INTELLECTUAL PROPERTY FORTIFICATION IN THE CRUCIBLE OF CONFLICT: NAVIGATING RIGHTS AND SAFEGUARDS AMIDST GLOBAL TURMOIL

Angshuman Srivastava[*]

Pravit Vir Sarmah[**]

Abstract

The Russia-Ukraine war has highlighted critical gaps in the global intellectual property (hereinafter "IP") protection framework, particularly in the face of geopolitical conflicts. Russia's Decree No. 299, which nullified royalty rates for IP from "unfriendly" nations, underscored the vulnerability of IP rights (hereinafter "IPR") during wartime. Despite the increasing significance of IPR in international trade and economic stability, the literature on their protection during and after conflicts remains underdeveloped. The paper addresses this gap by examining the resilience of the international IPR framework, including its structural safeguards under agreements such as the WTO TRIPS Agreement and regional treaties. It analyses the extent to which nations can enforce IPR protections while imposing sanctions or engaging in armed conflicts. The discussion extends to national policies, the role of investment agreements, and the intersection of IPR with national security concerns. Recognizing the growing complexities of IPR protection amid global instability, the paper proposes legislative and policy recommendations to strengthen safeguards during wartime. By drawing on principles of international law and trade regulations, it underscores the need for a more comprehensive and adaptive approach to ensuring IPR fortification in times of crisis.

Keywords: Intellectual Property Rights, Russia-Ukraine War, TRIPS Agreement, Geopolitical Sanctions, National Security IP

1. Implications for IPR during Wartime

The literature of IP consists of negligible analysis of the status of IPR during the war or post the war. Irrespective of the fact that the literature is quite deep, this lack of research does not shock many. IPRs can be understood as those ***"legal tools"*** which are

[*] Graduate, National Law University, Jodhpur.
[**] Associate, Curiam Legal, New Delhi.

very much specialized and are regularly used in ***"well-functioning"*** markets.[1] However, in the case of a war affected market and post-war markets, IP protection doesn't hold much importance, as during the war and in the aftermath there are much more pressing issues which require the focus and attention of the policymakers.

Before World War II, there was not much scholarship available on int. IP law. This limited knowledge consisted of initiation or amendment of international IP law.[2] As a matter of fact not much research took place[3] in this area till after the establishment of the "TRIPS Negotiations" in the1980s.[4] The following many decades saw the world only encountering short term conflicts or armed conflicts limited or constrained to a particular geography. This lack of significant armed conflicts besides existence of an environment which was peaceful, may have obstructed any research on the protection of IPRs during and post the war.

1.1. Multilateral Agreements

Irrespective of the fact that the IP literature has not covered much about wartime or post wartime protection and since 1950s, also only irregular coverage has taken place – the international IP system is aware of the disarray which was caused by the armed conflicts. In an attempt to address the issues brought up by such disturbances, the international IP regime was laid down in part.[5]

When the "Paris Convention for the Protection of Industrial Property"[6] (***hereinafter*** "Paris Convention") and the "Berne Convention for the Protection of Literary and Artistic Works"[7] (***hereinafter*** "Berne Convention") were not established in the late 19th century, nations used to enter into ***"bilateral commercial treaties"*** in order to keep international IP relations stable and to protect authors by the help of "cross-border IP protection". This linkage between the treaties and IP protection was coupled with one

1 Paul Joseph Heald, "Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPS Game", 88 *Minnesota Law Review* 249, 258–260 (2003).
2 *Id*. at 294-299.
3 Charles Ronald McManis, "Teaching Current Trends and Future Developments in Intellectual Property", 52 *Saint Louis University Law Journal* 856 (2008).
4 General Agreement on Trade and Tariffs, Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations Pt. I.D, Sept. 20, 1986, 25 I.L.M. 1623, 1626 (1986).
5 Robert Oswald Keohane, "The Demand for International Regimes", 36 *International Organization* 325, 332 (1982).
6 Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 828 U.N.T.S. 305.
7 Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221.

significant disadvantage, which was that armed conflicts or other strife could hamper or disrupt such protections.[8] The biggest disadvantage of setting up the Paris and the Berne conventions was that disruptions were minimalized.

Through membership unions, wherein the nations could join or withdraw in the absence of any disturbance to other members,[9] these conventions efficiently and effectively control any disruptions to the members which could be brought by the armed conflicts or other strife. This unions' creation by the conventions answers the question that why international IP regime was operative even during the two world wars.[10] Should any disturbance arise during a war, it was due to shifting market and trade circumstances rather than the two Conventions being suspended throughout the conflict. Following the two world wars, there did not seem any need for the conventions to start their operations again.

The conventions not only established the unions but it also had other features which are worth mentioning. *Firstly*, the drafters of the conventions realized and recognized the "need to agree and disagree", instead of mandating the member nations to adopt the same rules across the globe.[11] *Secondly*, the conventions have room for ***"national autonomy"*** in the delicate and sensitive areas by inculcating such safeguards and limitations. *Thirdly*, solution to the cross-border disputes is also facilitated by the international IP agreements in order to minimize the conflicts.

While the conventions mentioned above were responsible for creating the "international standards" for IPR protection which the parties have to follow, significant aspects of IPRs relating to trade under these conventions have been included into the WTO through the Agreement on Trade Related Aspects of Intellectual Property Rights (***hereinafter*** "TRIPS Agreement"). Accordingly, the Agreement establishes guidelines for trading and investing in ideas and creative works by utilizing criteria established in specific clauses of the primary IPR conventions. In the context of trade, the WTO stipulates that IPR must be safeguarded. In order to achieve some level of harmonization

---

[8] Sam Ricketson, "The Birth of the Berne Union", 11(9) *Columbia-VLA Journal of Law & the* Arts 9, 15 (1986).

[9] *Supra* note 7, art. 1; *Supra* note 6, art. 1(1).

[10] Peter K. Yu, "Intellectual Property Paradoxes in Pandemic Times", 71 *GRUR International*, 293 (2022).

