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CLIMATE CHANGE AND IPR IN INDIA

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ABSTRACT

Technological solutions are imperative for curbing the menaces of climate change. Thus, the development of technology and its transfer have become a crucial component in climate negotiations. Within this grandiose setup, intellectual property rights add a new dimension. It is the constant demand by 'not so rich nations' that IPRs should not become a hurdle in the transfer and allocation of climate technology. Being the third-largest emitter of greenhouse gases, India has been proactive in climate talks and now is ready to move ahead with clean energy development. However, for India, the obvious conundrum is about framing proper policies and legal rules that would enlarge the technology transfer scenario. Simultaneously, poverty alleviation and sustainable development have been a long-standing challenge for India. The challenge of climate change calls for out of the box thinking to find solutions that can make a difference. The IPR issues in technology transfer need to be tackled by a combination of policy measures, incentives and bringing in changes at the global IP regime under TRIPS.

The main objectives of my research are to understand the key economic and technical issues of climate change and international technology transfer, and critically discussing the constraints of the IPR system for technology transactions.

Keywords:

- IPR- Intellectual property rights
- TRIPS- Trade Related of Intellectual Property Rights
- NDCs- Nationally Determined Contributions
- IGCC- Integrated Gasification Combined Cycle
- UN- United Nations
- NGOs- Non-government organisations

- MNCs- Multinational Corporations
- WTO- World Trade Organization
- ACTA- Anti Counterfeiting Trade Agreement
- RTA- Regional Trade Agreement
- FTA- Foreign Trade Agreement
- European Union
- IPCC- UN Intergovernmental Panel on Climate Change
- FCCC- Framework Convention on Climate Change
- REDD+- Reducing emissions from deforestation and forest degradation in developing countries

1. Introduction

Nature has accepted human intervention to accomplish the developmental and nutritional needs of mankind. Thus, better living requires technological advancement in every field. Advanced technology is needed to generate enough food, sufficient housing, enhanced health services, and other public services. These needs are fundamental and indispensable for human beings to lead a dignified life. In consequence of it, no state can overlook the needs and the means to accomplish the same for the welfare of human beings too. The apparatus to lug away these crucial requirements may differ among nations depending upon the respective technological strength. In the progression of achieving rapid growth, countries are turning oblivious to the over-utilisation of natural possessions which has caused irreparable damage to the environment. Climate change is a multifarious problem which the whole world is confronting. It is getting warm day by day which is quite unequivocal which has threatened human life. This has compelled the global leaders to address the problem on urgent basis which has no more become territory-specific. Hence, it requires a comprehensive perspective in meeting challenges arising from global warming. Technology transfer from industrially advanced countries to developing and least developing nations is estimated as a sustainable answer to the growing problem. This now should be judged upon from the perspective of trade between the two advanced and advancing nations. However, now these two categories

of nations are working together to utilise polluted technology which ultimately contributes to the emission of greenhouse gases. Within this extravagant setup, the intellectual property rights (IPRs) add a new dimension. It is the invariable demand of 'not so rich nations' that IPR's should not become an obstacle for transfer and allocation of climate technology.

India which is the third-largest emitter of greenhouse gases has become practical regarding climate talks and is ready to promote clean energy development. While the United States under President Donald Trump has shown disinclination towards the Paris Agreement, India has sensibly recommended its commitments going under the Paris Climate Agreement.¹ However, for India, the most evident challenge is framing proper policies and legal rules but also the implementation of such policies and rules in the 'right' framework is particularly crucial both in securing socio-economic rights of suffering (Mostly poor and marginalized) classes and selecting 'right' option (presumable decisions based on scientific and technological understanding). India does not have a very heartening record when it comes to implementing environmental policies and laws. There have been conflicts between judiciary and executives or legislatures on the environmental issues which have been a recurrent theme over the last few decades. However, such conflicts are fairly very common in many parts of the world and India, these disagreements gulch deeply in sociopolitical differences. Climate change and its mitigation cover a large number of complex set-ups within which institutions of the country have to react in time. There are assumptions also which are mystifying as technological perils, and its benefits must be measured with caution. Although, there has been a universal accord now that IPRs are the essential drivers for innovation, how the environment can be benefitted still is unclear. In India, the IP regime is cloaked by a 'classic paradox'. On one hand, they intend to inspire innovation and originality and on the other, 'they have themselves safeguarded from innovation experimentation'². Also, poverty alleviation and sustainable development have been long-standing challenges for India. An effective implementation of the Paris accord and climate change action plans, visualised sufficiently in the Nationally Determined Contributions (NDCs), involve enormous financial

¹ Re- generations would be an immoral and criminal act", <https://www.nrdc.org/experts/india-leads-climate-actiontrump-withdraws-paris> (accessed on 26 September 2017).

