LEGAL PERSPECTIVE OF TRANSFER OF TECHNOLOGY
AND DEVELOPMENT IN DEVELOPING COUNTRIES

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Abstract

This paper is based on research in the areas of the intellectual property (IP) law and
the international trade law. The research examines whether the TRIPS Agreement promotes
transfer and technology (TT) and development in developing countries. The research is mainly
library research, which is conducted at the Faculty of Law, Monash University, Australia. The
completion of this paper is using a number of selected books and international journals, case
law, documents of international organization, and international agreements.

Valuable findings were shown by the research that in most cases, IP system, which is
introduced by the TRIPS Agreement, would make technologies more expensive. From this point
of view, the TRIPS Agreement may not promote TT and development in developing countri,
IP would promote innovation, but does not simultaneously promote TT and development. As
a strong relationship between technology and economic development in the issue of TT, there is
a need for rethinking the TRIPS Agreement and a balancing between producers and users of
IP. When developing countries were obliged to strengthen IP protection, TT would have been
implemented as an instrument of balancing the efforts of developed countries to give more access
to technology and the rights of technology which is promised by the TRIPS Agreement, despite
complex TT agreements. Accordingly, the TRIPS Agreement should be able to eliminate distortion
in international trade relating to IP. A reform proposal on the TRIPS Agreement is offered and
several recommendations are also given to governments and international organization in order
to scrutinize current system of IP rights protection-international trade interface and to establish
a set of guidelines of behaviour on TT in favour of developing countries.

1. Introduction

The signing of the Agreement on Trade Related Aspects of Intellectual Property
Rights (the TRIPS Agreement) is a major landmark in the development of international
law in the field of intellectual property (IP). With regards to the implementation of the
TRIPS Agreement, negotiations between developed and developing countries have
been widely conducted. The negotiations are often bitter for developing countries, which
are mostly "net exporters" of subject matters which are legally protected by the IP regime

1 This paper was submitted and examined as research paper in the subject of Government Regulation of International
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2 J.B., Lecturer of Business Law in the Faculty of Law, Gadjah Mada University. The writer wishes to thank to
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that is captured by the interests of the producers in developed countries. 

Accordingly, the TRIPs Agreement is facing a crisis of legitimacy. In the six years since it came into force, there has been ever-increasing evidence of social, environmental and economic problems caused by its implementation. Yet, little, if any, of the TRIPs Agreement promised benefits of the transfer of technology (TT), innovation and increased foreign direct investment (FDI) has materialised. However, there are perfectly legitimate economic resistions which may cause a foreign patentee to wait to produce patented goods, or to introduce a patented process, in his own or some other industrialised countries, rather than in developing countries, and to export the product to the developing countries rather than produce the goods there.

This paper examines whether the TRIPs Agreement promotes TT and development in developing countries. It also discusses issues related to the TT in developing countries mainly from a legal perspective and recommends that the TRIPs Agreement be reviewed in order to create a fairer system for developing countries. This paper analyses various agreements related to TT that need to be reformed.

II. Emerging Legal Issues of the TRIPs Agreement on Transfer of Technology and Development

The main issue of TT in developing countries is an implementation issue relating to the lack of actual implementation of Articles 62.6 and 67 of the TRIPs Agreement which are about incentives for TT and technical assistance to developing countries.

While developing countries have been required to expand and enhance their TT regimes, very little is contained in the World Trade Organization (the WTO) agreements to effectively facilitate and promote access to technology. The distribution of the capabilities to generate science and technology gives rise, in fact, to a most dramatic North-South imbalance.

Contrary to the so-called free trade and trade liberalisation principles of the WTO, the TRIPs Agreement is being used as a protectionist instrument to promote corporate monopolies over technologies. Some of the world’s largest industries in developed countries (pharmaceutical, agriculture-food, computer software, and entertainment) depend on effective protection of their IP to survive. Through the TRIPs Agreement, large corporations use IP to protect their markets, and to prevent competition. Excessively high levels of IP protection required by the TRIPs Agreement have shifted the balance away from the public interest, towards the monopolistic privileges of IP holders. This undermines sustainable development objectives, including eradicating poverty, meeting public health needs, conserving biodiversity, protecting the environment and the realisation of economic, social and cultural rights.

