP standards.⁸ Developing nations persisted in that posture in the 1980s and 1990s. In the TRIPS negotiations, the developing world believed the developed world was bargaining over its affinity for ad hoc bilateral agreements in favor of a universal standard negotiated on a multilateral basis. Today, however, TRIPS forms a minimum foundation for the protection of Intellectual Property Rights. Given the proliferation of BITs since 1995, TRIPS does not provide the universal global standard that the developing world had anticipated. Indeed, BITs now play a crucial role, offering investor-state dispute settlement provisions that empower investors by enabling them

⁶ Under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), the principles of national treatment, automatic protection and independence of protection also bind those World Trade Organization (WTO) Members not party to the Berne Convention. In addition, the TRIPS Agreement imposes an obligation of "most-favored-nation treatment", under which advantages accorded by a WTO Member to the nationals of any other country must also be accorded to the nationals of all WTO Members. It is to be noted that the possibility of delayed application of the TRIPS Agreement does not apply to national treatment and most-favored obligations, (WIPO)

⁷ Charles R. McManis & Eul Soo Seo, *The Interface of Open Source and Proprietary Agricultural Innovation: Facilitated Access and Benefit-Sharing Under the New FAO Treaty*, 30 WASH. U. J.L. & POL'Y 405, 421 (2009)

⁸ Alan M Anderson and Bobak Razavi, 'The Globalization of Intellectual Property Rights: TRIPS, BITs, and the Search for Uniform Protection' (2010) 38 Ga J Int'l & Comp L 272

to bring direct actions against a host state for Intellectual Property Rights violations.⁹ TRIPS required all WTO member nations to abide by certain minimum IP standards. Examples include twenty-year patents in all technology fields and fifty-year copyrights for the majority of copyrightable materials.¹⁰ TRIPS has both advantages and disadvantages.¹¹

Today knowledge has transformed into wealth, knowledge being the key to international competitiveness and ‘magic of the marketplace’ (Duffield 2008). Knowledge is flowing highly in trade, innovation and protection of such industry. TRIPS (Trade Related aspects of Intellectual Property Rights) covers all the dimensions of Intellectual Property Rights, where under Doha Declarations (2001) the concerns regarding the Intellectual Property and Public Health problems were raised. And with the increase in Globalisation, number of standards in copyright laws and patents increased, thereby, Pharmaceuticals and audiovisual industry were mostly affected by patents and copyright regime respectively. A long patent life raises the rate of discoveries but reduces social benefits of each discovery which result in Intellectual Property Rights Issues in Pharmaceutical industry, extension of Intellectual Property Rights may lead to more research in drugs but low purchasing power and lack of commercial interest of pharmaceutical companies lead to less researches.¹²

III. INNOVATION IN PATENT PROTECTION IN THE GLOBALISING WORLD

Strong intellectual property protection is justified by a market approach, because such protection provides incentives to “increase the number of commercially available products and thereby serve the public interest.”¹³ However, it is important to question which public interests these rights serve, thus focusing on the relation of TRIPS with the global health under globalisation of intellectual property rights. Millions of people, particularly in low- and middle-income countries, lack access to effective pharmaceuticals, often because they are unaffordable. The 2001 Ministerial Conference of the World Trade Organization (WTO)

⁹ DAVID VIVAS-EUGUI, REGIONAL AND BILATERAL AGREEMENTS AND A TRIPS-PLUS WORLD: THE FREE TRADE AREA OF THE AMERICAS (FTAA) 8-9 (Geoff Tansey ed., 2003), available at <http://homepages.3-c.coop/tansey/pdfs/ftaa-a4.pdf>

¹⁰ Carsten Fink & Patrick Reichenmiller, Tightening TRIPS: The Intellectual Property Provisions of Recent US Free Trade Agreements, TRADE NOTE, Feb. 7, 2005, at 4, available at <<http://siteresources.worldbank.org/INTRANETTRADE/Resources/Pubs/TradeNote2O.pdf>> accessed on October 18, 2019

¹¹ “The Globalization of Intellectual Property Rights: Much ...” <https://www.researchgate.net/publication/256055328_The_Globalization_of_Intellectual_Property_Rights_Much_Ado_About_Nothing> accessed October 26, 2019

¹² Alan M Anderson and Bobak Razavi, 'The Globalization of Intellectual Property Rights: TRIPS, BITs, and the Search for Uniform Protection' (2010) 38 Ga J Int'l & Comp L 272

¹³ Risa L. Lieberwitz, The Marketing of Higher Education: The Price of the University's Soul, 89 CORNELL L. REV. 763, 782 (2004) (reviewing DEREK BOK, UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION (2003))

