

TRIPS through the lens of Global Public Goods: Are TRIPS-plus FTAs eating up all the good there is?

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ABSTRACT

With the adoption of TRIPS Agreement in 1994 emerged an unprecedented international legal regime of global IP protection. Much has been talked about the fairness of this regime and almost all of such discussions conclude that the TRIPS agreement leans in the favour of the developed nations. Still, it is argued that TRIPS can be viewed as possessing certain features which make the regime set up by TRIPS being identified as a Global Public Good (GPG). The article outlines the peril faced by this GPG, in the form of the recent practice of the developed nations to negotiate higher levels of IP protection in the guise of bilateral free trade agreements known as TRIPS-Plus FTAs. Though these FTAs are compliant to the TRIPS and other WTO norms, they tend to make the common minimum standards of TRIPS irrelevant. These FTAs not only worsens the already skewed global IP protection framework but also hampers the availability of other public goods such as elimination of epidemic diseases, improvement in human health and well being which are of far much importance than the unbalanced global IP scenario. The article concludes by offering plausible solutions which could be pursued to deal with this complex issue.

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I. INTRODUCTION

The TRIPS Agreement (TRIPS) was adopted in 1994, as part of a bundle of multilateral agreements ushering a new global trading regime called the World Trade Organization. Since its adoption, TRIPS has had a bitter history and has sparked plenty of controversy.¹ It has predominantly been accused of being tailored to the needs of developed and industrialized nations, though it does contain certain provisions which seem to accord developing and poorer countries some room to adjust their Intellectual Property (IP) norms in conformity with the interests of their people. In brief, the distinguishing feature of TRIPS is that it establishes minimum standards of IP protection and hence creates a never-seen-before harmonization of norms and standards relating to IP protection worldwide. Latching onto this thread, this essay analyses TRIPS through the Global Public Goods perspective and considers whether TRIPS itself can be seen as a Global Public Good (GPG) and, consequently, what the impact of the current flurry of TRIPS-plus FTAs on the proper and efficient utilization of this GPG is, especially by developing countries.

II. IS TRIPS ANY GOOD AT ALL?: TRIPS AS A GLOBAL PUBLIC GOOD

A. Global Public Good Approach: A brief outline

In simple terms, a public good is one which has the twin properties of being non-excludable, i.e., nobody can be excluded from its use, as well as non-rival, i.e. the availability of the good is not diminished after consumption.

¹ See, Daniel J. Gervais, *Intellectual Property, Trade & Development: The State of Play*, 74 *FORDHAM L. REV.* 505, 507 (2005); See also, Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 *HOU.S. L. REV.* 979, 982-997 (2009).

Public goods can be best understood in comparison to private goods:² clean air, often cited and much clichéd, is an example of a pure public good, while a commodity like a burger is essentially a private good. The GPG approach, which is a recent offshoot of the traditional public good theory, is concerned with the transnational spill-over effects of some public goods: elimination of epidemic diseases, environmental sustainability and promotion of free trade, to name but a few, are now seen as GPGs, as their availability considerably impacts the well being of all mankind. The GPG approach has emerged as an important perspective to look at the phenomenon of globalization and the trends and processes that come with it.³

Non-excludability and non-rivalry, however, are not intrinsic attributes of goods, but are often the result of societal choices to make goods available in that manner. In light of this, Kaul and Mendoza⁴ propose a wider definition centred around the idea of being ‘de facto public in consumption.’⁵ For instance, roads - a typical illustration of a public good - can, as an infrastructure, support different uses, which may be deemed more or less beneficial to society as a whole (think of a road used by tractors for farming, as opposed to one leading to an elite holiday resort and used chiefly by polluting SUVs). Depending on what uses that infrastructure can be put to, it may (or may not) be kept non-rival and non-excludable.

A similar approach can be taken vis-à-vis GPGs: demand for a GPG may vary depending on the particular international situation. TRIPS itself, for example, has emerged only when the need was felt, owing to increasing globalization, to establish uniform protection of intellectual property.

