

## A DILEMMA OF INTELLECTUAL PROPERTY RIGHTS IN DEVELOPING COUNTRIES

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### **I. INTRODUCTION**

The Uruguay round introduced, for the first time in the history of the General Agreement on Tariffs and Trade<sup>1</sup>, multilateral negotiations on “trade-related Intellectual Property Rights”. Under strong pressure by the industrialised countries, a specific agreement on the availability and enforcement of such rights became part of the Final Act of the Round: Agreement on Trade Related Aspects of Intellectual Property Rights<sup>2</sup>.

The TRIPS agreement is, by its coverage, the most comprehensive international instrument on intellectual property rights<sup>3</sup> dealing with all types of IPRs, with the sole exception of breeders’ rights and utility models.<sup>4</sup>

The Agreement establishes minimum standards on –

- Copyright and related rights, including computer programmes and databases
- Trademarks
- Geographical indications
- Industrial designs
- Patents
- Integrated circuits, and
- Undisclosed information (Trade Secrets)<sup>5</sup>

While the agreement’s objectives establish that the protection and enforcement of IPRs should balance rights with obligations to the mutual advantage of both producers and users of technological knowledge<sup>6</sup>, the agreement has been criticised on many levels, in particular for serving to exclude developing countries<sup>7</sup> from participating in the knowledge sector. Secondly, implementation of the TRIPS Agreement incurs substantial economic and

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<sup>1</sup> Hereinafter referred to as “GATT”

<sup>2</sup> Hereinafter referred to as “TRIPS”

<sup>3</sup> Hereinafter referred to as “IPR”

<sup>4</sup> Carlos M. Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* (2002) Zed Books Ltd.

<sup>5</sup> Ibid

<sup>6</sup> The TRIPS Agreement, Article 7.

<sup>7</sup> UNDP, op. cit., p. 57.

social costs for developing countries because it involves a significant transfer of resources from consumers and firms in developing countries to those in industrialized countries.<sup>8</sup> Thirdly, the difficulty of effecting technology transfers to developing countries is more than ever as they are facing health crises on a massive scale and as the disparity between the rich and the poor is enlarging at an alarming rate. Improving access to effective and affordable medicine and technology is necessary to reverse the rising trend of high mortality and morbidity from infectious and non-communicable diseases. It is also an effective way of alleviating poverty in these countries.<sup>9</sup>

Despite this it is argued that undoing or reopening the TRIPS agreement is not a course of action that would benefit developing nations for several reasons:

- a) The agreement is a part of the package of international trade agreements from which developing countries can benefit.
- b) Without such a multilateral agreement developing countries would be more vulnerable to the tactics of develop and conquer through lopsided bilateral or pluralateral negotiations<sup>10</sup>
- c) Long-term, multi-levelled and multi-channelled co-ordinated actions can help developing countries enhance their ability to redefine and reshape the understanding and priorities concerning the interests of right users and to ensure the implementation of intellectual property regimes in a manner appropriate to their needs.<sup>11</sup>

This being said, it is acknowledged that there is no easy way to address the asymmetric power relationship between the battalions of pharmaceutical and entertainment industries based in developed countries and poor developing countries. Nor is there an easy way to balance the power of a few rich countries with the interests of many small and poor developing countries. The reality of world politics remains power-based: *'the structure of power and interests, the extent of inequality, the divergences of cultures and value systems, and the rigidities of political language make the resolution of many conflicts difficult if not impossible.'*<sup>12</sup> Therefore, the developing countries must actively participate in the process of bringing their concerns to the multilateral arena as the availability of institutionalised setting through which collective actions can be taken does not by itself guarantee the rebalance of the interests of right-holders and right-users.

<sup>8</sup> United Nations Conference on Trade and Development, 1996.

<sup>9</sup> Justin Malbon, Charles Lawson, *Interpreting and Implementing the TRIPS Agreement: Is It Fair?* (2008) Edward Elgar Publishing Ltd., p .

<sup>10</sup> As they experienced during the financial crises in 1980s and 1990s.

<sup>11</sup> Supra 9.