[11] Peter K. Yu, "Currents and Crosscurrents in the International Intellectual Property Regime", 38 *Loyola of Los Angeles Law Review*, 333–34 (2004).

of national laws in this area, the WTO has mandated through the TRIPS that all of its member nations adhere to the fundamental minimum IPR requirements set forth in the agreement.

When the policymakers and drafters explore international IP reforms, they pay significant attention to the requirement of two things, i.e. balance and coherence. This balance in the international IP regime stood at the forefront in the ***"North-South"*** debate between DCs (developing countries) and LDCs (Least developing countries) and in the TRIPS negotiations.[12] Having said that, the scholarly and policy discussions many a times fail to consider remarkable durability which the international IP regime provides. The regime prevailed not only during the two world wars, but also during the interwar period. Moreover, the regime showcased its adaptability in addressing the problems posed by many global events, including the COVID-19 pandemic effectively.[13]

As the scholarly research done on the toughness of the International IP regime is quite scarce, there is a need for IP scholars to delve deeper into this subject. The scholars should look into the question that whether the roots of this sturdiness must come from the strong structural features and the safeguards, limitations, and flexibilities which have been devised with care within the regime or do they find their origin in the unique ties between IPs and trade matters, which in general, are not very much politicized and have the potential of returning to normalcy smoothly and quickly after the conflicts. A thorough examination of the factors contributing to regime resilience would enhance our understanding of both the strong points and weaknesses of IPR and international law.

1.2. Agreements for Investment between Countries

Until now we have been giving primacy to International IP agreements. However, there is an enhanced use of international investment agreements in the last decade by the IPR holders with the aim to strengthen their rights of cross-border protection.[14] These agreements have an investor-state dispute settlement mechanism (***hereinafter*** "ISDS") which is put to use by the IP investors to take legal action against the host state in any

[12] Peter K. Yu, "Caught in the Middle: WIPO and Emerging Economies", in Sam Ricketson (ed.), *Research Handbook on the World Intellectual Property Organization: The First 50 years and Beyond* 356, 359–61 (Edward Elgar Publishing, 2020).

[13] *Supra* note 10.

[14] Peter K. Yu, "The Investment-Related Aspects of Intellectual Property Rights", 66(3) *America University Law Review* 829, 837–44 (2017).

arbitral fora independently of their own governments. This mechanism is very much different from the dispute resolution of the WTO wherein state-to-state dispute resolution is given and not the investors to host states dispute resolution. During the early 2010s, it was Philip Morris who first took the lead in the use of "ISDS" in IP contexts. Morris challenged Uruguay's and Australia's tobacco control measures.[15] Following suit, Eli Lilly made use of the "North American Free Trade Agreement" (***hereinafter*** "NAFTA")[16] in order to seek compensation for the invalidation of patents on certain drugs belonging to Eli Lilly by the Canadian courts.[17] After this the Japanese company Bridgestone Group[18] went on to file an "ISDS" complaint based on the decision of the Panama Supreme Court. Even before 2020, the Einarssons and Geophysical Service Inc.[19] invoked the "NAFTA" seeking compensation for the unauthorized disclosure of proprietary data done by the Canadian Government.

"ISDS" underlines the benevolent use of dispute resolution mechanisms to reduce conflicts in the international IP regime. Further, it also takes us back to discussions on how international IP agreements aimed to lessen the disruptions caused by armed conflicts or political instabilities. When such agreements weren't in place, powerful nations many a times resorted to ***"gunboat diplomacy"*** to protect their nationals and investments abroad.[20]

For example, during the First Opium War that involved China and the United Kingdom, heavy losses were to be suffered by the British merchants because of Chinese actions against opium trade. In response to the losses suffered, Britain sent warships, which lead to the establishment of treaty ports in China resulting into opening up of its trade with the West.

---

15 *Philip Morris Asia Ltd. v. Commonwealth of Austl.*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (Dec. 17, 2015); *Philip Morris Brands Sàrl v. Oriental Republic of Uru*., ICSID Case No. ARB/10/7, Award (July 8, 2016).

16 *North American Free Trade Agreement*, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993).

17 *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2.

18 *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34.

19 *Harold Paul Einarsson, Russell John Einarsson and Theodore David Einarsson v. Canada*, ICSID Case No. UNCT/20/6.

20 Scott Miller and Gregory N Hicks, *Investor-State Dispute Settlement: A Reality Check: A Report by the Scholl Chair in International Business at CSIS*, 17-19 (Centre for Strategic and International Studies and Rowman & Littlefield, Washington, 2015).

In the current scenarios wherein any host state damages the property of its foreign investors, the injured parties have three avenues to seek compensation for the damage caused. First, through domestic litigation,[21] second, through state-to-state dispute settlement processes,[22] and third, through "ISDS".[23] These avenues are which can be pursued independently of their home governments and the last resort always is the use of intergovernmental diplomacy in case the above 3 mechanisms fail.

In summary, while wartime and post-war protection of IPRs are seldom explored in IP literature, the international IP regime is accustomed to managing disruptions caused by certain armed conflicts or political crises. This regime, along with the development of international investment agreements, aims to minimize such disruptions and is equipped with robust features to ensure its continuity during and after such events.

2. Protecting IPR as a Human Right

The idea of having a framework of human rights is rooted in the belief that each individual has a fundamental dignity and the concept of equality of all individuals. It has evolved over time and now encompasses a bouquet of liberties and rights that are contemplated to be inherent to all human beings. These rights are typically seen as somethings which are considered unalienable and apply to everyone irrespective of caste, creed, language or any similar distinction.[24] The connection between IPR & these universally inherent human rights emphasizes how nations are required by numerous international agreements to defend both sets of rights.[25] It also emphasizes the necessity of balancing the needs of IPRs on one hand and other human rights like food, shelter and education, on the other hand.[26] The UN charter has been the foundation in elevating human rights as a crucial constituent of International Law.

---

[21] Andrea K. Bjorklund, "Private Rights and Public International Law: Why Competition among International Economic Law Tribunals is not Working", 59(2) *UC Law Journal* 254 (2007).