In developing countries, access to technology is difficult to obtain from commercial sources. In fact, Article 31 of the TRIPs Agreement contains a set of conditions for the granting of compulsory licenses. This Article should be considered in the light of the Preamble, and Articles 7 and 8 of the TRIPs Agreement. These Articles provide grounds for the granting of compulsory licenses
to implement TT in developing countries. A developing country can be granted a compulsory license if (1) a corporation refuses to deal; or (2) there is an emergency and extreme urgency (Article 8(1); 3) a corporation engages in anti-competitive practices (Article 8(2); 4) the use of the technology is non-commercial purposes; and (5) dependent patents (Article 31 (1)). However, few developing countries are able to use these grounds to implement TT in their countries due to developing countries having limited power to bargain, unclear interpretation of ‘emergency and extreme urgency’, and because of economic and profit-oriented reasons that are prevailing or dominant so that companies in developed countries are not implementing TT in developing countries. Developing countries only get second priority in their right to have adequate access to technology.

It is believed that the IP protection is not an end in itself. The objectives of technological innovation and the TT (Article 7) should place IP protection in the context of the public interest of social and economic welfare. Furthermore, the TRIPS Agreement also acknowledges the right of the WTO members to adopt measures for protecting overreaching public policy objectives, such as public health and nutrition, and socio-economic and technological development, and to prevent abuse of IP, and anti-competitive practices (Article 6). Yet, these fundamental objectives and principles have been ignored by certain developed countries in their interpretation and implementation of the TRIPS Agreement.

Attempts by these developed countries to force developing countries to adopt such flawed interpretations will only perpetuate the crisis that the TRIPS Agreement is already facing.

TT has had an important role in industrialisation and TT was undertaken by firms investing in new technologies used by others. However, producers in developing countries will find it difficult or even impossible to copy technology which is IP-protected. Domestic firms that wish to make use of the technology will have to obtain permission from the IP holders and pay expensive royalties. Many firms in developing countries may not be able to afford the fees and those that can will find that the high cost reduces their ability to be competitive. Thus, the TRIPS Agreement punishes innovators in the way of developing countries’ efforts to upgrade their technology levels and development.

There are the principle objectives of TT legislation applied to developing countries. These are: to increase the bargaining power of local purchasers of technology and the information available to local parties as to possible sources of technology; to improve the quality and local assimilation of TT; and the balance of payments; to protect local innovation and technology; to control foreign exchange operations and the nature of imported technology; to prevent tax avoidance; to limit IP protection; and to regulate foreign investments. TT and developments ensure the transfer and creation of technology components: technology capabilities; and

Processes to enforce intellectual property rights do not themselves become barriers to legitimate trade.”

Article 7 of the TRIPS: “The provisions and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to mutual advantage of producers and users of technological knowledge and to a manner conducive to social and economic welfare, and the balance of rights and obligations.”


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innovation triangle; technology infrastructure; and a technology climate. IP is included in the third element, as IP protection is believed to stimulate innovation and inventive products resulting from research and development (R&D).

These objectives and elements are related to legal aspects of TT which involve TT's contract and barriers to the sales process (infringement and interferences, and the grey market and parallel importation). Thus, the legal instrument of TT is important since TT is a major way to enforce IP rights possessed by IP holders. Without TT, IP holders benefit only if IP holders give no compensation to developing countries which are mostly recipients of technology and IPs protected subject matters.

Therefore, a fundamental rethinking of the TRIPs Agreement is required. The WTO members initiated a process of reviewing and reforming the TRIPs Agreement at the Doha Ministerial Conference. It should be reformed supposedly to benefit developing countries as in practice developing countries are finding that developed countries are not fulfilling their obligations to assist TT. As a result, TT and development are more difficult for developing countries.