<sup>12</sup> Abbot and Snidal 1998, p. 4-5.

## II. TRIPS and IPR

The TRIPS agreement of the World Trade Organisation<sup>13</sup> is considered to be one of the milestones in the international harmonization of patent protection. It is one of the most controversial international intellectual property agreements that have entered into force.<sup>14</sup> Its negotiations were highly contentious, and the perspectives of developed and less developed countries on the role of intellectual property protection and enforcement remain far apart.<sup>15</sup>

The Three main features of the Agreement are:

◆ **Standards:** In respect of each of the main areas of intellectual property covered the TRIPS Agreement sets out the minimum standards of protection to be provided by each Member. Each of the main elements of protection is defined, namely the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection. The Agreement sets these standards by requiring, first, that the substantive obligations of the main conventions of the WIPO, the Paris convention for the protection of industrial property<sup>16</sup> and the Berne Convention for the protection of literary and Artistic Works<sup>17</sup> in their most recent versions must be complied with. With the exception of the provisions of the Berne convention on moral rights, all the main substantive provisions of these conventions are incorporated by reference and thus become obligations under the TRIPS Agreement between TRIPS member countries. The relevant provisions are to be found in Articles 2.1 and 9.1 of the TRIPS Agreement, which relate, respectively, to the Paris convention and to the Berne Convention. Secondly, the TRIPS Agreement adds a substantial number of additional obligations on matter where the pre-existing conventions are silent or were seen as being inadequate. The TRIPS Agreement is thus sometimes referred to as a Berne and Paris – Plus agreement.

◆ **Enforcement:** The second main set of provisions deals with domestic procedures and remedies for the enforcement of intellectual property rights. The Agreement lays down certain general principles applicable to all IPR enforcement procedures. In addition, it contains provisions on civil and administrative procedures and remedies, provisional

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<sup>13</sup> Hereinafter referred to as the WTO

<sup>14</sup> Yijun Tian, *Rethinking Intellectual Property*, (2009) p. 27-35

<sup>15</sup> Peter K Yu, *The international enclosure movement* (2007) *Indiana Law Journal*, 82(4): 827–907, 828.

<sup>16</sup> Hereinafter referred to as the Paris convention.

<sup>17</sup> Hereinafter referred to as the Berne Convention

measures, special requirements related to border measures and criminal procedures, which specify, in a certain amount of detail, the procedures and remedies that must be available so that right holders can effectively enforce their rights.

◆ Dispute settlement: The Agreement makes settlement procedures of disputes between WTO members with respect to the TRIPS obligations subject to the WTO's Dispute Settlement Unit.<sup>18</sup> In recent years, less developed countries -including both developing and least developed countries- have expressed their deep dissatisfaction with the way the Agreement has been interpreted and implemented. They are also frustrated by the ongoing demands by developed countries for protections that are in excess of what they promised during the TRIPS negotiations- often through new bilateral and regional trade and investment agreements. As they claim, the Agreement as interpreted by their developed trading partners and the additional TRIPS-plus ignore their local needs, national interests, technological capabilities, institutional capacities, and public health conditions.<sup>19</sup>

Economically, they facilitate innovation, technology transfer and knowledge production while at the same time promoting social and economic welfare and development goals<sup>20</sup>. Politically, they provide the much-needed balance to make the Agreement a legitimate bargain between developed and less developed countries. Globally, they have sowed the seeds for the development of new international norms both within and without the TRIPS regime. Although most of the draft language proposed by less developed countries did not make its way to the TRIPS Agreement, the choice of such language for Articles 7<sup>21</sup> and 8<sup>22</sup> is more than consolation. The agreement recognizes the role of technology in social and economic welfare and sets out its objectives in Article 7, that efforts to promote compliance with to the TRIPS agreement should be accompanied by measures that enhance the participation of the developing countries in international trade. These measures include a broadening of the intellectual property regime to cover products and resources that are

<sup>18</sup> Dr.V.Manickavasagam, *Intellectual Property Rights And The Impact Of TRIPS Agreement With Reference To Indian Patent Law* (2007) p.1-2.