[22] Peter K. Yu, "The Pathways of Multinational Intellectual Property Dispute Settlement", in Christopher Heath & Anselm Kamperman Sanders (eds.), *Intellectual Property and International Dispute Resolution* 127 (Kluwer Law International, 2019).

[23] *Id* at 132–36.

[24] Jack Donnelly, "The Relative Universality of Human Rights", 29 *Human Rights Quarterly* 282-283 (2007).

[25] World Intellectual Property Organization, *A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science* (2006), *available at*: https://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_5.pdf (last visited on September 03, 2024).

[26] Myriam Christmann, "How Intellectual Property Rights are Human Rights", Lexology (July 9, 2018), https://www.lexology.com/library/detail.aspx?g=ad58aecb-f971-426d-96bc-

Following the UN Charter, the UDHR was adopted in 1948 which outlined various civil and cultural rights. While the UDHR is only a declaration and not binding, its principles have been routinely integrated into international customary law. In consonance with values enshrined in the UDHR, the International Covenant on Civil and Political rights (ICCPR) and the International Covenant on Economic, Social and Cultural rights[27] (ICESCR) were adopted in 1966 which brought provisions that were binding as treaty obligations on member states.

UDHR and ICESCR together recognize that all individuals have a human right that protects their material interests arising from any literary, artistic or scientific production. However, this right is limited by concerns emanating from the perspective of public interest. The provisions of the UDHR[28] recognize the rights of authors of any such production to the protection of the moral and material interests which results from such works,[29] however, Article 27(1) of the UDHR also recognizes the right of everyone to freely participate in the cultural life that constitutes a part of their community and to enjoy the benefits that arise from its advancement. In other words, the UDHR, while recognizing the moral and material interests of the author of such production, also recognizes the rights of everyone in the society to enjoy the arts and to share in the scientific advancement. A similar provision, *mutatis mutandis*, exists within the ICESCR as well.[30] These rights of the author as recognized under UDHR and ICESCR appear to be more comparable to the rights which are granted under IP laws.

Philosophical discussions have been prompted by the incorporation of IPR in the framework of human rights, which highlight the conflicts between positivist criticisms and conventional conceptions of rights based on natural law. Some contend that individual rights should come first, while others stress how crucial it is to strike a balance between private and public interests.[31] There was some debate over whether or not to

6a2d8c6e6cf7#:~:text=Indeed%20Intellectual%20Property%20found%20its,of%20Indigenous%20People%20 (last visited on September 03, 2024).

27 International Covenant on Economic, Social and Cultural Rights, art. 15, Dec. 16, 1966, 993 U.N.T.S. 3

28 Sandra Fredman, *Human Rights Transformed: Positive Duties and Positive Rights*, 498-520 (Oxford University Press, 2006).

29 Universal Declaration of Human Rights, A/RES/217(III) (December 10, 1948) at Art. 27(2).

30 *Supra* note 27, at art. 15(1).

31 Aurora Plomer, "The Human Rights Paradox: Intellectual Property Rights and Rights of Access to Science" 35(1) *Human Rights Quarterly* 143 (2013).

include the provisions in the UDHR which protected the rights of authors over their production; socialist nations argued in favour of it, while liberal, market-oriented nations objected.[32] Additionally, there has been increasing recognition of the cultural rights of indigenous peoples, leading to the development of conventions and declarations aimed at safeguarding intangible cultural heritage.

Johannes Morsink also in his seminal work revealed that the United Nations was inspired from Socialist South American nations' constitutions and regional Pan-American covenants discussing human rights for the inclusion of cultural and socio-economic rights within the framework of the UDHR.[33]

The constitutional sources relied upon by the drafting committee show that the first part of Article 27 matches with the first part of Article XV of Chile's Inter-American Juridical Committee,[34] stating *"everyone has the right to share in the benefits accruing from the discoveries and inventions of science".* However, it is to be noted that the remaining part of the original Chilean text was left out of the draft bill which qualified this right further and stated that such sharing would be only contemplated in a situation where there is fair return to the author and the industry from such sharing.[35] Thus, the part of the covenants of the socialist countries which in fact granted protection to the authors was omitted.

However, it is somewhat baffling to discover that the insertion of Article 27(2) was *'not an ignorance of the ideological tensions that may arise'*.[36] Not only were the drafters aware of the potential tension created by the juxtaposition of public and private rights, but it still chose to give this right a recognition as the market oriented nations had long sought the same. The right over the material interest of invention and innovation, got drafted into the declaration due to the vehement support of the liberal-market oriented countries and came at the cost of the views put forward by the socialist

---

[32] *Ibid*.
[33] Morsink, Johannes. The Universal Declaration of Human Rights: Origins, Drafting, and Intent, 130-156 (1999).
[34] Draft Outline of International Bill of Rights, Drafting Committee, U.N. ESCOR, Commission on Human rights., U.N. Doc. E/CN.4/AC.1/3 at 356.
[35] *Ibid*.
[36] Audrey R. Chapman, "Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications", 8(1) *Journal of Human Rights* 1 (2009).

countries.[37]

As far as an interface between human rights and IPR is concerned, it is evident that countries are indeed, obliged to protect human rights and IPRs under various International covenants which resultantly, makes it the duty of the countries not to jeopardize

human dignity and to protect IPRs in accordance with international human rights obligations. Such integration of IPRs within the human rights framework demonstrates how our view of rights is changing in a globalized world. While tensions and debates persist, particularly regarding the relationship between private rights and public interests, there is a growing consensus on the importance of protecting IPR while upholding fundamental human rights principles.