adopted the Doha Declaration on the TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement and Public Health. The declaration recognized the implications of intellectual property rights for both new medicine development and the price of medicines.¹⁴ The use of TRIPS flexibilities is an important tool that can help countries fulfil their human rights obligation to provide access to essential medicines as part of the progressive realization of the right to health.¹⁵ Alongside the legal obligations of states, pharmaceutical companies also have a responsibility to provide access to medicines, for example, through compulsory licensing. The Medicines Patent Pool could be expanded to include all new essential medicines so that these medicines would be available as generics in low- and middle-income countries well before the patents expire marking as the evident to be a patent innovation. In the absence of voluntary or Medicines Patent Pool licences, governments could use TRIPS flexibilities as part of regular procurement.¹⁶ There is a need for minimising diseases on the global level through regulating the drug development process and accessing and incorporating the research studies formulating in abroad for the global benefit. Also, through the production of cost-productive drugs, not only developed but developing countries will also be able to combat life challenging diseases, thus channelising the policies and laws in the favour of global focus. It is highly recommendable that we recognise the relationship between the world health and research on health and making the patents on drug available to any part of the world which is in need of it. International Organisation, WHO must redesign itself in such a manner to balance the responsibilities and harmonise the transnational borders. In 2002, Nelson Otwoma, a Kenyan social scientist discovered that he is suffering from HIV AIDS and needed access to treatment.¹⁷ He was told that the cure did not exist and was lethal. In 2002, the treatment for this disease only existed in the developed countries. People in North America, Europe were living with HIV but had access to the treatment. But this was not the case with Nelson and also for his three year old son who was soon detected with HIV. Then, Nelson decided to become a treatment activist and join up with other groups. In 2002, the prices for ARV (drugs needed

¹⁴ Declaration on the TRIPS agreement and public health. Adopted on 14 November 2001. DOHA WTO Ministerial 2001: TRIPS WT/MIN(01)/DEC/2. Geneva: World Trade Organization; 2001 <https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm> accessed on September 19, 2019

¹⁵ Article 25. In: The Universal Declaration of Human Rights. United Nations General Assembly, Paris, France, 10 December 1948 <<http://www.un.org/en/universal-declaration-human-rights/>> accessed on September 15, 2019

¹⁶ Medicine Procurement and the Use of Flexibilities in the Agreement on Trade-Related Aspects of Intellectual Property Rights, 2001–2016” (*World Health Organization* February 28, 2018) <<https://www.who.int/bulletin/volumes/96/3/17-199364/en/>> accessed October 26, 2019

¹⁷ Globalization of intellectual property rights: Implications of the TRIPS agreement for access to HIV/AIDS drugs in Africa John Agada-John Gathegi-Johannes Britz-Peter Lor <<https://asistdl.onlinelibrary.wiley.com/doi/full/10.1002/meet.2009.1450460149>> accessed on October 15, 2019

for HIV) costed about 12000 dollars per patient per year and the patents on those drugs were held by a number of Western pharmaceutical companies that were not willing to make patents available on global level as when you have a patent you can exclude anyone from making the same product or producing the low-cost versions of that product for medication purposes. This led to patent war breaking out all over the globe. But in that time, the pharmaceutical product patent did not exist everywhere such as India and thus Indian Pharmaceutical companies started to produce so called generic versions, low-cost copies of such medicines and made them available in the developing countries and within the year the price had come down from 10,000 dollars per patient per year to 350 dollars per patient per year and today the same drug is available for 60 dollars per patient per year, as a consequence of which Nelson is leading a healthy life with his son and has access to the medication, this marked the beginning of enormous change globally on the number of people who could afford access to these medicines resulting in treatment programs, funding and cost-effective medicine available globally. Today, Intellectual Property Rights have obliged to provide 20 years patent protection which is seen as a fallback and there is a need for deliberate action to establish the Medicine Patent Pool which should be recognised globally in the market. In 2010, the global health initiative was taken up by UNITAID by establishing the Medicine Patent Pool for HIV. Medicine Patent Pool works globally as the patent holders, investors develop new medicines and patent those inventions and make those inventions available to the medicine patent pool, which further license those out to whoever needs access to those patents, that can be a generic manufacturer or not-for-profit drug development agencies. These agencies pay royalty over the sales to the patent holders so they are remunerated for sharing their intellectual property. These agencies further sell these medicines at much lower cost to people who need access to them making to globally available and resulting in win-win situation. Thus to provide a global public health atmosphere an appropriate legal system and policies be enforced regarding the flexibilities of TRIPS.¹⁸

IV. CONCLUSION

Globalisation has helped in evolution of Intellectual Property Rights which is a component of global economy, subject to individual creativity and a tool of economic and monopolistic interest for economies and vice versa as the innovation has helped the global as well as domestic economy to prosper. To conclude the paper it analyses the growth of intellectual

¹⁸ Medicine Procurement and the Use of Flexibilities in the Agreement on Trade-Related Aspects of Intellectual Property Rights, 2001–2016” (*World Health Organization* February 28, 2018) <<https://www.who.int/bulletin/volumes/96/3/17-199364/en/>> accessed November 10, 2019

Property Rights in the past years. The acquisition of knowledge requires the knowledge holder and the user to be equally compensated and also a regime which is safe. Knowledge is flowing highly in trade, innovation and protection of such industry. TRIPS (Trade Related aspects of Intellectual Property Rights) covers all the dimensions of Intellectual Property Rights and thus the policies are required to be drawn out to take benefit from foreign technologies of developed nations, thus developing nations should put in place explicit policies to create adequate absorptive capacity in terms of competences, skills, infrastructures and institutions. There are cross-industry differences in the effectiveness of IPRs and while pharmaceuticals are heavily dependent on patents of which the concept of innovation of patent protection is discussed in the paper and audio-visual cinematography are heavily dependent on copyrights, there could be parallel litigations or regulations could be drawn out for more effective protection of Intellectual Property Rights in the global era. Moreover, IPRs are much more effective if combine with wider companies' strategies, which include continuous learning and innovation with more flexible regime.¹⁹

¹⁹ "The Globalization of Intellectual Property Rights: Much ..."

<https://www.researchgate.net/publication/256055328_The_Globalization_of_Intellectual_Property_Rights_Much_Ado_About_Nothing> accessed October 26, 2019