<sup>19</sup> Carlos María Correa, *Research Handbook on the Protection of Intellectual Property Under WTO Rules*, (2010) vol.1, p. 146

<sup>20</sup> Emmanuel Hassan, Ohid Yaqub, Stephanie Diepeveen, *Intellectual Property and Developing Countries*, Technical Report Prepared for the UK Intellectual Property Office and the UK Department for International Development, available at [http://www.rand.org/pubs/technical\\_reports/2010/RAND\\_TR804.pdf](http://www.rand.org/pubs/technical_reports/2010/RAND_TR804.pdf)

<sup>21</sup> "The protection and enforcement of intellectual property rights should 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."

<sup>22</sup> "Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement." The agreement (in Article 8.2) provides countries with freedom to adopt measures that "may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international."

provided by these countries. It notes the importance of exploring ways by which public interest issues such as health, nutrition and environmental conservation could be addressed through scientific and technological cooperation in accordance with the provisions of the TRIPS agreement<sup>23</sup>. The TRIPS Agreement has an additional important principle that intellectual property protection should contribute to technical innovation and the transfer of technology. Both producers and users should benefit, and economic and social welfare should be enhanced. The basic principle on which TRIPS is based are the National treatment principle wherein imported and locally-produced goods should be treated equally- at least after the foreign goods have entered the market. The same should apply to foreign and domestic services, and to foreign and local trademarks, copyrights and patents. National treatment only applies once a product, service or item of intellectual property has entered the market. Therefore, charging customs duty on an import is not a violation of national treatment even if locally-produced products are not charged an equivalent tax.<sup>24</sup> For most developing countries, imports allow them to acquire goods through importation that are necessary for economic growth and poverty reduction, but are not produced domestically. In turn, exports can make it possible to transform under-utilised natural resources and surplus labour into foreign exchange, in order to pay for imports to support economic growth. However, this process requires speed and stability in export growth so as to meet growing import demand sufficiently. The TRIPS Agreement increases the strength of IPRs through bilateral agreements in the TRIPS-plus era has raised concerns for policymakers about the effect of IPRs on trade. The theory of IPR trade is a growing body of scholarly literature examining the relationship between IPRs and international trade developed through the 1990s and 2000s. However, within this body of work, the relationship between IPRs and trade remains ambiguous from a theoretical viewpoint. Stronger IPRs confer ownership advantages to firms serving foreign markets by providing legal recourse against violation of their assets. In this regard, stronger IPRs expand the markets served by firms. Exporting firms in developed countries face additional costs when exporting to developing countries, when they must engage in activities designed to inhibit local imitation<sup>25</sup>. International harmonisation of IPR regimes can diminish the transaction costs of operating in different regulatory environments. In this regard, it can represent a location advantage for the participating countries.

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<sup>23</sup> Calestous Juma, *Intellectual property rights and globalization: implications for developing countries*, p.2

<sup>24</sup> Nishant Thakur, *An Economic Analysis of Patent Rights Assignment in India*, available at <http://cci.gov.in/images/media/ResearchReports/NishantThakurPatent.pdf> (Accessed on 3/04/2014)

<sup>25</sup> *Supra* 20.

### III. Foreign Direct Investment<sup>26</sup> with reference to TRIPS

The global system of IPRs is undergoing profound change as we approach the next century. Numerous developing countries recently have undertaken significant strengthening of their IPRs regimes. The channels through which globalization affects economies include expanded trade in merchandise and services, greater international portfolio investment and FDI, and formal product and technology licensing.<sup>27</sup>

Over the past two decades, there has been a growing scholarly literature on the relationship between IPRs and FDI inflows in developing countries. This brief review of globalization suggests that emerging countries have strong and growing interests in attracting trade, FDI, and technological expertise; although such encouragements must be tempered by accompanying programs to build local skills and ensure that the benefits of competition actually arise. In this context, intellectual property rights are an important element in a broader policy package that governments in developing economies should design with a view toward maximizing the benefits of expanded market access and promoting dynamic competition in which local firms take part meaningfully. This broad package would include promoting political stability and economic growth, encouraging flexible labor markets and building labor skills, continuing to liberalize markets, and developing forward-looking regulatory regimes in services, investment, intellectual property, and competition policy.<sup>28</sup>