3. Specific Exceptions in Light of National Security

A country's welfare, national-security and existence gets threatened by any form of armed hostilities, therefore inserting a ***"national security exception"*** in international IP agreements becomes quite pivotal. Such an exception would not only empower the states to counter the conflicts in an effective fashion but also boost the strength and sturdiness of the international IP regime.[38] Before the TRIPS Agreement was adopted, there was no international IP agreement which directly included any such exception.[39] In this section of the paper we explore the beginning and execution of Article 73 of the TRIPS Agreement.[40] Herein besides examining the responsibilities laid on the countries which are a part of any kind of armed hostility we also examine the responsibilities of those states which are not directly involved but have imposed sanctions on hostile states. Additionally, this section delves into the protections which the international investment agreements lay down when any armed conflict takes place. Despite the fact that this

---

37 Davinia Ovett, "Intellectual Property and Human Rights: Is the Distinction Clear N Assessment of the Committee on Economic, Social and Cultural Rights, General Comment", 17 *Policy Brief* 2 (2006).

38 Rostam J. Neuwirth and Alexandr Svetlicinii, "The Economic Sanctions over the Ukraine Conflict and the WTO: Catch-XXI and the Revival of the Debate on Security Exceptions", 49 *Journal of World Trade* 891 (2015).

39 UNCTAD-ICTSD, *Project on IPRS and Sustainable Development, Resource Book on Trips and Development* 803 (2005).

40 *Art. 73, Agreement on Trade-Related Aspects of Intellectual Property Rights*, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (April 15, 1994).

section primarily focuses on Article 73 of the TRIPS Agreement, the analysis is apposite for all regional, bilateral or plurilateral IP agreements.

3.1. Article 73 of TRIPS

This Article of the TRIPS authorises a member to not provide any kind of information, or to take such action which is crucial for the protection of 'essential security interests' in particular situations. This agreement cannot be construed as preventing members from taking action in pursuance of a member's obligations under the UN Charter for the maintenance of international peace and security.

Article 73 has been worded in such a manner that it reflects Article XXI of GATT and Article XIV *bis* of GATS. Therefore, the jurisprudence which has evolved with respect to Article XXI of GATT may be pertinent while interpreting this article. Despite the fact that exception included therein provides a huge leeway to the member states in the determination of security reasons, the decision so taken is not immune from scrutiny. It could be put through review under the DSU, a treatment similar to other measures which may be seen to be in conflict with the agreement. In particular, invocation of a security exception may not take place to exclusively protect commercial interests.[41] However, any kind of health crisis or a natural disaster may account for the invocation.

At the time when the TRIPS negotiations commenced in the 1980s, the provision on national security exception was not available, rather ***"national security"*** was part of a wider scheme similar to ***"public morality"*** and ***"public health and nutrition,"*** under Article 8 of the TRIPS Agreement.[42] The scheme was developed by UNCTAD[43] and it emphasized upon the state's right to take relevant steps during law making to safeguard national security, public health, and other vital socio-economic sectors.

As discussion progressed further, it was realised that it is more appropriate to establish a different and independent provision particularly addressing the concerns related to national security. Hence, the language regarding national security was

---

41 Panagiotis Delimatsis and Thomas Cottier, "Article XIV *bis* Security Exceptions", in Rüdiger Wolfrum, Peter-Tobias Stoll, *et.al*., (eds.), *Max Planck Commentaries on World Trade Law, WTO - Trade in Services*, 329-348, (Leiden/Boston: Martinus Nijhoff Publishers, 2008).

42 S*upra* note 24, art. 8.

43 Abdulqawi A. Yusuf, "TRIPS: Background, Principles and General Provisions", in Carlos M. Correa and Abdulqawi A. Yusuf (eds.), *Intellectual Property And International Trade: The Trips Agreement* 3, 10, 11 (Kluwer Law International, 3rd edn., 2016).

transported to what finally came to be known as Article 73 which drew inspiration from Article XXI of the GATT.[44] Although the provision was drafted originally with armed hostilities in mind, its scope extends beyond wartime scenarios to even include wider national security or emergency situations.[45] During the COVID-19 pandemic, this pliability became even more apparent with demands from commentators and NGOs to enforce Article 73 to address the health crisis. Like, South Centre's Carlos Correa supported the use of this Article to procure medical supplies and technologies which are required to contain the pandemic, a sentiment echoed by legal scholar Frederick Abbott.[46]

3.2. Parties in an armed conflict

The right of the countries to look after their national security by way of ***"taking any action they deem necessary to protect their essential security interests, particularly during times of war or international emergencies"***[47] is enshrined in Article 73(b). As per this provision the states which are a part of any kind of armed hostility would get a significant latitude in justifying their ***"wartime measures"*** related to IPs. For instance, during the Russia-Ukraine War, Decree 299 was issued by Russia which lessened the royalty rates for IP rights holder from ***"unfriendly"*** nations to zero for national security-based compulsory licenses,[48] certainly affecting the rights holders from the United States. Even though there are concerns, such actions are likely in accordance with the TRIPS Agreement due to the broad and extensive discretion which is given to the member states in choosing and adopting the necessary actions required for protecting their national security. Although the WTO panels have not ruled on the national security exception comprehensively, there are two such cases which are noteworthy wherein the exception was invoked. These cases were with respect to two states, Russia[49] and Saudi Arabia.

In the case pertaining to Russia; the 2014 dispute between Ukraine and Russia resulted into transportation blockades of Ukrainian goods by the Russian side and as per

---

44 General Agreement on Tariffs and Trade, art. XXI, 61 Stat. A3 (pts. 5 & 6), 55 U.N.T.S. 188 (Oct. 30, 1947).

45 S*upra* note.24, art. 73(b)(ii)–(iii) (including language such as "the traffic in arms, ammunition and implements of war" and "taken in time of war").

46 Frederick Abbott, *The TRIPS Agreement Article 73 Security Exceptions and the COVID-19 Pandemic*, (August 2020) (Research Paper No. 116, South Centre, Geneva).

47 *Supra* note 40, art. 73(b).

48 Josie L. Little and Osagie Imasogie, "McRussia: The Weaponization of Intellectual Property", 63(2) *IDEA: The IP Law Review* 320 (2023).

49 World Trade Organization, *Russia - Measures Concerning Traffic in Transit, Panel Report*, para 7.5.7 at 59, WT/DS512/R (April, 2019).