III. Intellectual Property Protection, Transfer of Technology, and Development

In the Middle Ages in Europe, the main objective for granting patents protection was to encourage industrial development. However, some developed countries which are home of some of the most innovative companies such as France, Germany, Italy, Japan, Sweden and Switzerland, resisted providing patents until their industries had reached a certain degree of development. During the 19th century, the U.S. refused to protect IP as IP would prevent its useful and economic development. The U.K., as the time the world leader in technology, claimed the U.S. was not providing adequate IP protection. Those complaints had very little effect since the U.S. companies wanted freedom to imitate British innovations and put them on the market. This process is being repeated in a conflict between developing and developed countries.

IP protection involves recognition of the moral obligations of society to reward creativity and to provide an incentive for innovation and innovation. Developed countries prompted the negotiation of the TRIPs Agreement based on the argument that an expanded and strengthened protection of IP would bring about increased flows of FDI and TT to developing countries and that changes in IP would also stimulate local innovation. However, particular attention has been paid to the effects of the TRIPs Agreement on the TT. The North-South technological gap has continued to grow since the adoption of the TRIPs Agreement. Fears that the enhanced protection given to IP will not effectively promote the development process, but instead retard the access to technology, have been raised by many developing countries. A similar view has been expressed by Baron who

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3 Michael Blakney, 1989, Legal Aspects of the Transfer of Technology to Developing Countries, ESC Publishing Ltd., Oxford, p67.
5 Blakney, n.d., (On Cq., p.67).
has noted "the risk that IP slows the movement of technological capability to developing nations suggests that harmonization efforts might most wisely consider one common standard for developed nations and a different one for developing nations." Hanson argues that governments need to coordinate legal and policy actions and measures to reduce international differences in such actions.  

Further, the role of patenting in the promotion of innovation was sector specific and differed between countries. These differences depend to a large extent on the commercial usefulness of the relevant invention. Thus, the general significance of IP protection as an incentive for innovation may be overstated since it is the trans-national firms which will have the administrative and legal personnel able to engage in the complicated and protracted business of securing patent protection and which are aware of the strategic possibilities in patenting. Another reason for opposing the above argument is the expensive costs of the enforcement of IP so that developing countries would not be able to afford them, although there are a number of small and medium enterprises attempting to do so. However, there are only a few companies that will enforce IP because of this economic reason.

IV. Problems of Implementing Transfer of Technology in Developing Countries

Global IP is expected to increase innovation and trade in high technology goods, in addition to reducing costs of transferring proprietary information across borders. Despite these benefits, a 'one size fits all' model raises fundamental concerns for the well being of developing countries and, indeed, for small and medium-sized firms and researchers everywhere. Incentives for innovation must be balanced against the need for diffusion of new technologies, while measures to overcome market failure should not jeopardize the public domain or unduly hinder healthy competition. Even stronger and globally more comprehensive IP may turn out to impede the promotion of such public good as sustainable development, widespread health care, TT, and broad-based advances in science and education. They may also create barriers to entry and other anticompetitive effects.

Interpretation of a particular point in limiting IP protection is unclear. The TRIPs Agreement supports protection of IP which is limited in time. There is a question as to whether there is a limitation in the principle objective of TT (above) and whether it is meant to be identified as a limitation in time for the protection of IP. It is argued that it supposes not only a limitation of time, but also a limitation of subject matter if IP protection occurs. IP is an acceptable obstacle of free trade. The drive to harmonize IP norms has been pushed forward in the name of expanding private rights with insufficient attention given to the balance of public and private interests that traditionally underlies both IP and the national systems of innovation they support. As the forward momentum of international trade negotiations heads toward an integrated global market, more light must be shed on the public processes and inputs that will be indispensable to any trans-national system of innovation aiming to promote technical progress, economic growth and welfare for all participants. This is not merely a matter of vital interest to developing countries; it also affects the continuing ability of firms in developed countries to innovate in a more protective global environment. Thus, a study to analyse
the complex conceptual foundations of the new IP regime based on both legal and economic reasoning is needed besides creating ways and means to minimize social costs and enhance the benefits that could ensue from the TRIPS Agreement and other international agreements by deliberately taking the promotion of public goods into account. The TRIPS Agreement lacks the consideration of different levels of development and as a result, the structure of protective rights is determined by the level of technological development of different levels of IP protection, whereas, the structure of protective rights depend on the state of development of the relevant national economy.2