The Foreign Direct Investment would be greatest benefit for developing countries, since they could catch up with their technological development. IPRs affect the composition of FDI. Strong protection may encourage FDI in high technology sectors, where such rights play an important role. In addition, it may shift the focus of FDI projects from distribution to manufacturing it. The TRIPS requirement that patent protection has to be ensured even if a product is just imported and not locally produced will hamper more FDI in developing countries<sup>29</sup>. As a consequence, countries can be supplied with finished products, which are protected but produced elsewhere. Developing countries in particular, will not unconditionally benefit from foreign direct investment or transfer of technology.

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<sup>26</sup> Hereinafter referred to as F.D.I.

<sup>27</sup> Keith E. Maskus, *The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer* (1997) p.

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<sup>28</sup> *Ibid*, p.2

<sup>29</sup> K.A. Rasure, *Intellectual Property Rights and its impact on Developing Countries*, published in *Intellectual Property Rights in WTO and Developing Countries*, Talwar Sabanna (2010), Serials Publications, New Delhi, p. 245

#### IV. The Pharmaceutical Industry

*“The idea of a better-ordered world is one in which medical discoveries will be free of patents and there will be no profiteering from life and death” – Indira Gandhi.*

The Indian Pharmaceutical industry is one of the largest in the developing world and is ranked as the fourth largest in terms of production and thirteenth largest in terms of domestic consumption value. Over the past thirty years Indian drug industry has emerged from almost non-existent to a world leader in the production of generic drugs.<sup>30</sup> With the changes brought about by the Patents Act of 1970, Indian drug manufactures became experts in the field of reverse engineering and increased its supply of less expensive copies of the world's best-selling patent protected drugs. This could only be possible because there was no product patents system for drugs and medicines. While the Patent Act of 1970 in its original form does provide a distinction between product patents and process patents, the exception provided in section 5 of the act of 1970 (which has been omitted by the amendment of 2005) offered only a process patent for food, medicine or drug substances and specifically excluded product patents for the same. Thus India was able to copy foreign patented drugs without paying a license fee and was able to make it available to the masses at one-tenth of the original price.<sup>31</sup>

Now, India is a leading example of a low-income developing country that had not recognized patents prior to 1995 and did in fact lead the opposition of developing countries to TRIPS. This prominent position of Indian firms in the global pharmaceutical industry is the result of a unique and successful industrial policy in the 1970's and 1980's. In addition, a number of other measures, such as drug price controls, restrictions on capacity expansion, limits on multinational equity shares, etc., encouraged the development of the Indian pharmaceutical industry, while keeping prices low for domestic consumers. Many of these regulations and restrictions have been lifted or eased since the mid-1980s with marked acceleration in the pace of liberalization during the 1990s. As a result of these policies, the Indian pharmaceutical industry grew rapidly to the point where it is now the world's largest producer of formulations in terms of volume and one of the world's largest producers of bulk

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<sup>30</sup> Journal of Intellectual Property Law & Practice, *Progress of the Indian pharmaceutical industry: a shifting perspective*, (2012) 7(1): 48-51

<sup>31</sup> Ayyappan Palanissamy, *Patent Regime In India- Challenges And Proposal For Reform*, published in *IPEDR vol.12 (2011)* © (2011) IACSIT Press, Singapore.

drugs<sup>32</sup>. The history of intellectual property protection in pharmaceutical products demonstrates it.