Article XXI (b)(iii) of the GATT, which states that "if this article is invoked by any member, then the actions of the member states is immune from WTO panel scrutiny"[50] the act was considered reasonable. It was ruled by WTO that the requirements mentioned under Article XXI(b)(iii) of GATT 1994 in order to invoke the measures in question were fulfilled by Russia.[51] Although the case was not something which involved Article 73 of the TRIPS Agreement and instead focussed on Article XXI of the GATT, the language of both these provisions are so strikingly similar that it makes the instances from the case particularly significant in the IP context.

In the dispute between Saudi Arabia and Qatar,[52] the sanctions which Saudi Arabia placed, obstructed the access of the Qatari rights holder to the legal remedies. The sanctions so imposed were considered to be permissible under Article 73 and even the WTO panel found that the requirements of Article 73 were met.[53]

There have been other WTO cases as well that invoked this exception, however, their significance to the matters relating to IP varies. As a whole, such cases explain and illustrate the way Article 73 and Article XXI of GATT could be used by the states involved in armed hostilities to justify the IP measures taken by them, with WTO panel decisions providing insights into their evaluation.

4. Practice in India

India has had a very contentious approach to IP rights and has often prioritized fundamental rights over IP protection. While, there have been no IP cases related to war since, India engaged in war at a time when IPRs did not hold much importance or consequence in the international or domestic arena. However, the courts have been routinely involved in issues of balancing the rights of the author and the public as we encountered before in the article where we examined the juxtaposition of the provisions of Article 27 of the UDHR.

---

50 *Ibid.*
51 *Ibid.*
52 World Trade Organization, *Saudi Arabia - Measures Concerning the Protection of Intellectual Property Rights, Panel Report*, WT/DS567/R (June, 2020).
53 *Id.* para 7.23-7.42 at 54-59.

Cases like *EBC v. D.B. Modak*[54] and *Bayer Corp. v. UOI*[55] are a testament to the fact that the law has given precedence to rights such as education and healthcare over IPR. The Delhi High Court had once even gone as far as allowing photocopying of books in an attempt at safeguarding the right to education.[56] Efforts to protect IPRs such as the Patents (Amendment) Ordinance, 1994,[57] aimed to align with TRIPS Agreement obligations. However, this ordinance lapsed and subsequent attempts like the Patents (Amendment) Bill, 1995, failed due to legislative issues. India faced many WTO complaints[58] which compelled it to amend its laws and thus, the Patents (Amendment) Act, 1999, was brought into existence with a goal to make our law in conform with the TRIPS agreement.

The 2002 amendment to the Patents Act made even more substantial amendments, yet the grant of product patents for pharmaceuticals and agricultural chemicals remained a persistent issue for the legislature to address. To fulfil TRIPS obligations, the Patents (Amendment) Ordinance, 2004, was introduced. Despite objections regarding healthcare accessibility, amendments to Section 3(d) and Section 2(1)(ja) of the Patents Act limited what could be considered an invention[59] and the Parliament hastily passed these changes to avoid TRIPS violations.

Provisions like Section 92 and Section 157 A,[60] which give the government the authority to grant compulsory licenses and cancel patents for national security reasons without providing precise definitions of emergencies or wars, demonstrate how anti-IP India's patent legislation is. Even in times of peace, this legislative approach shows an unwillingness to give IP rights priority. In conclusion, India's IP protection system has had difficulty balancing international commitments with fundamental rights. Rather than being proactive steps to improve IPR, legal revisions have been reactive, prompted by outside forces. The ambiguity regarding IP protections in times of crisis is highlighted by

---

54 *Eastern Book Company v. D.B. Modak*, (2008) 1 SCC 1.
55 *Bayer Corporation & Ors. v. Union of India & Ors,* (2009) 162 DLT 371.
56 *Masters & Scholars of University of Oxford v. Rameshwari Photocopy Services*, (2016) 235 DLT 409 (DB).
57 The Patents (Amendment) Ordinance, 1994, §1(Dec. 13, 1994).
58 India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, (WT/DS50/AB/R, dated 19-12-1997); India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, (WT/DS79/R, dated 24-8-1998).
59 Surendra Malik and Sudeep Malik, *Supreme Court on Intellectual Property Rights*, 179-184 (Eastern Book Company, 2022).
60 The Patents Act, 1970 (Act No. 39 of 1970).

the emergency provisions' lack of clarity. In general, India's IP environment is still marked by a careful balancing act between conflicting interests, with fundamental rights frequently superseding IPR.

The law in India therefore, even under normal conditions is not pro-intellectual rights, let alone during times of emergency or war. This is visible from a combined reading of Section 92 coupled with Section 157 A, which allow the government to issue compulsory licences and revoke any patents for the security of India. These provisions also do not define situations of emergency or war with any clarity and leave it to the imagination of the executive.

India till now has not come across the need to use IPRs as a weapon since, it fought all of its wars during a time when IPR was not in vogue. However, the situation has ceased to be the same and India along with its unruly neighbour, China, has become one of the biggest players in IPR. Therefore, any future outbreak of conflict could witness serious consequences and actions. The same need not come from the warring countries itself and could come from other countries motivated by the present IPR hostile setup existing in the country. Repercussions also may not be always related to IPR and could involve freezing of assets as well which could be further supported by parallel importation.

For example, in the Russia-Ukraine war, countries allied to the USA responded by freezing Russian assets while *parallel imports* to Russia from China, a neutral country, made sure that markets in Russia remained stocked up till viable domestic alternatives came into existence.

A similar situation could arise in a conflict engaging India and another country with a robust IPR protection framework where the other warring country could parallelly import Indian manufactured generic drugs through other neutral countries to suit its medicinal needs. Further, it could save its IPRs from ending up in India by having agreements with neutral countries over parallel importation and such neutral countries would be willing to come into such an understanding while knowing that their IPRs would be protected in the warring country as opposed to India, where their IPRs enjoy much lesser protection.

Therefore, the current public interest perspective developed by Indian courts may suit the needs of a stable world without conflict, however, apart from thwarting meaningful technological transfer and investment, it also puts a question mark on the effectiveness of a lax and inefficient system during wartime. Such a system, is inconsistent with our interests during a possible time of war and steps have to be undertaken as soon as possible in order to prevent a debacle in the future.

