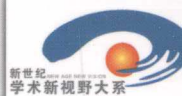
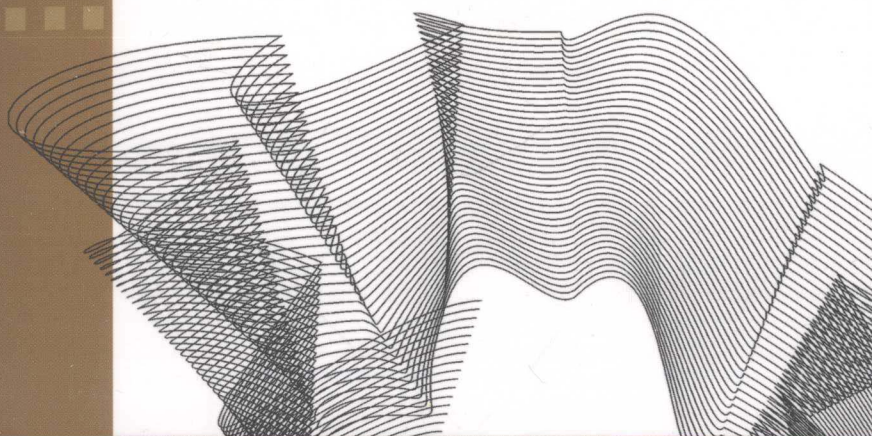


厦门大学
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国际人权法视角下 《TRIPS协定》的变革研究



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On the Reform of the TRIPS Agreement From
the Perspective of International Human Rights Law

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衣淑玲 著



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序 言

国际经济法是发展中的边缘性法学学科。在世界范围,国际经济法作为独立的法学学科,已有近 60 年的发展史。在中国,经过 20 多年的发展,国际经济法已成为法学各学科中理论研究最活跃、实践性最强的学科之一。当前,在经济全球化和中国加入世界贸易组织的新形势下,国际经济法更呈现其鲜明的时代性和蓬勃的生命力。

得改革开放风气之先,厦门大学在我国较早开展国际经济法的教学和研究。经原国家教委批准,厦门大学于 1981 年和 1985 年在全国率先招收国际经济法专业硕士生和本科生,1986 年开始招收国际经济法专业(1997 年后调整扩大为国际法专业)博士生。1987 年成立厦门大学国际经济法研究所。1995 年,厦门大学“国际经济法及台港澳法研究”学科点被列为全国高校“211”工程重点建设项目。2002 年,厦门大学国际法专业由教育部批准为国家重点学科。长期以来,厦门大学国际法专业学术群体秉承“自强不息,止于至善”的校训,囊萤映雪,开展了一系列国家急需的国际经济法理论和实务研究工作,为我国的法治建设和学科发展作出了应有的贡献。同时,经过不断探索,本专业逐渐形成“出人才”和“创成果”相互促进、相辅相成的研究生培养模式,培养了大批“懂法律、懂经济、懂外语”的国际经济法专门人才。

把本专业建成我国国际法领域的重要研究基地和人才培养基地是我们的奋斗目标。“厦门大学国际经济法文库”的编辑出版,是本专业学科建设和发展的长期性工作。“文库”的宗旨是以系列学术专著的形式,集中展现国际经济法领域的专题研究成果,促进学术和社会发展。“文库”立足出版厦门大学学者、校友在国际经济法领域的研究成果,更欢迎海内外国际经济法学者惠赐佳作。“文库”坚持作品的原创性标准,崇尚严谨治学,鼓励学术创新和争鸣。在出版国际经济法专家学者力作的同时,尤其关注国际经济法学界的新人新作,包括在优秀博士学位论文基础上发展的学术专著。我们期望“文库”成为国际经济法专家学者辛勤耕耘的园地,源源不断地产出智慧之果,启迪思想,弘扬学术。同时,更希望“文库”发挥国际经济法“智库”的功能,为我国的国际经济条约实践、涉外经贸立法以及涉外经贸实务提供有益的理论指导或参考。

“厦门大学国际经济法文库”编辑委员会

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内容摘要

20 世纪 90 年代以来,知识产权国际保护制度,尤其是世界贸易组织(WTO)框架下的《与贸易有关的知识产权协定》(以下简称《TRIPS 协定》),对发展中国家及其人民的健康权、文化权、食物权、发展权等人权实现的不利影响成为国际社会各界别行为体普遍关注的焦点,“知识产权与人权关系”这一问题联结因之成为一个重要的研究领域。无论是对于知识产权国际保护和人权国际保护的和谐实现,还是对于国际法体系化的有序发展,这一研究都有着重大的意义。在“知识产权与人权关系”这一复杂的重大课题中,倍受关注和争议较大的问题包括:知识产权的人权属性之争议;《TRIPS 协定》及知识产权对人权国际保护的影响;人权视角下知识产权国际保护制度(以《TRIPS 协定》为核心)的变革。本书从国际人权法的视角,运用相关的基本法律原理探讨了上述息息相关的问题。