² Inge Kaul, *Governing Global Public Goods in a Multi-Actor World: The Role of the United Nations*, On the Threshold: The United Nations and Global Governance in the New Millennium, International Conference, 19-21 January 2000, UNU Tokyo, (May 28, 2010) available at <http://www.unu.edu/millennium/kaul.pdf> (last visited on 28-05-10) at 4 (Hereinafter Kaul, *GPGs in Multi Actor World*).

³ See Inge Kaul et al., *Why Do Global Public Goods Matter Today?*, in, PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION at 1, 1-5 (Inge Kaul et al. eds., 2003) [Hereinafter PROVIDING GPGs].

⁴ See Inge Kaul and Ronald U. Mendoza, *Advancing the Concept of Public Goods ?*, in, PROVIDING GPGs, *supra* note 3, at 78, 80-81.

⁵ *Id.*

Hence, according to Morrissey, the best way to define a GPG is as a utility, bestowing some kind of benefit which is, in principle, available to everyone across the globe.⁶

B. TRIPS as a Global Public Good

To establish the basic premise of this essay, we have to place TRIPS among the class of GPGs. For this purpose, TRIPS will first be analysed as an international legal regime and, afterwards, the concerns will be addressed about the benefits of the legal regime established by TRIPS.

(i) International Legal Regimes as GPGs: TRIPS included

Exponential rise in interaction and interdependence among states has led to the necessity of formulating some commonly accepted norms, rules and standards, with the aim of enhancing cooperation and reducing conflicts. International legal regimes which establish these global standards are usually considered to have a 'crucial public good component'.⁷

From this point of view, TRIPS, by establishing minimum standards on IP protection, and also as part of a wider multilateral trade regime, displays such properties which indicate it being a GPG.⁸ First of all, it creates the widest international intellectual property regime owing to its extensive membership, which includes all the WTO members, making it truly multilateral and global in nature. The non-excludability feature is a corollary following this wide membership, in the sense that once a nation joins TRIPS, it cannot, in principle, be excluded from the benefits of the global IP regime under it. Again, it is also non-rival in consumption, implying that participation of any new members does not lead to a reduction in the benefits available to existing ones.⁹

⁶ See Oliver Morrissey et al., *Defining International Public Goods: Conceptual Issues*, in INTERNATIONAL PUBLIC GOODS IN INTERNATIONAL PUBLIC GOODS: INCENTIVES, MEASUREMENT, AND FINANCING at 31, 35 (Marco Ferroni & Ashoka Mody eds., 2002).

⁷ See John O. McGinnis and Ilya Somin, *Should International Law be Part of Our Law?*, 59 STAN. L. REV. 1175, 1237 (2007).

⁸ See Kaul and Mendoza, *supra* note 4, at 98.

⁹ See Ronald U. Mendoza, *The Multilateral Trade Regime: A Global Public Good For All?*, in, PROVIDING GPGs, *supra* note 3, at 455, 460.

(ii) Is TRIPS a global benefit in real sense?

While analysing TRIPS vis-à-vis the GPG approach, neither the question of non-excludability nor that of non-rivalry is as contentious as the question of whether TRIPS is, indeed, a public *good* (i.e. whether it generates some kind of utility), especially for poorer countries. TRIPS reflects the bitter conflict between the interests of the developed and developing countries and the persistent efforts of the former to maintain their dominance over the latter, which are perceived as nothing more than markets for selling products.¹⁰ Further, there hardly appears to be much substantial correlation between greater IPR protection and potential benefits, like increased FDI, technology transfer, and so on.¹¹

Theoretically, the benefits arising out of a GPG must be completely global, in practice it is not so.¹² Public benefit does not imply that every member of the relevant public actually derives a ‘measurable benefit’, or the same level of utility.¹³ Hence, the guiding principle here is that benefits should theoretically be *available* to all, even if some users do not benefit as much as others. Supporting the idea that TRIPS makes benefits available to *all* its members, one can refer to pro-South provisions of the Agreement, like Arts 7 and 8, dealing with object and principles, which, in the words of Yu, ‘may provide less-developed countries with important tools for restoring the balance of the international intellectual property system’,¹⁴ along with several other flexible provisions¹⁵ such as those on compulsory licensing,¹⁶ parallel

¹⁰ See, Scott Holwick, *Developing Nations and the Agreement on Trade-Related Aspects of Intellectual Property Rights*, 11 COLO. J. INT’L ENVTL. L. & POL’Y 49, 57 (2009).