Another possibility is the exploitation of the system of international exhaustion of IPR in India. Accordingly, once a product is offered for sale by the IP owner or another authorized party anywhere in the globe, it can be freely traded across national borders as a single market. India accepts this idea of worldwide exhaustion in accordance with the provisions of the Indian Patents Act[61] and the Indian judiciary accepted this specific exhaustion system to be existent within the Indian IPR framework in the case of *Kapil Wadhwa and Ors. v. Samsung Electronics Co. Ltd*.[62]

This system could be exploited by countries in conflict with nations that have a strong IPR culture. To explain with an example, if say Iran is in a war with Israel then it can import Israeli IPs from India freely as the Indian system would not protect the sale once the IPs entered Indian borders through importation and could be freely imported to Iran. In such a case, relations between India & Israel would get unnecessarily affected even without India entering the conflict. This points towards a set of problems that could arise due to third party conflicts as well.

A statutory restraint against suspension of enemy IPRs needs to be created so as to not motivate permanent IP restrictions in lieu of temporary conflicts. The practice of restraint has been seen as India and China, in their various border altercations have not till now suspended each other's IPRs, however, both could be motivated to take such a measure in the future and therefore, there exists a need to cement this existing practice into a statutory framework. This therefore, would need an explanation to the ambit of *'national emergency'* and in the author's opinion such an explanation or attempt at defining *'national emergency'* must exclude temporary or minute aggressions and conflicts from its ambit expressly.

---

61 The Patents Act, 1970 (Act No. 39 of 1970) at sec.107A.
62 *Kapil Wadhwa and Ors. v. Samsung Electronics Co. Ltd.*,194 (2012) DLT 23.

5. Exceptions Available in Other Jurisdictions

The dispute between Russia and Ukraine has been going on since long now. The starting of the conflict could be dated back to as early as the USSR disintegration. Although, over the years the two nations have had dynamic diplomatic relations, but, with the coming of Volodymyr Zelenskyy to power in the year 2019, those relations have become worst.

It is not just the political disputes which have put the states into hot water but they have had legal crisis in the past as well, when Russia stopped the passage of Ukrainian goods scheduled for Kazakhstan, Kyrgyzstan, Mongolia, etc., through its region.

In 2016, requests were made by the Ukrainian side to the Russian side for consultations on alleged multiple constraints on trade movements from Ukraine to other states through the Russian land. It was asserted by the Ukrainian side that the *"measures appear to be inconsistent with principles of the WTO agreement."*

The tensity between the two sides kept on increasing and just days before declaring the war against Ukraine, Russia gave recognition to two supposedly independent territories in the east of Ukraine, Donetsk and Luhansk. A treaty of friendship was signed with both these regions by Russia thereby paving the way for its troops moving in as "peacekeepers". On February 24, 2022 Russia attacked and invaded Ukraine after alleging Ukraine of committing acts of genocide in the two regions. Against this hostility Ukraine appealed to the ICJ under the Genocide Convention and charged Russia for commencing an illicit war based upon flawed and concocted allegation of Ukraine committing genocide on its land.

In order to permit the use of utility models, patents and industrial designs without the IPR holder's permission and without giving any kind of compensation to the IP owners, when owner belongs to *"foreign states and territories that have committed hostile acts against the Russian Federation",* Russia amended Article 1360 of the Russian Civil Code (regarding compulsory licenses) by decree 299 of 2022.

This decree set out some steps and measures which could be applied to not only the companies which are incorporated or based in any "unfriendly" country but also to companies which earn their "main profit" from one or more of such countries. The list

of the countries which are "unfriendly" includes all 27 member states of the EU, as well as Canada, Lichtenstein, Japan, Iceland, Australia, Monaco, New Zealand, Norway, South Korea, USA and many other countries.

5.1. United States of America

It has been the practice of the USA to employ IPRs as a strategic tool, particularly by the help of laws like the Trading with the Enemy Act[63] (*hereinafter "*TWEA*"*) of 1917. TWEA was brought in at the time of the first World War and it gave the President of the US (*hereinafter* "POTUS") wide powers to regulate trade with rival states. As time went by, amendments like the International Emergency Economic Powers Act[64] (*hereinafter "IEEPA"*) in 1977 revised the scope of the act, and limited its application to armed hostilities and on similar lines came up with provisions for emergencies in peacetime.

TWEA had a noteworthy feature, which was the compulsory licensing of patents, owned by enemies, during the first World War. This gave way to the US companies to fuel their production to help the war.[65] These days compulsory licensing is used by several nations for multiple purposes like producing generic drugs. The phrase enemy has been defined very broadly by TWEA. The definition even brought within its scope the citizens of such enemy nations and companies functioning from these states or the ones associated with such states.[66]

TWEA evolved further to permit the seizure of enemy owned patents and this included some very famous products as well such as the Bayer's Aspirin.[67] Although these steps gave a blow to Germany in its war effort, some doubts were posed with respect to the power centralization in the hands of POTUS. Such questions and doubts led to the

---

63 The Trading with the Enemy Act of 1917 §1, Pub. L 65-91, (USA).

64 The International Emergency Economic Powers Act of 1977 §1, 50 U.S.C. ch. 35 § 1701.

65 Petra Moser, "Patents and Innovation: Evidence from Economic History", 27(1) *The Journal of Economic Perspectives* 25 (2013).

66 C. H. Hand, Jr., "The Trading with the Enemy Act", 19(2) *Columbia Law Review* 115-116 (1919).

67 Alan Strowel, "Bayer's Aspirin: A Lasting Success Without Patent and Strong Trademark Protection", *available at*: http://www.ipdigit.eu/2011/10/bayers-aspirin-a-lasting-success-without-patent-and-trademark-protection/?pdf=1059 (last visited on September 18, 2024); Andrew Jack, "The Serial Painkiller", *available at*: https://www.ft.com/content/f7345e36-ffbc-11e0-8441-00144feabdc0 (last visited on September 18, 2024).

institution of IEEPA which limited such wide powers in the hands of POTUS to emergencies and also gave the congress a power to veto the emergency declarations.