The beginning of the Uruguay Round of negotiations in 1986 focused on the field of trade-related aspects of IP and was intended to reduce the distortions and restrictions on international commerce resulting from the unregulated trade in infringing goods, while taking into account the need for the development of an effective and reasonable protection of IP.3 Since that time, developing countries had long applied the infant-industry argument that a competitive industry needed to be developed by means of the cheap imitation of foreign products according to the Japanese model, which had been the model for many industrialized countries.4 The developing countries considered that the TRIPS Agreement in the frame of the General Agreement on Tariffs and Trade (GATT) is a strategic move by the developed countries to conquer an international market. Enterprises innovate through both acquisition (TT) and self-generation (technology development) to enhance their market competitiveness. Proper management of technological change, particularly at the production level, has become an all-important factor in development. However, to improve technology management, the prevailing situation must be properly assessed. Furthermore, in some developing countries, the concept of competition even does not exist. These countries tend to develop one solid and reliable company which usually holds monopoly rights over particular products or services. In the absence of national regulations of TT, the TRIPS Agreement (Article 3) should depend on a fair exercise of patent rights regarding TT.

V. Reform Proposal on the TRIPS Agreement

It is important to focus attention on the bigger picture that is emerging from the upward harmonization of international IP. One of the important objectives of the WTO Agreement, as mentioned in its preamble, is the need for positive efforts designed to ensure that developing countries secure a share in the growth in international trade commensurate with the needs of their economic development. However, the TRIPS Agreement in its current form might tempt IPR holders to charge exorbitant and unreasonably high prices for the transfer or dissemination of technologies held through such IP. It is important, therefore, to build disciplines for effective TT at fair and reasonable costs to developing countries so as to harmonize the objectives of the WTO Agreement and the TRIPS Agreement.

The foreign patentee may be willing to start production in the developing countries...
through a controlled subsidy9 (strategic trade policy with regard to R&D subsidies). Licensing the patent by others may require working of the patent by the patentee in the developing countries. Licensing is one way of the licensor’s countries benefits from the licensor’s exploitation of technological development in the licensor’s country. Successful exploitation of technological processes requires more than just the right to use the IP in which those processes are embodied. It also requires the investment of process, raw materials and the transport infrastructure to convey them to the place of technological process.25 An integrated sequence of commercial transactions heavily favours the technology provided in the developing country. The imbalanced (uneven balance) bargaining power between parties is often extreme as well as providing almost everything the technology acquired needs. The technology provider may also provide the acquirer in the developing country with capital credit to enable it to pay for the rest of the package.28

