NEED TO HARMONISE TRIPS AGREEMENT OF WTO AND INTERNATIONAL SPACE LAW REGIME FOR THE BETTERMENT OF HUMANITY

S. Elumalai*

I. Introduction

We are living in a technological era; there are several technologies which dominate the global economy, such as Information and Communication Technology (ICT), Bio-technology, Nano-technology and others. But all these technologies can be brought under one umbrella that is Space Technology. However the importance of space technology and its applications has not been given major focus at least in the developing countries. It is a truth that the access to the space technology is available only for a few elite nations. In this context the role of International Law developed by the UN assumes more importance which wants to eliminate the divide between the developed and the developing countries and wants to ensure that the benefits arising out of international space technology must be made available for the humanity as a whole. But this a daunting task and there is no clear cut mechanism in the international space law itself. The space technology and its applications require a huge amount of investment and naturally it requires various legal protection including intellectual property protection. Space technology is also a technology that cannot be discriminated in the subject matter of patents. Once space technology is patented it becomes private property. Therefore it is very difficult to achieve the objective common heritage of mankind, in this context let us discuss the harmonization of TRIPS Agreement of WTO and the international space law to strike a balanced mechanism.

Salient Aspects of TRIPS

The TRIPS Agreement was originally incorporated in the Uruguay Negotiations,[1] formally the WTO came in to existence by first January 1995. TRIPS Agreement was incorporated as Annexure 1 (c)[2] as one of the Agreement in the multi lateral categories[3] of the WTO Agreement. Only a few provisions of TRIPS came in to existence by the first of January 1995, such as National Treatment and MFN clause[4] whereas the rest of the provisions have come in to operation by first January 2000, other than product patent regime.[5]

II. Area Of Synergy Between Trips And International Space Law

The subject matter of copy right and patents[6] embodied in the TRIPS Agreement have a direct bearing upon the objectives to be achieved by the International Space Law, for example, the "Data protection" enunciated in the

* S. Elumalai, Assistant Professor, School of Excellence in Law, The Tamil Nadu Dr. Ambedkar Law University, Chennai, India.

TRIPS can very well protect the data arising out of space technology and its applications.[7] But the protection per se may impede the sharing of benefits arising out of such a data base to the developing and that of the LDC's, without complying IP requirements.[8]

Likewise the patent protection embodied in the TRIPS Agreement mandates all the member countries of WTO to provide patent protection and to protect the subject matter of patents subject to certain conditions to "all fields of technology" whether products or process provided if it is new having a inventive step and capable of industrial application. The TRIPS Agreement also mandates the member countries that they shall not discriminate the patent protection based upon the "field of technology" and "place of invention whether locally produced or imported".[9] It should be emphasized that the space technology itself is a genus and it carries lot of species of technology such as small satellite technology, nano satellite technology, tele medicine and others.

III. Problems And Challenges Faced By International Space Law Regime And Trips Regime

International Space law owes its origin from the establishment of the Committee for the peaceful uses of outer space established by the UN in the year 1959, till now it as contributed to the conclusion of five international conventions relating to the space law and around ten declarations relating to the space law. The notable among them for the purposes of this paper are that, the Third UN Conference that is the Vienna Declaration of 1999 and the Declaration of International Exploration of Outer Space for Peaceful Purposes for the Benefit of All the Countries taking in to account the Needs of Developing Countries.[10] These are the only existing two international instruments focusing on IP protection.

The Vienna Declaration explicitly recognizes that "consideration should also be given to develop a set of measures to protect the intellectual property rights recognising this issue is in the jurisdiction of the WIPO". This is contentious as well as controversial one as identified by the author in the following ways.

International Space Law mechanism lacks competency as well as expertise to develop a set of measures relating to IP protection for space technology for its application, because the TRIPS Agreement provides for IP protection for all fields of technology including space technology, therefore there is no need to develop separate set of measures.

This issue is not only within the exclusive jurisdiction of WIPO but also essentially in the jurisdiction of the TRIPS Agreement of the WTO.

The space law regime cannot completely ignore the existence of the TRIPS Agreement of WTO at all and mere WIPO alone cannot deal with this issue.[11]

International Space Law identifies three major issues to be resolved, that is issues related to debris disaster management, nuclear power source and IP.[12] To

resolve the IP issue the UN General Assembly provides a broad mandate to the Committee, to promote cooperation within the "entities of UN and the relevant international organizations".[13] The word "relevant organizations" can very well include the WTO, therefore it is mandatory for the Committee to provide at least a permanent observer status to the TRIPS Council of the WTO in all its meeting.

The place of invention as envisaged in the TRIPS Agreement should not be interpreted so widely as to include the outer space, till a concrete and tangible step is taken by the international space law regime. Therefore it is highly desirable to address this issue in the ministerial meet and include this as an agenda for t heir future negotiations.

Doha Declaration of TRIPS on public health provides waiver of paten protection to address certain epidemic situation and emergency requirements to combat certain deadly diseases but it does not explicitly recognise the relevance of space technology, tele medicine and others arising out of space application in addressing the public health prices. In the absence of such an waiver by the TRIPS Council, the exercise of the international space law mechanism will become futile, therefore it is desirable to provide permanent status to the Committee in the WTO meetings too.

To resolve the issues relating to the ownership and access to the resources available in the outer space the mere efforts of international space law mechanism alone are not sufficient, therefore the coordination of the WTO on space law mechanism is highly desirable.

IV. Conclusion

It is estimated around 600 billion US dollar worth of trade has taken place during 1996–2006. Since it is an essential interest of trade the trade related IP aspects of space law cannot be determined only by WIPO and international space law mechanism. No doubt international space law mechanism advocates the non-appropriation of outer space and the common heritage of mankind on the same time it also recognises the need of IP protection too. If the international space law mechanism recognises and cooperates with the WTO it can result in to the better culmination and achievement of the UN Millenium Development Goals, such global health, sustainable development, poverty eradication, so on and so forth. After all these are some of the basic objectives of the WTO too.[14] So the TRIPS Agreement is not conflicting but can be complimenting the international space law mechanism provided if there is an effective coordination and cooperation among the two regimes.

Endnotes

1. It is the eighth and final rounds of GATT Negotiation which has been culminated in to the WTO, held during the 1983-1984, one of the lengthiest and most comprehensive in the WTO jurisprudence.

2. There are four Annexes in the WTO, Annexure 1 alone contains, 1(a), (b) and (c) respectively for trade and services and Trips.
3. The Annexures 1 to 3 belong to the multi lateral category, Annexure 4 belongs to pluri lateral category whereas in the multi lateral category it is mandatory for all the members of the WTO to become a party to the Multi lateral agreements wheras it is optional in the case of pluri lateral categories. See Also, Article 2 of the Agreement establishing WTO.
4. Articles 3 and 4 of the TRIPS Agreement of WTO.
5. The operationalisation of the TRIPS Agreement have been differed depending upon the economic status of the country, for example, only one year period has been given in the case of the developed countries and five years in the case of the developing countries, ten years period have been given to developing countries to implement product patent, in the case of LDC's the dead line has been extended for a longer time by the TRIPS Council, in the Doha Ministerial Meet, Also see Article 65 of TRIPS Agreement of WTO and Article 11 (2) of WTO.
6. Article 9 to 14 of Section 1 of Part II of TRIPS Agreement Article 27 to 34 of Section 6 of Part II of TRIPS Agreement respectively deals with the subject matter of copy rights and patents.
7. For example, data relating to remote sensing, weather and climate, natural resources including biological resources and others.
8. The issue of non payment of royalties and damages for the breach of violating data protection. Also See Article 10 of the TRIPS Agreement of WTO.
9. Article 27 para 1 of the TRIPS Agreement deals with the protectable subject matter of patents. But Article 27 para 2 and 3 of the said agreement provides discretion to the member countries in protecting certain subject matter of patent rights, such as "…surgical methods, therapeutic/diagnostic methods of treatment for human…", and "also anything which violates public order morality". The patent protection may be denied on some other grounds such as "anything which causes serious prejudices to the environment, hazardous to the human health, animals, plants and others, anything which is essentially of biological origin other than micro biological process and micro organisms".
10. UNGAR No. 51/122 E.
11. See Page No. 8 of the Vienna Declaration.
12. See Page No.2 of the Vienna Declaration.
13. Refer Paragraph 46 of UNGAR 64/86 E of 2010.
14. Refer the Preamble of the WTO and Article 7 and 8 of the TRIPS Agreement of WTO.