Later some legal problems with respect to the veto power also followed through cases such as *Immigration and Naturalization Service v. Chadha*.[68] This case paved way for some modifications in legal processes which came out to be a compulsory shared resolution by both the houses of the congress to overrule a state of emergency. This modification eventually restored the power in the hands of POTUS as anyways the joint resolutions would be ineffective and not have the force of law in the absence of assent from the President.[69] Despite making the changes, TWEA still remains mostly intact, whereas IEEPA has evolved to integrate power in the administrative branch. This power concentration puts up some doubts about the possible abuse of this power, particularly in conflict cases. For instance, in Cuba, where irrespective of the stoppage of hostilities, TWEA continues to be in place and despite the institution of IEEPA, such sanctions on Cuba which were imposed as per TWEA have not been removed. This kind of consolidation of IPR authority in the executive branch presents risks by putting the impetus on individual decision and side-lining the international and national objectives. When it is about application the executive system can be seen to be capricious and such a setting suits the regimes which are dictatorial in nature like Russia instead of democracies and hence, it would certainly not suit the flagbearer of democracy which the USA claims itself to be.

While progressing from the US, which is considered to be the trailblazer in using IPR strategically, to a state with a deep and prosperous legal heritage, it becomes unambiguous that legal frameworks help configure power dynamics and impact the global relations. Such a switch underlines the disparaging attitude towards governance and emphasizes upon the significance of balancing the authority of the executive with checks and balances to provide protection from any possible misuse of power.

5.2. United Kingdom

IPR development was witnessed by England for the first time through the Statute of Monopolies in 1623. Later on, with amendments this statute led to the Copyright,

[68] *INS v. Chadha*, 462 U.S. 919 (1983).
[69] Kim Lane Scheppele, "Trump's Non-Emergency Emergency", *available at*: https://verfassungsblog.de/trumps-non-emergency-emergency/ (last visited on September 15, 2024).

Designs & Patents Act[70] of 1988 (*hereinafter* "Copyright Act"). In the most accurate sense, this act revamped the law relating to copyright and came up with protection measures for *inter alia* dramatic, musical and artistic work. Besides the protection it also laid down the lifetime or the duration of the copyright as until 70 years from the death of the creator.

In the act, the crown gets the authority to transgress upon the design rights at the time of emergency which the council declares by order.[71] In a similar fashion, the Patents act of 1977[72] permits the crown to exercise powers on patents during emergency. However, a mellower approach is taken by the English Law in contrast to the US as the English Law provides protection measures for enemy patent under the Patents, Designs, Copyright and Trade Marks (Emergency) Act[73]. It is ensured under this law that the agreements or licenses with the enemy entities continue to be valid in case they are advantageous to the UK residents, however, it is laid down by this very law that any such agreement cannot be instituted at the time of war.

The English law provisions dispense the power in a broader sense as compared to the US wherein the power is accumulated in the hands of POTUS. For instance, as per the English law in order to announce an emergency, there is a requirement of parliamentary agreement via an order in council which is a testament of a more balanced and prudent approach towards imposing emergency. The primary focus of such a system is to ensure stability and avoid any potential power misuse besides providing for a more robust and reliable IP regime.

All in all, the endeavour of the English IPR framework during war is to strike a balance between safeguarding the national interests and maintaining neutrality. A more robust and pliable system which is less vulnerable to the whims and fancies or ego-based decision of any individual, is being promoted by England's approach.

The outcome of such a balanced approach is the acknowledgement of the human right aspect of IPR. Talking of our own country, such a balanced approach could be adopted and learned from the English law. Currently, the Indian IPR regime consists of a

[70] The Copyright, Designs and Patents Act 1988, c.48(UK).
[71] *Id.* at §244.
[72] The Patents Act, 1977 c. 37, §59 (UK).
[73] The Patents, Designs, Copyright and Trade Marks (Emergency) Act 1939, 2 and 3 Geo. 6, §1 (UK).

lot of ambiguities, such as the instances that amount to national emergency under Section 92 have not been defined, besides not mentioning the way to differentiate between national emergency and extreme urgency. Things like this provide unchecked power to the authorities to use the provision of compulsory licensing as per its wishes. Also, the provision doesn't talk of any need for parliamentary permission thereby leaving the decision solely upon the Government of India which upon its contentment will make a declaration by way of gazette notification. Such a system is highly whimsical, even more than that of the US or the UK therefore, we are of the opinion that the need of the hour is a more democratic system in the country wherein everything does not depend upon the desires of the Centre which can go with compulsory licensing as and when it wants by bringing out a notification in the official gazette, rather the gazette notification should come after the parliamentary nod.

5.3. Argentina

Argentina's approach to IP protection has been a subject of international scrutiny for years, particularly from organizations such as the World Intellectual Property Organization (*hereinafter* "WIPO") and WTO. Concerns primarily focus around the country's restrictive patent policies and lack of robust data exclusivity measures, which have drawn criticism from foreign governments and international bodies.

One of the most notable disputes arose in 2000, when the United States filed a complaint (DS171) against Argentina at the WTO, alleging that Argentina's legal framework was not in compliance with the TRIPS agreement. USA argued that Argentina failed to provide adequate patent protection for pharmaceutical products and did not ensure effective data exclusivity for agricultural chemicals. Specific concerns included the absence of product patent protection for pharmaceuticals, inadequate safeguards against the unfair commercial use of undisclosed test data, and restrictions on the patentability of certain innovations. The dispute was resolved in 2002, with Argentina and USA reaching a mutually agreed solution that addressed some of the concerns raised.[74]

[74] Mutually Agreed Solution, Argentina - Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals, WT/DS171, notified on 31 May 2002.