² Basheer S, An IP policy with no innovation, The Hindu, 17 May 2016.

resource requirements.³Therefore, it has become important for India now to allocate its resources judiciously by not giving undue priority to any particular sector. This paper aims to assess India's constant desire, determination & enigma in mitigating climate change problem. As the country with its growing population is slowly but surely moving towards the point of no return, robust decision-making in terms of developing and disseminating climate-friendly technology is vital. It is certainly a very big challenge for India to strike an accurate balance between its IPR regime and its domestic and foreign trade policies for further enhancing the green technology transfer process.

2. Recognition of Climatic Change

Across the world, there has been no method adopted to evaluate whether technology is climate-friendly or not. In general, technology which results in the reduction of 'greenhouse gases' emissions and helps in an increase in the power, effectiveness can be considered as climate-friendly technologies. Examples of such technologies are advanced and cleaner fossil-fuel technologies with carbon capture and storage, cleaner coal technologies such as Integrated Gasification Combined Cycle (IGCC) and pre-combustion technology, combined heat and power along with hydrogen cells and hybrid vehicles. The growing role of technology and innovation has been well recognised in the multilateral instruments on climate changes which quote that development, application and diffusion have become relevant to climate change, including the know-how, practices and processes. The Bali Action Plan of 2007 has acknowledged the role of Intellectual Property Rights (IPRs) in expansion and relocation of technologies in the perspective of climate change. This has also engrossed much consideration in the current journalism and deliberations on climate change from different reports and documents from the UN. The Report gives us a grim reality. According to the recent accounts, the global average water level rose by 20 cm as oceans extended because of warming and more ice melted. The sea ice extent in the Arctic has disappeared in every successive decade since 1979, with 1.07×10^6 km² of ice loss per decade. The world's oceans will continue to be warm and ice will melt constantly. What is

³ Economic Survey 2016-17, Ministry of Finance, Department of Economic Affairs Economic Division, Government of India.

more disturbing to pay attention is to the fact, that most of these aspects of climate change will persist for many centuries, even if emissions are stopped.⁴

From a legal standpoint also climate change creates many intricate problems worldwide. Uncertainty prevails in terms of predicting how society will respond to the rising level of pollution in villages and cities. Political responses to larger public demand ideally should be balanced against the interests of the small group of short-sighted industrialists. Hence, the solutions for climate change amidst these complex set up are bound to be intricate and exploratory.

The climate change in India has already become a spectacle from students to scholars, NGOs to the governmental organisation and small business entities to large corporate giants, all embrace it in both hands. Many of these efforts, perhaps, again self-motivated but at least it is encouraging in a sense that now we are ready to talk about it (and for the environment) expressively and according to Jurgen Habermas for India most of the European green movement, namely, that it is ignited not 'by problems of distribution, but by concern for the grammar of forms of life.'⁵ In India, they are certainly not post-materialistic and knowingly, connected with intense livelihood issues and basic human rights.⁶In other words, it is entirely up to the discretion of the state to rationalise its preferential treatment given to one particular group. In the absence of proper justification, amidst stark inequality, the poor communities are always the sufferers.

3. Understanding hindrances in a nutshell

Over several decades of climate talks, India has not only altered its position in the last few years but it has now begun to take a more vigorous role in determining the global climate scenario. What has helped India so far is its diversified market and human resources, but on the converse, there has also been a deficiency of insight and efforts to restrain domestic pollution. The government is persistently diluting the environmental norms which come in conflict with economic and industrial development. It is time for India to understand

⁴ IPCC Fifth Assessment Report, taken by the members of the IPCC at its 28th Session (09-10 April 2008, Budapest, Hungary), <https://www.ipcc.ch/report/ar5/> (accessed on 21 September 2017)

⁵ Guha R & Alier-Juan Martinez, *Varieties of Environmentalism: Essays North and South*, (Earthscan, UK), 1997, Reprinted in 2006, p. 21

⁶ Some of the landmark decisions of Indian judiciary include *Rural Litigation & Entitlement Kendra v State of Uttar Pradesh*, AIR 1985 SC 359; *Olga Tellis v Bombay Municipal Corporation*, AIR 1986 SC 180; *Samatha v State of Andhra Pradesh*, AIR 1997 SC 3297 etc.

‘meaningfully’ that climate change is an aggregate which requires the efforts of all for the public good. Thus, the need is to stand by one another to be successful. The problem with climate diplomacy and the reason it took so long to negotiate a global agreement, is that the motivation of countries to deal with climate change is collectively strong but individually weak.⁷ Further, there seems to be a clear contradiction in international understanding as for a very long time their major focuses have been related to the sustainable development of the international community. Even with contradictory ideology, it has been quite well understood that conservation is the prerequisite for all forms of development. Therefore we can believe that conservation is a precondition for ‘sustainable development’, which ultimately connects the ecological concepts of carrying power with the trade and industry for the growth and development of the state. However, the development of climate technology which ideally should take place in real quick time includes lucrative commercial opportunities for the nation as well for MNCs. However such technology, when put in utilization may give green benefit to society. But neither of the stakeholders nowadays are ready to ponder over any timeline. This gets more complicated when we consider the socioeconomic dimension of the problem. Evidently, sustainable development includes socio-economic aspects. But how far such aspects can be counterbalanced by business strategies is unclear. This is particularly important for India as the protection of such rights historically had given by the judiciary in the presence of considerable legislative ignorance and executive indifference which have identified climate technologies as nothing but green resources. IPRs that interact with such technology has inevitably now become the part of the green resources which is the self-driven motivation of IPR regime coupled with legitimate business interests stand is in direct conflict with a more equitable paradigm of green resource allocation. Since then there has been an enormous electricity demand in India as industries and communities grow and get connected to grids. Today, only a small number of homegrown companies are capable of developing the necessary in-house technologies and components for a finished environmental product. International configuration is, thus, obligatory for creating strong regional and global environmental goods supply chains to which India has by far opposed the

⁷ Frame Dave and Matthews H. Damon, Keeping Global Warming to 1.5 Degrees: Hard, but Not Impossible

Environmental Goods Agreement⁸, dreading that this may be used by the developed countries as an innovative skill-restrictive measure. This conundrum is abundantly reflected in WTO Solar Dispute Case involving India and the US, where WTO ultimately ruled in favour of the US. It was particularly made clear that the developers were required to produce designated categories of solar cells and modules only in India. WTO found that India's measure was trading restrictive and discretionary.⁹ The decision is certainly a questionable one. If we consider that India has a binding obligation as per the Paris Agreement to put forward NDCs, then it should have some flexibility in terms of determining its strategies. Paris Agreement leaves no uncertainty regarding the legal character of NDCs as its Parties can only submit NDCs in context to the alleviation of climate change¹⁰ and mitigation process is certainly clothed with 'collective action flavour'. Thus, any appraisal for developing domestic market to fabricate clean energy has to be seen as a vital part of international initiatives which eventually makes it acquiescent to TRIPS compliance. Certainly, WTO was technically correct. Still, hindmost it becomes somewhat rigid to fall in line with WTO's rational, especially when we consider the ethical dimension of the climate change problem. Thus, reality can be thornier than theories. Patents may produce doles both in terms of investment and commercialization of resources.

4. Enforcement issues faced in India

In India, IPR enforcement is subject to the provisions of the Code of Civil Procedure, the Indian Penal Code, and the Civil and Criminal Rules of Procedure. The Code of Civil Procedure provides for civil remedies and enforcement through civil courts. While penal remedies are provided in the Indian Penal code. India adheres to the common law tradition with judicial precedents of the Supreme Court binds the lower judiciary. Statutory enforcement mechanisms are provided in the IP laws, governing patents, trademarks,

⁸ Eighteen participants representing 46 WTO members are engaged in negotiations seeking to eliminate tariffs on several important environment-related products. These include products that can help achieve environmental and climate protection goals, such as generating clean and renewable energy, improving energy and resource efficiency, controlling air pollution, managing waste, treating wastewater, monitoring the quality of the environment, and combating noise pollution. https://www.wto.org/english/tratop_e/envir_e/ega_e.htm (accessed on 26 September 2017)

⁹ country. 41 https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds456_e.htm (accessed on 4 April 2018).

¹⁰Article 4.2: Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, to achieve the objectives of such contributions.

copyrights etc. Despite these attempts at modification, enforcement of patents in India is believed to be constrained by lack of awareness about patent basics in the judiciary, no prescribed time frame for disposal of cases, non-availability of criminal remedy for infringement of patents as in the case of copyright violation etc. (ibid.).