Many of the industrialized countries introduced patent legislation in this field after they had reached a certain level of technological competence and international competitiveness. Under TRIPS, all countries must, as a condition for membership in the World Trade Organization, recognize and enforce patents in all fields of technology, including pharmaceuticals which will restrain the innovation and information flow. Moreover, prices of medicines will continue to rise, making access difficult and damage to pharmaceutical industry<sup>33</sup>. While many low and middle income countries initially made an exception for pharmaceuticals, they agreed to introduce or amend their patent legislation to include pharmaceutical product patents by 2005. This effect seems particularly undesirable in the market for pharmaceuticals, where many believe that it is unethical for firms to make profits from selling life-saving medicines.<sup>34</sup>

In a study by Chaudhuri, Goldberg and Jia (2006) that analyzed the effects of patent enforcement for a sub-segment of antibiotics in India. Though the study focused on a particular country and pharmaceutical segment, it also highlighted the main insights are applicable to many other low- and middle-income developing countries. It mentioned that the actual effects of TRIPS are likely to be small for several reasons. First, TRIPS affects only patents issued after 1995; given that the majority of the products currently marketed in India involve molecules with either expired patents or patents that were issued pre-1995, only a very small number of products will be directly affected by TRIPS-enforcing legislation. A good fraction of such recently patented products are life-quality drugs, which are arguably less important in developing countries from a public health policy perspective. Along the same lines, some of the newer drugs may be marginal improvements to existing ones rather than important new medicines. The short-run effects of patent enforcement are further attenuated by a provision that allows Indian companies that are now producing drugs for which patent applications if they pay a royalty to the patent holder. Finally, TRIPS has several loopholes (e.g., for epidemics) that aim at guaranteeing access to life-saving medicines in cases where new patented drugs may not be readily available in developing

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<sup>32</sup> Bulk drugs are the therapeutically relevant active pharmaceutical ingredients that are combined with a variety of inactive ingredients to make the formulations that are ultimately consumed by patients. Firms in the pharmaceutical sector can be of one of three types: bulk drugs producers, pure formulators, or integrated firms, which produce both bulk drugs and market formulations.

<sup>33</sup> K.A. Rasure, *Intellectual Property Rights and its impact on Developing Countries*, published in *Intellectual Property Rights in WTO and Developing Countries*, Talwar Sabanna (2010), Serials Publications, New Delhi, p. 246.

<sup>34</sup> Supra 25.

countries. For all these reasons, it is unlikely that patent enforcement will have any dramatic effects in the short run. However, the main concern with patent enforcement in developing countries regards not the specific effects of TRIPS, but rather the new equilibrium that would emerge if IPR systems were harmonized across the world. Specifically, we estimate a model of supply and demand for a specific sub-segment of the pharmaceuticals market and then use the estimated model parameters to conduct simulations and provide a counterfactual analysis of what prices, sales, consumer welfare and firm profits would have been, if patents had been in effect. It is important to note that this exercise does not inform us about the actual effects of TRIPS. Rather it derives the effects associated with a thought experiment, in which India is at a steady state with full IPR protection.<sup>35</sup>

## V. CONCLUSION

The case against TRIPS is currently being promoted by several public interest groups including Oxfam, Médecins sans Frontières, and Third World Network, which have particularly highlighted agricultural and public health issues. As a result, there is currently strong pressure coming from some of these groups — together with a number of developing country governments — for TRIPS to be revised.<sup>36</sup>

In recent years several developing countries have indicated an interest in lowering some of the agreed standards. For example, some African countries such as Kenya have proposed to the WTO that both the ability to patent plants and animals (which is optional at present, although allowed in the United States, Europe and Japan) and micro-organisms (which is obligatory) be prohibited. In addition, a number of Latin American countries — including Peru and Bolivia — have proposed that the WTO establish new IPR regulations aimed at protecting traditional knowledge to further their specific development priorities.<sup>37</sup>

