Understanding the Conflicts between the TRIPS Agreement and the Human Right to Health

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I INTRODUCTION

The debate on linkages between World Trade Organization (WTO) and human rights has been going on for quite some time. A wide range of views and analyses have been presented on the linkage by different scholars. This paper discusses the linkage between one of the important agreements in the WTO – the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and human right to health. In this context the paper examines the provisions of the TRIPS agreements and studies their linkage with the human right to health as given and understood in the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic Social and Cultural Rights (ICESCR) and other human rights treaties. Part II of the paper discusses the conflict between Article 27 of the TRIPS agreement and the human right to health. Part III challenges the argument that the TRIPS agreement is flexible enough to take into account the human rights concerns. Part IV discusses the limitations of the proposed solutions to increase the accessibility of medicines to mitigate the adverse impact of the TRIPS agreement on human right to health. Part V provides the concluding remarks.

Before one examines the linkage between the TRIPS agreement and human right to health, a brief description of the TRIPS agreement is pertinent. The TRIPS Agreement

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was adopted as part of the final act containing the results of the Uruguay Round of multilateral trade negotiations held from 1986 to 1994, which led to the formation of the WTO. This agreement entered into force for developing countries from 1 January 2000. However, some developing country members were allowed to postpone the fulfillment of some of the obligations given in the TRIPS agreement such as recognizing product patents in all fields of technology till 1 January 2005 provided they set up a 'mailbox' system where the product patent applications could be filed and stored to be examined after the product patent regime was adopted by this country. The TRIPS agreement has emerged as one of the most important intellectual property treaties at the global level due to its coverage of a relatively large number of intellectual properties and also due to the strong enforcement mechanism. However, it is important to state that the negotiations towards the formation of the TRIPS agreement witnessed huge differences between developed and developing countries. Developing countries were not very keen on an agreement on intellectual property in the WTO whereas developed countries wanted to bring intellectual property within the domain of the WTO because of their dismay due to the absence of detailed rules on intellectual property and the lack of an effective enforcement mechanism for the same at the global level.

Ultimately developing countries gave up their opposition to the TRIPS agreement due to a plethora of factors such as coercion by developed countries like the United States, the fact that the TRIPS agreement was a part of the entire Uruguay round package where countries had to accept the entire package, which also had agreements perceived to be beneficial to developing countries such as the agreement on agriculture and the agreement on textile and clothing.

The TRIPS agreement is a minimum standards agreement and it aims at achieving a certain degree of harmonization amongst the national intellectual property laws of WTO member countries. This minimum standard of the TRIPS agreement is given in Article I.1 of the TRIPS agreement, which states 'Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.' In other words, if a member country wishes it can adopt intellectual property standards, which are more stringent than the standards laid down in the TRIPS agreement.

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3 See Article 70 (8) of the TRIPS agreement. Also see Article 70 (9) of the TRIPS agreement.
4 This strong enforcement mechanism for TRIPS is due to the Dispute Settlement Body of the WTO. See N.P. de Carvalho, 'The TRIPS Regime of Patent Rights' (Hague: Kluwer Law International: 2002), 24-25.
5 This was for a number of reasons with one of the prominent reason being that stringent intellectual property system will have impact on the prices of the pharmaceutical products. See D. Gervais, 'The TRIPS Agreement: Drafting, History and Analysis' (Sweet and Maxwell: London: 1998, 1st edition), 19.
8 N.P. de Carvalho, above n 3, 56.