

Rebalancing the TRIPS Agreement and Strengthening Enforcement for Development

By Ambassador Sun Zhenyu



The TRIPS Agreement is the outcome of the Uruguay Round of Negotiations which strengthens greatly the disciplines for IPR protection. The importance of protection of IPR and promotion of technological innovation is generally recognized, particularly as the world is facing challenges of rising

food and energy prices, climate change, poverty reduction as well as financial turbulence and economic downturn which require tremendous efforts in the fields of innovation and creativeness. However, after years' implementation of the TRIPS Agreement, continued complaints have been heard, particularly from many developing countries. During the Doha Round this has been an implementation issue. There is also a fundamental question about where is the right place for the discussion of intellectual property rights. Many developing countries and NGOs believe that the IPR issue should have been dealt with by WIPO rather than the WTO or other international organizations.

Besides, the TRIPS Agreement in the WTO is viewed by many experts as a zero-sum game which greatly favours the Developed Members. According to a UNDP report, developed countries hold about 97% of all patents worldwide. There is no doubt that the developed countries are the biggest beneficiaries of the TRIPS Agreement. For example, in 2004, the United States received US\$52.6 billion in royalties and license fees from their patents, which accounts for 45% of the world's total. At the same time the developing countries paid heavily for their patents. For instance, China pays more than \$4 billion each year for the patents alone. In some cases, for example DVD machines, the Chinese companies have to pay more than \$30 as royalty fees for each machine. As a result, the profit margin for each one is no more than 2 dollars for the manufacturers. Royalty fees payment has been the 3rd biggest contributor to China's long-standing service trade deficits. I am not saying that the right holders should not be paid for their patents. They do have the legitimate right to be paid, but by how much? Where is the right balance for rights and obligations between right-holders and licensees?

Although the structures and the provisions of the TRIPS Agreement are not balanced, there are some articles which do provide some chances and flexibilities for improvement. For instance, Article 8.2 of the TRIPS Agreement says, "appropriate measures may be needed to prevent the abuse of intellectual property rights by right holders", which is something we may study carefully. A case in point is the issue of the TRIPS and Public Health negotiations in the Doha Round which led to the amendment of the relevant provisions in article 31 of the TRIPS Agreement. When it is the issue between commercial interests and life and death for millions of poor people, of course the latter trumps the former.

On top of that, what concrete measures should be developed to prevent practices which may unreasonably restrain trade or adversely affect the international transfer of technology, as set out in Article 8.2, also deserve some consideration.

Concept of Enforcement and the Priorities for Future Work

As far as the issue of enforcement is concerned, there are already quite comprehensive provisions in the TRIPS Agreement. For example, Article 41 of the TRIPS Agreement defines clearly the general obligations. "Members shall ensure that enforcement proceduresto permit effective action against any act of infringement of intellectual property rights". Article 45 says the judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury. Article 46 provides other remedies for infringements. Section 4 provides special requirements related to border measures, which are very concrete and specific provisions. On top of that, Article 61 provides criminal procedures and penalties for wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available also include imprisonment or monetary fines.

It is fair to say that the current TRIPS Agreement has already provided sufficient measures for enforcement of the IPR protection. All we need to do is to ensure the implementation of the current TRIPS Agreement. Any efforts to seek WTO-plus provisions at this stage will not be well-received by many developing countries.

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As the chapeau of the TRIPS Agreement has rightly pointed out, the intellectual property rights are private rights. Article 1 provides that “Members shall be free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice”. It also stipulates clearly that Members shall not be obliged to implement in their law more extensive protection than is required by the Agreement. IPR should be protected on the equal basis as other rights, including tangible property rights.

If we have a closer look at the concept of enforcement, it does have much broader meaning than some Members have interpreted. For example, Article 7 of the TRIPS Agreement sets the objectives to “contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations”. According to these objectives, the concept of enforcement should include not only protection of the IPR of the right-holders but also activities aiming at promoting social and economic welfare and providing balance of rights and obligations. In addition, Articles 66 and 67 provide specifically the requirements of promoting and encouraging technology transfer to LDCs and the obligations of Developed Members to provide technical and financial cooperation in favour of developing and LDC Members. Since the current rules for enforcement of these provisions are too vague, the priorities for the future work to strengthen the enforcement should fall in these areas. So far, there are no specific measures and provisions to make these best endeavour clauses to produce concrete results.

Policy Suggestions for Enforcement

In order to better implement the TRIPS Agreement and strengthen further the enforcement in a manner that is consistent with our development needs, I would like to make the following recommendations:

Firstly, we should formulate the most appropriate and adequate domestic intellectual property rights policies that are consistent with our own national development needs and interests. There are no “one size fits all” solutions for IPR enforcement. My first suggestion is simply “Do it my own way.” On the one hand we are in need of strengthening the creativeness, innovation, utilization, management and protection of intellectual property rights, so that we could develop our own technologies and capabilities. On the other hand, we should always adopt the most suitable policies that will benefit our people and economy and meet our development needs.

Secondly, it is important for the developed countries to provide efficient technical and financial cooperation in favour

of developing and least developed countries. This cooperation should include training of personnel and education to raise the awareness of the people to better understand the importance of protecting IPR. We also call upon developed countries to implement the obligations of transfer of technology.

Thirdly, we should promote a fair balance between protection of IPRs and other public and social interests. In this regard, enforcing intellectual property rights should not mean to deal with counterfeiting or infringement only, but should also include measures to ensure the protection of public health, to promote social welfare and to facilitate technological innovations. We would like to reiterate the right of developing countries to adopt measures necessary to protect public health and promote public interests.

Fourthly, we should make efforts to improve the current international IP system to achieve a more balanced and development-friendly enforcement arrangement. The proper solution to the TRIPS and CBD issue is one of the keys to striking a fair balance and to further strengthening the enforcement. The request for an amendment to the TRIPS Agreement to incorporate the principles of CBD is backed by more than 100 WTO Members, which is more than two thirds of all the Members of the Organization. The issue of CBD and traditional knowledge is reflected in the Development Agenda by the WIPO Assembly. Unless these issues are properly addressed, enforcement could not possibly become a priority for the developing countries.

Fifthly, here is a word of caution: do not try to force developing countries to increase the levels of IP protection based on standards of developed countries. We have seen some TRIPS-plus provisions in some recent FTA and RTA arrangements. While many developing countries are still struggling to implement the minimum standards of the TRIPS Agreement, these TRIPS-plus provisions may bring new and extra burden on them. There are also some dispute settlement cases in the WTO that bring more pressure on developing countries to undertake WTO-plus obligations on enforcement.

In conclusion, we strongly believe that the TRIPS Agreement should be improved and enforcement of IPR should take into full account development needs so that all countries, particularly developing countries, could benefit from it.

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