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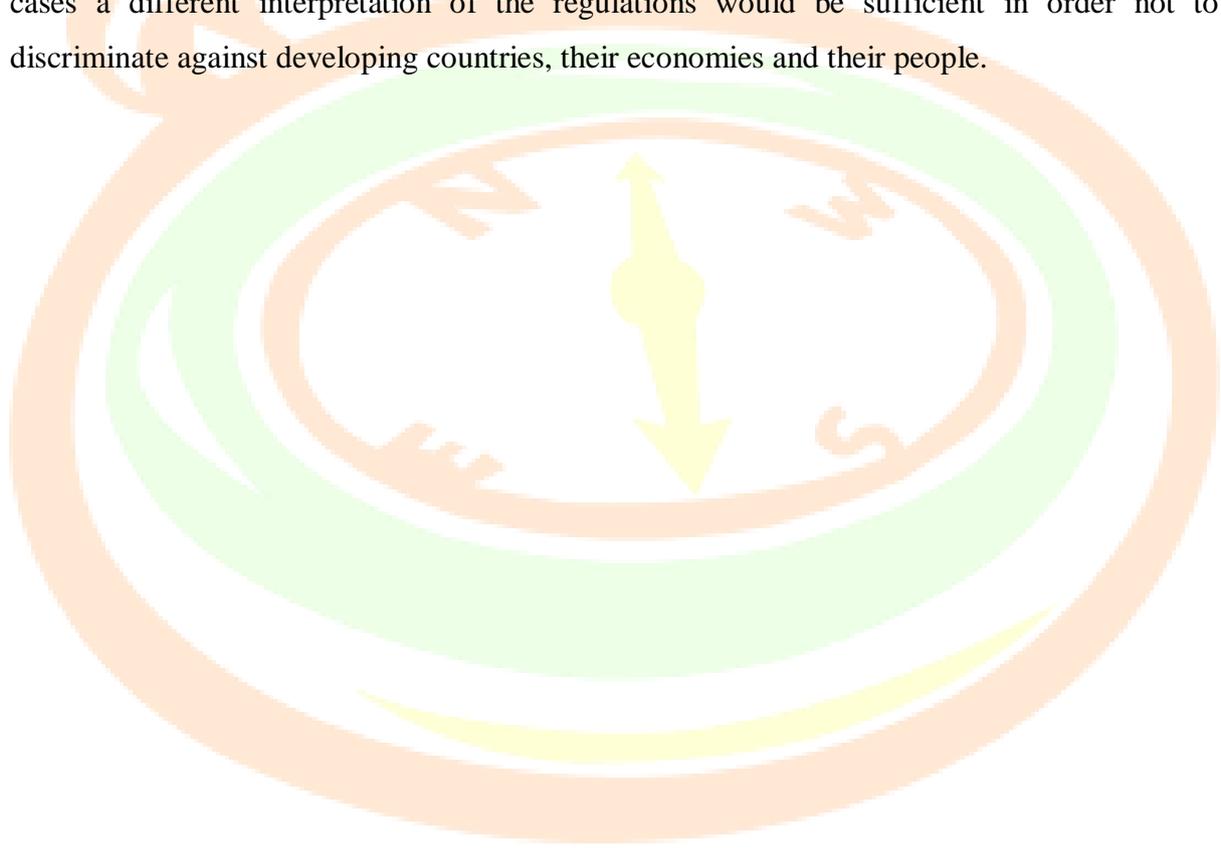
<sup>35</sup> *Ibid.*

<sup>36</sup> United Nations Development Programme (1999) Human Development Report 1999, chapter 2.

<sup>37</sup> Commission on Intellectual Property Rights (2002) Integrating intellectual property rights and development policy

TRIPS stipulates that reviews of the agreement itself must be carried out every two years by a body set up within the WTO — known as the Council for TRIPS — that is open to all member states. Any revisions of the text of TRIPS can take place either immediately following one of these reviews or, more likely, at the conclusion of a new round of trade negotiations. So far there have been no revisions at all.<sup>38</sup>

IPR is a dynamic tool for wealth creation providing an income for enterprises and individuals to create and innovate, encompassing more monopoly element. In globalised economic scenario, creativity and innovation are the new drivers of the world economy. An effective intellectual property is the foundation of such strategy. the situation, developing countries are in a serious situation if they try to comply with the obligations imposed on them by the TRIPS agreement. There is an urgent need for a reform of TRIPS although in some cases a different interpretation of the regulations would be sufficient in order not to discriminate against developing countries, their economies and their people.



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<sup>38</sup> Graham Dutfield (2000) Literature survey on intellectual property rights and sustainable human development. UK Department for International Development