Despite this resolution, Argentina continues to face challenges in strengthening its IP enforcement mechanisms. As of 2024, the International Property Rights Index (IPRI) ranked Argentina 94th globally, assigning it a score of 4.181 out of 10 — a reflection of ongoing deficiencies in the country's IP protection framework.[75] Similarly, the U.S. Trade Representative's 2022 Special 301 Report[76] placed Argentina on the Priority Watch List, citing key concerns such as limitations on patent-eligible subject matter (particularly in the pharmaceutical and biotechnology sectors), inadequate protection against the unfair commercial use of test data submitted for regulatory approval and a significant backlog of patent applications, which disproportionately affects biotechnological and pharmaceutical innovations.

Argentina's restrictive approach to IP protection is reflected in several laws, regulations, and administrative policies, particularly in the pharmaceutical sector. Some of the key legislations include Joint Resolution No. 118/2012[77] which was issued by the Argentine Patent Office (INPI), the Ministry of Industry, and the Ministry of Health and it limits the patentability of pharmaceutical inventions, particularly new formulations and second medical uses of existing drugs. Another such legislation is the Argentine Patent Law No. 24.481 (1996, amended in 2018)[78] which serves as the primary legislation governing patents in Argentina. While amended by Law No. 27.444 (2018)[79] to streamline administrative procedures, it retained strict patentability criteria, limiting the scope of protection available to inventors. Decree No. 260/1996 [80] is another such example. This decree regulates the compulsory licensing framework in Argentina. The decree allows the government to bypass patents under certain conditions, thereby reducing the exclusivity period for patented innovations. Another such restrictive

[75] Property Rights Alliance, "International Property Rights Index", *available at*: https://internationalpropertyrightsindex.org/countries (last visited on October 5, 2024).

[76] Office of the United States Trade Representative, *2022 Special 301 Report*, *available at*: https://ustr.gov/sites/default/files/IssueAreas/IP/2022%20Special%20301%20Report.pdf (last visited on Octobe 05, 2024).

[77] Joint Resolution No. 118/2012, 546/2012 and 107/2012, Adoption of Guidelines for the Examination of Patent Applications of Chemical and Pharmaceutical Inventions, Ministerio de Salud [Ministry of Health], Ministerio de Industria [Ministry of Industry], and Instituto Nacional de la Propiedad Industrial [Industrial Property National Institute], B.O., May 8, 2012.

[78] Regulation of the Law No. 24.481, on Patents and Utility Models.

[79] Law No. 27.444 of May 30, 2018, on the Simplification and Debureaucratization for the Productive Development of the Nation, Argentina.

[80] Decree No. 260/1996 of March 20, 1996, on Approval of the Consolidated Text of Law No. 24.481 on Patents and Utility Models and its Regulation (as amended up to Decree No. 403/2019 of June 5, 2019), Argentina.

legislation is the Law No. 25.506 on Digital Signatures (2001)[81] which establishes the legal validity of digital signatures in Argentina, playing a role in IP-related electronic transactions.

While WIPO and other international organizations continue to monitor Argentina's IP landscape, the country's restrictive policies and enforcement gaps remain a major concern for foreign investors and multinational companies. Despite efforts to address past disputes, Argentina's approach to patentability, data exclusivity, and compulsory licensing reflects a broader pattern of weak IP protections, particularly in critical sectors like pharmaceuticals and biotechnology.

Moreover, these regulatory shortcomings raise deeper questions about Argentina's ability to safeguard intellectual property during periods of crisis or conflict. The lack of robust enforcement mechanisms and the ease with which patents can be overridden through compulsory licensing suggest that, in times of economic turmoil or wartime, intellectual property rights would be at even greater risk of being disregarded. Without meaningful reforms, Argentina's IPR framework remains vulnerable, offering little assurance to rights holders that their innovations and proprietary technologies will be protected when they need it the most.

6. Conclusion

The war between Russia and Ukraine has highlighted the pressing need to re-evaluate how resilient the international IP framework is during times of conflict. Although the present framework has fared well during previous global crises, such as the COVID-19 pandemic and world wars, it is still insufficiently equipped for contemporary geopolitical conflicts. Wartime measures that nullify IP safeguards, like Russia's Decree No. 299, draw attention to weaknesses that need to be fixed in order to defend IPR around the world.

Policymakers must enact proactive institutional and legal reforms to strengthen IPR safeguards during times of war. Clear definitions of "national emergency" should be incorporated into national IP laws to avoid arbitrary IPR suspensions and make sure that

[81] Law No. 25.506, Dec. 11, 2001, B.O., *available at*: http://www.certificadodigital.com.ar/ley25_506.htm (last visited on October 07, 2024).

short-term disputes do not result in long-term limitations. For example, India needs to establish legislative supervision for actions impacting intellectual property rights in times of crisis and re-examine its extensive executive powers under Sections 92 and 157A of the Patents Act. In the same vein, strong but fair security exclusions must be included in international accords to guard against misuse while permitting necessary interventions in dire situations.

Researchers have still not examined how resilient the global IP framework actually is. An evaluation of how IPR protections relate to trade sanctions, national security strategies, and international economic stability during wars is required. It is imperative that academics and policymakers pay immediate attention to the possibility of IPR being used as a weapon in geopolitical conflicts, such as the conflict between Russia and Ukraine and the escalating tensions in the Middle East. In order to ensure ongoing innovation and investment, research should concentrate on creating legislative frameworks that strike a balance between IP safeguards and humanitarian and security considerations. This discussion becomes all the more important due to the current hostility between Palestine and Israel and this has the potential to lead to hostilities breaking out between various countries and Israel which could see an unprecedented form of IPR warfare leading to nullification of Israeli IPRs in these warring countries and vice-versa. We already have seen the Russia-Ukraine war affecting IPRs and it cannot be promised that the Israel conflict in the middle east would not conflagrate further.

Policymakers and academics must work together to fortify the international intellectual property framework in a world that is becoming more unpredictable. The international community runs the risk of IPR safeguards gradually eroding without a calculated and forward-thinking approach, which would ultimately impede innovation and economic progress. By prioritizing legal clarity, international cooperation, and comprehensive research, governments and institutions can ensure that IPR remains resilient - even in the face of geopolitical turmoil.

***