¹¹ Charles T. Collins-Chase, *The Case Against TRIPS-Plus Protection in Developing Countries Facing AIDS Epidemics*, 29 U. PA. J. INT’L L. 763, 781-83 (2008).

¹² See Morrissey *supra* note 6, at 34.

¹³ See Morrissey *supra* note 6, at 34.

¹⁴ See Peter K. Yu, *supra* note 1, at 982.

¹⁵ See Carlos Correa, INTEGRATING PUBLIC HEALTH CONCERNS INTO PATENT LEGISLATION IN DEVELOPING COUNTRIES 65-79, 91-102 (South Centre, 2000) www.southcentre.org/publications/publichealth/publichealth.pdf.

¹⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C, Marrakesh Agreement Establishing the World Trade Organization (opened for signature on 15 April 1994, came into effect on 1 January 1995) 1869 UNTS 299 [Hereinafter TRIPS] (March 15, 2010), http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm, see Art. 31.

importation,¹⁷ experimental use exception¹⁸ and developments like the *Doha Declaration on the TRIPS Agreement and Public Health*.¹⁹ Moreover, some scholars, like Reichman, are of the view that ‘the medium and long term effects of the IP regime set up by TRIPS may ‘boomerang’ against the developed countries leading to a more equitable position for developing countries’.²⁰

III. TRIPS-PLUS FTAs

Recently, it has become more common for developed countries, most prominently the U.S., to enter into Free Trade Agreements (FTAs) with developing countries, which contain IP protection that is more stringent than the minimum standards prescribed in the TRIPS Agreement, thus known as TRIPS-plus FTAs. This has emerged as an important tool for developed countries in the wake of stronger resistance put forward collectively by developing countries in the multilateral set-up.²¹ In this sense, the TRIPS agreement becomes a ‘floor rather than the ceiling’²² as far as global IP norms and standards are concerned. But these TRIPS-plus FTAs do not only raise the level of IP protection, but also restrict the use of TRIPS’ flexibilities.²³

A. TRIPS-Plus FTAs: A closer look

Concerns of public health, due to the higher patent protection, are the most pressing in the TRIPS-plus FTAs debate. As an illustration, FTAs concluded by the U.S with developing countries like Chile, South African

¹⁷ *Ibid.*, Art. 8.1.

¹⁸ *Supra* note 16, Art. 30.

¹⁹ World Trade Organization, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002).

²⁰ Jerome H. Reichman, *Intellectual Property In The Twenty-First Century: Will The Developing Countries Lead Or Follow?*, 46 HOUS. L. REV. 1115, 1119-20 (2009).

²¹ Collins-Chase, *supra* note 11, at 780.

²² Susy Frankel, *Challenging TRIPS-Plus Agreements: The Potential Utility Of Non-Violation Disputes*, 12 J. INT’L ECON. L. 1023, 1024 (2009).