Many corporations in developed countries are troubled by the provisions for TT, which essentially mean surrendering the herefore exclusive patent and trade secrets of advanced technology to competitors in developing countries, which is provided for in the TRIPS Agreement. It was argued that developed countries have been trying to maintain their dominant positions in the world economic order by encouraging the development of new technological innovation. Meanwhile, some developing countries have been adopting some of these new technological innovations without reimbursement to the developed countries. Developed countries proposed the strengthening of IP under the Uruguay Round of GATT that led to the adoption of the TRIPS Agreement as it offered a more comprehensive and higher level of protection for IP and that the provisions set forth in the TRIPS Agreement hinder their economic growth because IP serve to stop the TT. Several studies have shown that higher levels of IP protection do not necessarily result in preventing the TT. These studies have discovered that strengthening protection for IP result in positive economic development and growth. In a report entitled The TRIPS Agreement and the Developing Countries, commissioned by the World Intellectual Property Organization (WIPO), the United Nations Conference on Trade and Development (UNCTAD) outlines the financial and other implications of the TRIPS Agreement on developing countries. The objective of the report is to assist developing countries in collaboration with the WIPO and the WTO to identify opportunities provided by the TRIPS Agreement, including attracting investment and new technologies. The report finds that by strengthening protection on the IP, there may be a positive impact on developing countries through increases in local innovation, FDI, and TT. The report notes that depending on the country’s economy, technological development, and existing system of protection for IP, the impact of the TRIPS Agreement will differ significantly among countries. Newly industrialized countries with strong

industrial and technological bases will most likely benefit from the TRIPs Agreement. Countries with a rudimentary technological basis may benefit from TT, but little local innovation may result in a financial impact. However, innovations that are adequately financed and intelligently marketed are likely to circumvent any incoherences created by intellectual property law. Consequently, tension over the benefits and burdens of the TRIPs Agreement between developed and developing countries will remain until member nations have worked through the provisions and requirements of the TRIPs Agreement and a new international equilibrium has been reached.

A partnership with enterprises in the developing countries would assume different forms depending on the technical nature of the partnership. For example, some of the possibilities that would lead to TT in developing countries would include: joint contracting, association of groups of enterprises, the creation of agencies for enterprises, the creation of decentralized services by company, and the creation of a company held jointly by developed and developing countries' partners. By creating a flexible strategy (case by case assessment), it is likely to facilitate the process of combining TT in developing countries. The partnership will, therefore, increase their prospects in this administrative challenge to be able to create the right set-up, both from the point of view of technical problems to overcome as well as of the legal and administrative aspects to be settled through assignment or licensing of IP or transfer of legal rights of IP avoids little unless the recipient has the technology capacity to put industrial processes into operation, traditional methods of TT (dislosure of R&D results, licensing, franchising, information exchange, training, joint ventures, support of R&D). Regarding this, developed countries' assistance to developing countries is important to establish adequate technology capacity and to direct TT as one form of compensation.

Therefore, it is important to develop a special provision in the TRIPs Agreement to ensure that the objective of fostering TT and technology dissemination (Article 7) is effectively realized. The development of a multifaceted and comprehensive approach is needed because of the complexity of this issue. Also, it is needed to enhance technology flows to developing countries through a revision of Article 27.1 (working obligation). Article 31(b) (broader application of refusal to deal) is autonomous ground for compulsory licensing, and Article 46 (specification of illegal restrictive business practices in voluntary licenses). These revisions may be submitted to other WTO agreements, such as General Agreement on Trade in Services (GATS), and Subsidies and Countervailing Measures (SCM) Agreement for subsidies for TT.

VI. Recommendations

The TRIPs Council should undertake the following recommendations:

* To make a fundamental review and reform of the TRIPs Agreement in order to
"redress imbalance and inequities" of the TRIPs Agreement and to prevent further negative effects of its implementation.90

- To implement Article 7 and 8 of the TRIPs Agreement which provide for TT on fair and mutually advantageous terms;91

- To provide more responsiveness in the TRIPs Agreement to the development and welfare goals of the TRIPs Agreement's participants (developed countries, developing countries, and members of civil society) through continuous dialogue in order to approach the IP standards setting of TT and development in a more efficient way;92

- Legitimate technological objectives of developing countries should be given due consideration in IP negotiations relating to TT; and93

- To find approaches that are applicable across the board, so as to be able to reform the TRIPs Agreement following dynamic changes of its members' interests.94

The U.S. and the E.U. (and other developed countries) should undertake:

- To call for the U.S. and the E.U., as they are the dominating parties in the TRIPs Agreement, to transcend their IP and shift the WTO's processes on IP in the direction of improving welfare gains for all countries,95 to implement package TT,96 and to show respect for IP laws in developing countries regarding TT. Developing countries should undertake:

- To maintain TT law and administration by setting legal and administrative parameters within which TT must take place, planning of technical innovation,97 engineering management of R&D,98 science and technology policy,99 patent strategy and licensing model,100 national and regional systems of innovation in which several countries in a region agree by treaty on the protective terms that they will impose on the importation of technology (e.g. Andean Code 1969); and

- To strengthen international co-operation in a spirit of partnership.101

All of the WTO members should maintain a responsibility:

- To keep eye on the trade-IP interface and the implications of IP standards, so it would not be used to play "beggar thy neighbour" trade games;102

- To urge the delivery of the Code of Conduct on Transfer of Technology prepared by the United-Nations Conference on Trade and Development (UNCUTAD) since 1974 and the Model Law For Developing Countries on Inventions prepared by the

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91 Christiana Rugman, October 5, 1999, Change Gupta in TRIPs, Geneva, at http://www.terre&m.org Gupta.htm
92 Peter Drahos, "Negotiating Intellectual Property Rights: Between Common and Dialogue", in Dahoun and Maysire
93 On p. 379
96 Manu Chandy, "Innovation, Management and Diffusion of Technology: A Survey of Literature", in Technology Transfer in the Developing Countries, 1990, MacMillan Press Ltd., p159
97 Assistance Projects, "Science and Technology Policy in South Africa: A System in Transition", in Carlos Monté

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World Intellectual Property Organization \(\text{WIPO}\) in 1979-1980. These set of guidelines or standards of behaviour on TT in developing countries should be legally binding in favour of developing countries.

VII. Conclusion

As technology and economic development are inseparably linked\(^\text{46}\) in the issue of TT, there is a need for re-thinking the TRIPS Agreement in the WTO and a balancing between producers and users of IP. As IP negotiations have been influenced by industrial lobby groups, these negotiations are being driven by concerns for trade liberalization and international investment. When developing countries were obliged to strengthen IP protection, TT should have been implemented as a means of balancing the efforts of developed countries to give more access to technology and the rights of technology which is promised by the TRIPS Agreement, despite complex TT agreements.

Thus, the TRIPS Agreement should be able to eliminate distortion in international trade relating to TT.\(^\text{47}\)

As a legal document, the TRIPS Agreement has not directly affected proper implementation of TT in the developing countries since economic concerns have been more significantly observed by companies or licensors to currently implement TT. The inclusion of TT in the TRIPS Agreement as an integrated part of the TRIPS Agreement is not enough to make companies or licensors transfer their technologies. There is a call for companies in developing countries to be given increased access to technology by invoking TT and to promote technological diffusion\(^\text{48}\) in those countries.

To maintain development, developing countries need cheap technologies. However, in most cases, IP which is introduced by the TRIPS Agreement would make technologies more expensive. From this point of view, the TRIPS Agreement may not promote TT and development to developing countries. IP would promote innovation, but does not simultaneously promote TT and development. The TRIPS Agreement has not been designed to deal with levels of technological differences. It was designed to protect technologies at such levels of development as are achieved by developed countries. It is not designed to develop the technology in countries which have insufficient technological infrastructure as commonly happens in developing countries.

In most international agreements including the TRIPS agreement, all parties 'won' and 'lost' important issues. However, developing countries could not lose more. As there are developing countries with different interests, different levels of industrial and inventive activities, availability of skills, and level of per capita income,\(^\text{49}\) there should be serious attempts to arrange co-operation between developing and developed countries to work on gaps between them in order to use IP as a tool for creating fair access to technology which is a key to the progress of mankind.


\(^{47}\) ibid, p.177

\(^{48}\) Cables M. Coons, "Innovation and Diffusion of Technology", in Dobok and Mayne n.2, Op.Cit., p.60

\(^{49}\) Waid, Op.Cit., p.60

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