However, apart from all the above shortcomings, India continues to be one of the main concern for the United States about the Special 301 Report. While it has now acknowledged that India has made incremental improvements on enforcement, and its IP offices continued to practice promising modernisation, the report, however, criticises India for continuing to include the “efficacy test” in absence of the provisions to defend data exclusivity and for the lack of an unlawful enforcement establishment. Indian scholars point out that this Report is significantly inconsistent and is using a way of enforcing TRIPS-plus onto India to the harm the national interest and hence its acknowledgement should be refused by the Indian government.

5. Is India being pressurized to follow the TRIPS-plus way?

While the WTO-TRIPs presented the rule of least licensed innovation principles, TRIPS Plus alludes to both those exercises planned for expanding the degree of insurance for right holders past that which is known in the TRIPS Agreement and these measures are planned for lowering the scale or viability of limitations on rights and special cases. Such standards and practices have the impact of diminishing the capacity of creating nations to ensure open intrigue. It might even be embraced at the multilateral, provincial and additionally national level.

In the context of India, it was opined that India had adopted a "TRIPS-plus" regime when the Indian government had issued an ordinance on December 27, 2004, to revise some modifications in the Patent law of 1970. This amendment was believed to be required under TRIPS which included the introduction of patents in products for pharmaceutical inventions. The ordinance led to 74 amendments in the Act. After facing severe criticism, the government was further forced to withdraw and re-draft some of the amendments. It resulted in the Patents Amendment Act of 2005, which was required to balance out several competing interests.

Nevertheless, they further opined that some of the key amendments were riddled with loopholes and ambiguities. They have not made much use of flexibilities under TRIPS to safeguard the public interest, particularly concerning pharmaceutical products.

Concerning TRIPS-plus through FTAs, India's position as articulated at the TRIPS Council in 2010 has been to the effect that the surge of TRIPS Plus initiatives in the multilateral foray. The RTAs and plurilateral initiatives like the Anti-Counterfeiting Trade Agreement (ACTA) is, likely to disturb the balance of rights and obligations enshrined in the TRIPS Agreement. It has the potential to confine the flexibilities and strategy space provided to developing country members like India particularly in areas such as public health, technology transfer, socio-economic development, promotion of innovation and access to knowledge. India could also end up in accepting TRIPS Plus protection through Foreign Trade Agreements such as the EU-India FTA unless India was able to confer and deal with the IPR issues in a manner reliable with its interests. The negotiating content so far identified indicated that India has been resisting many aspects of the EU demands of higher IPR principles such as the extension of patent term and data exclusivity. There is also pressure on India from the United States, as evident from the Special 301 Report of 2010 to protect anonymous ordeal or other data generated to obtain a marketing sanction for the pharmaceutical and agricultural chemical products which has been a TRIPS Plus measure.

6. Conclusion

Advancement and relocation of climate-friendly technologies is an essential element in the adaptation policy. The brief examination in this paper highlights that in many technologies IPRs can become an obstacle to its admission and transfer to the developing countries. Another important issue which is highlighted upon is whether IPRs act as a barricade for leapfrogging by developing nations. In my view, this aspect should be given vital importance because in the context of climate change the developing nations do not have the time to try different technologies than developed earlier and then switch to newly developed technologies, as the time for evolution to less carbon concentrated economy is not even three decades.

India is standing amidin transition. Apart from policy measures, its IP regime has grown considerably throughout.It should also think earnestly how to integrate innovation with sustainable development. However, it has been appropriately articulated that understanding is a requirement for the advancement of carefully targeted interventions to neutralise the power which imbalances the obstruction in realising the full potential of novelty. Actors who have such organising power should assist more in sharing across incongruent communities of practice.¹¹

For India at present it has been not quite dark though, it has significantly taken some domestic measures to expedite climate change mitigation.

The key functions of which include:

- Identification of possible needs and gaps in coordination support;
- Advancement in the efficacy of business;
- Fair allocation of information only based on knowledge, experience and good practices;
- Exchange of information as per the FCCC requirements and
- Approval of national-level REDD+ proposal for submission to FCCC.

India has also quite recently recognised the National Designated Entity for Climate Technology Centre and Network and Technology Executive Committee ¹²and now all it requires to do is to put them into practice as its age of incorruptibility is over. It must take the direct role in marking and defining the new frontier of IP innovation, technology transfer and solving climate change problem.

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¹¹ Anadon Laura Diaz et al., Making Technological Innovation Work for Sustainable Development, Faculty Research Working Paper Series, Harvard Kennedy School, (December 2015), RWP15-079, 16.

¹²Indian 2017, Additional Director General, Publications Division, Ministry of Information and Broadcasting, Govt. of India, (2017).

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