²³ See Peter Drahos, *BITs and BIPs: Bilateralism in Intellectual Property*, 4 J. World Intell. Prop. 791, 793 (2001).

and Central American States contain TRIPS-plus provisions, like extended protection by longer patent terms, a wider range of patentable subject matter and, most importantly, limitations on TRIPS flexibilities like those on compulsory licensing and parallel importation.²⁴ These flexibilities in the TRIPS Agreement are crucial from the developing nations' perspective, most remarkably those battling with epidemic diseases such as HIV/AIDS and facing the problem of access to life-saving drugs. Narrowing policy options in these areas leave such nations with hardly any choice or strategy to combat similar threats to human health. The negative impact of such FTAs can even be seen in countries like Australia and Jordan, who have TRIPS-Plus FTAs with the U.S., resulting in a two-year delay in release of generic versions of patented drugs, rise in drug prices and harm to local production.²⁵

B. Impact on TRIPS

Considering sovereign states act in the international arena as private actors, always following policies which are conducive and in consonance with their national interests, the impact of such an approach is definitely a matter of concern. As there is no central agency to govern and supervise the conduct of sovereign states, keeping the interests of all in perspective, there is always the need for a minimum standard of international cooperation to arrive at some common ground.²⁶ Though some may debate it, TRIPS can be viewed as such a common ground. Raising the level of IP protection through these FTAs disrupts whatever little balance we can make out of TRIPS. The main purpose of TRIPS may be to establish minimum standards of IP protection, but the provisions like the flexibilities are an integral part of it, giving space to nations to exercise their autonomy by moulding IP protection to suit their specific needs.

Moreover, the problem is not just limited to disequilibrium caused in respect to the legal utility and benefits of the TRIPS Agreement, it is deeper

²⁴ See Assafa Endeshaw, *Free Trade Agreements as Surrogates for TRIPS-Plus*, 28(7) E.I.P.R. 374-380, 384 (2006).

²⁵ See Collins-Chase, *supra* note 11, at 780.

²⁶ See Kaul, *GPGs in Multi Actor World*, *supra* note 2, at 7.

and much more sinister. TRIPS-plus FTAs restrict the availability of other public goods like reduction of epidemic diseases and overall improvement in human health, which are much more essential than protection of intellectual capital. In this sense, as Chon puts, TRIPS can be seen as a global intermediary good which leads to provision of several public goods.²⁷

IV. TACKLING THE TRIPS-PLUS PROBLEM

The solution to the problem posed by TRIPS-plus FTAs is not straightforward. Objectively speaking, these FTAs are WTO-compliant, as even the TRIPS Agreement provides that enhanced levels of IP protection may be negotiated and enforced between the member nations.²⁸ Moreover, the weak bargaining position of developing countries, in a bilateral setting, which is a strong incentive for developed countries to resort to TRIPS-plus FTAs, makes the prospect of renegotiations or other such efforts improbable.

In such a situation, analyzing the problem from a GPG approach seems to offer some plausible solutions. The approach offers a wider perspective which is not limited to TRIPS as a tool for establishing a global IP regime. Instead, it helps us to view the regime set up by TRIPS in relation to other key policy concerns. Accordingly, the TRIPS-plus obligations which are being thrust upon developing countries through FTAs can be seen as “public bads” which, apart from affecting the functioning of TRIPS, are also becoming big obstacles in the ability of several countries to provide for other more important public goods such as control of epidemic diseases and a high level of public health.

The strategy to be adopted to combat this issue is twofold. In the short term, the focus should be on addressing those issues which are more pressing, rather than on restoring the balance of the global IP regime. Accordingly, problems like the access to essential medicines are to be seen independently

²⁷ See Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2833 (2006).

²⁸ TRIPS, *supra* note 16, Art. 1.

from the TRIPS-plus debate. It must be understood that such problems can be best tackled if efforts are made in alternative fora of international cooperation which are much more suited and are sympathetic towards such concerns, like specialized agencies of the United Nations such as WHO and other civil society groups.

On other hand, the ambitious goal of achieving an equitable stand in the global IP regime can be best pursued through collective efforts in the multilateral set up. This suggestion seems easier said than done. However, keeping in mind the recent developments such as the Doha Declaration²⁹ and the 2005 TRIPS Amendment,³⁰ there is some room for hope.

²⁹ World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

³⁰ World Trade Organization, Amendment of TRIPS Agreement, Decision of 6 December 2005, WT/L/641, (June 5, 2010) http://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm.