

UNDERSTANDING TRIPS: MANAGING KNOWLEDGE IN DEVELOPING COUNTRIES

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Trade Related Intellectual Property Rights (TRIPS) form the core subject matter of one of the most controversial components (Agreements) of the World Trade Organization (WTO) that came into effect on the first day of 1995. In India, the Agreement on TRIPS created controversies as well as confusion and skepticism because, among other things, the country was required to move from an earlier process patent system to a product patent system thereby affecting the growth and progress of important sectors such as pharmaceuticals. The provisions of TRIPS Agreement were also feared to deprive Indian farmers and local communities of the benefits of their traditional knowledge and to make them perennially dependent on multinational companies which in the critics' view, considered commercial gains above everything else. Certain provisions of TRIPS were also considered to affect, seriously and adversely, the government's ability and cost of meeting national health calamities. However, many even-minded observers and analysts have argued about the benefits of the new TRIPS regime that include a generally friendlier environment for attempting innovations, protection to innovations and other intellectual properties, and an opportunity for industries such as pharmaceuticals to strengthen their market capabilities and success. Given this background, a book written at this juncture with the explicit purpose of enhancing the understanding on TRIPS and the implications of TRIPS to developing countries should be considered well-intended as well as well-timed.

In the introductory section of the book, the authors explain, although in a rather disconnected manner, certain salient features of some of the aspects and articles of the TRIPS Agreement. This section also outlines the pur-

pose of the book and its coverage. Chapter 1 provides a brief background on TRIPS and takes us through the viewpoints of the industrialized and developing countries apart from narrating the basic features of the Uruguay Round negotiations. Chapter 2 analyses the various issues involved in the interpretation of the provisions of the TRIPS Agreement. It recognizes the significance of the preamble of the TRIPS Agreement along with its text in interpreting the agreement and suggests how the earlier international conventions and treaties such as the Berne Convention, Rome Convention, WIPO Copyright Treaty, etc. constituted the foundation of the TRIPS Agreement. Chapters 3 to 8 deal with the treatment of various Intellectual Property Rights (IPR) under TRIPS Agreement: copyright and related rights, trademarks and geographical indications, industrial designs, patents, layout designs of integrated circuits, and protection of undisclosed information. Chapter 9 examines the issue of controlling the anti-competitive practices of the holders of IPR. Chapter 10 discusses the provisions for enforcing the IPR of the holders when these are infringed. Chapter 11 relates to the transitional arrangements applicable to the member countries when they move from their earlier IPR regime to a TRIPS-compatible system. The last chapter raises certain concerns arising from the implementation of TRIPS especially in respect of the developing and the least developed countries.

According to the book, the industrialized countries argued for the TRIPS framework referring to the trade-distortion effects of the weak protection to intellectual property in the developing countries and to the benefits of all nations from a strong intellectual property protection regime. However, countries like India require a proper

balance between the interests of the producers and consumers in any multilateral agreement on intellectual property and more flexibility to address their special developmental needs.

As the authors suggest, interpretation of the provisions of the TRIPS agreement should duly recognize its background in all earlier international conventions on intellectual properties. It is observed that often the Dispute Settlement Panels and the Appellate Body of the WTO do not interpret the TRIPS provisions with consistency.

The book explains how developing countries could use provisions such as the minimum standards, national treatment, most favoured nation status, and the national versus international exhaustion of rights to achieve their expected policy outcomes. The Indian bill on 'protection of plant varieties and farmer's rights' has a provision for compensation to farmers if a genetically modified seed failed to deliver. In addition, India refuses protection to seeds and plants containing terminator-type of genes. At the same time, as highlighted in the book, the Competition Bill 2000 of India fails to use the flexibility provided in TRIPS on compulsory licensing to control anti-competitive practices.

For an inquisitive reader, the book throws light on several aspects of the TRIPS Agreement. To the delight of Indian software industry, TRIPS Agreement allows for reverse engineering or de-compilation of software protected by copyright, to understand the unprotected aspects of the code and to facilitate the development of new software. However, the TRIPS Agreement provisions are said to be ineffective in dealing with on-line developments, i.e., owner of a trademark can assign the trademark with or without transferring a business to which the trademark belongs. Trademarks cannot be subjected to compulsory licensing by authorities. Protection of geographical indications is available only to wines and spirits, that too when they have not become generic. There is a lack of interest even among developed countries in protecting industrial designs. Compulsory licensing is possible on industrial designs. For a product or process to be patentable, it should be non-obvious (innovative) and useful. TRIPS Agreement preserves the rights of prior users of a subsequently patented product or process. Many of the patents granted in the US and Europe involve bio-

piracy of Indian traditional knowledge. Most countries resent high drug prices and look at compulsory licensing of patented drugs favourably. Innocent infringements on layout designs of integrated circuits are not to be treated as lawful and should attract royalty obligations. Penalties against IPR infringement could include compensation to IPR holders, confiscation of the infringing goods, injunctions against the import of infringing goods or services, etc. As regards the anti-competitive practices of the IPR holders, countries differ in their approach to dealing with them. The readers will find much more of such information in the book.

A few words of caution may also be in order. The arguments in the book are often repetitive. Many technical issues related to TRIPS provisions have been introduced without explaining, through a note or otherwise, the basic meanings and implications. Often, the discussion looks complex with inadequate clarity for a reader with an average level of interest in the subject. Moreover, it is not adequately focused and shifts rapidly from one agreement/convention to the other, one article to the other, or one example to the other without a proper link. After going through the entire text of the book, if the reader is still unable to decide precisely how many sections/articles each part of the TRIPS Agreement has, he/she need not be disappointed; this could be clarified from Annexure I. Besides, while the objective of the book is to strengthen the readers' understanding on TRIPS, most of the examples and illustrations given here seem to have a consequence of strengthening the readers' skepticism about the TRIPS provisions. Further, a professional approach has not been adopted for the references. Finally, a thorough editing and restructuring of some of the chapters might have made the book more reader-friendly.

Despite the above weaknesses, the book will be highly useful, given the nuances of the complex legal text of the TRIPS Agreement, for those who are seeking support in interpreting the TRIPS provisions to further their business or research interests. ✓

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