本书共分前言、正文及结论三部分,其中正文分为四章。

前言简要介绍了研究论题的确定,评述了本论题的研究情况和已有成果,界定了本书的研究范围、拟研究的主要问题及基本框架,说明了本论题的研究目的和意义。

知识产权是否具有人权属性是“知识产权与人权关系”研究中首先需要澄清的基本理论问题。本书第一章首先分别地讨论了知识产权和人权的性质;在此基础上,通过对相关知识产权理论的分析、对知识产权制度历史起源的考察、对知识产权与人权特征的比较、对国际人权文件相关条款的解读,认为知识产权不是人权,而是促进人权实现的工具。

就理解《TRIPS 协定》与人权国际保护冲突的产生而言,对知识产权国际保护制度和人权国际保护制度的历史性考察无疑是必需

的。本书第二章以《TRIPS 协定》的产生为界限,概括、揭示了知识产权国际保护制度发展演进的特点和趋势;同时,也总结了人权国际保护制度发展演进的特点和趋势。通过这种纵向的历史考察,本书认为,知识产权国际保护制度和人权国际保护制度长期以来的隔离发展是《TRIPS 协定》与健康权、文化权等人权的实现相冲突的缘由所在。

为了更为深入地认识《TRIPS 协定》与人权国际保护的冲突,对有关国际人权文件、《TRIPS 协定》及其实施实践的共时性剖析是十分必要的。本书第三章具体分析了《TRIPS 协定》与国际法上的文化权、健康权、食物权及发展权等人权的实现之间冲突的表现,探讨了冲突产生的原因。通过这种横向的现实评介、文本与理论分析,本书认为,《TRIPS 协定》与人权国际保护的冲突,包含了法律规则之间的直接冲突,更主要的体现为权利冲突。从法律的内部视角,本章从不同权利主体之间的利益冲突、国际法上的制度冲突等方面分析了二者冲突的主要原因。此外,本章还从一国的经济发展水平、《TRIPS 协定》的缔结谈判等外部视角对二者冲突的产生进行了评析。

《TRIPS 协定》与人权国际保护冲突的解决是“知识产权与人权关系”研究中的重心所在,本书第四章对此进行了探讨。本章首先提出,立法途径即《TRIPS 协定》的制度变革是解决或缓解二者冲突的有效方式,这一变革必须与国际人权法相协调。进而,本章评述了 WTO 多哈回合中与《TRIPS 协定》有关的议题的谈判现状,并对《TRIPS 协定》变革的国际环境进行了利弊分析。从法制发展的应然角度,本章提出了《TRIPS 协定》变革的指导原则,讨论了中国在与《TRIPS 协定》有关的议题谈判中的谈判立场和策略选择,评介了学者们及 WTO 成员关于《TRIPS 协定》变革的建议。在此基础上,本书认为,《TRIPS 协定》框架下“发展导向”的、促进人权实现的制度变革将是必然的。国际法律制度,包括以《TRIPS 协定》为核心的

知识产权国际保护制度的人本化是大势所趋。

最后,针对前言中提出的“拟研究的主要问题”,笔者总结了自己的思考结论。

关键词:知识产权;人权;冲突;《TRIPS 协定》

ABSTRACT

Since 1990s, the adverse effects which the institutions of the international protection for intellectual property rights, especially the Agreement on Trade—Related Aspects of Intellectual Property Rights (hereinafter TRIPS Agreement) under WTO , affected the realization of the human rights which include the right to health, the right to culture, the right to food and the right to development etc. of the developing countries and their people have become the focus that the various actors of the international society have been paying attention to generally, and thus, the issue linkage of “the relationship between intellectual property rights and human rights” is becoming a important research field. No matter for the harmonious realization of the international protection for intellectual property rights and the international protection for human rights, or the orderly development of the international law system, this research is significant. Among the complicated and important problems of “the relationship between intellectual property rights and human rights”, the issues which are often concerned and disputed include: the divergence of the human right attribute of intellectual property rights; the effects of TRIPS Agreement and intellectual property rights on the international protection for human rights; the reform of the international intellectual property law (study with TRIPS Agreement as its center). From the perspective of international human rights law, the author discusses these issues which are closely linked each other by exercising correlative legal fundamentals in this book.

This book is divided into three parts: Introduction, Text, and Conclusion, and the Text consists of four chapters.

In introduction part, the author introduces briefly the definition of the research theme. Furthermore, academic history is reviewed, and the scope of research, the major issues to be explored, and the basic structure of this book are defined. At length, the purpose and the meaning of the research are explained.

The basic theoretical question which needs making clear first is whether intellectual property rights have human right attribute in the research of "the relationship between intellectual property rights and human rights". In chapter 1, firstly, this book discusses the attribute of intellectual property rights and human rights separately; on this basis, through analyzing the related theories of intellectual property rights, reviewing the historical origin of intellectual property rights institutions, comparing the characters between intellectual property rights and human rights, reading the related provisions of international human right documents, the author argues that intellectual property rights is not human right, but the tool of promoting realization of human rights .

In order to understand the arising of the conflicts between TRIPS Agreement and international protection for human rights, it is certainly necessary to review diachronically the institutions of the international protection for intellectual property rights and that of the international protection for human rights. In chapter 2, taking TRIPS Agreement as the dividing line, this book summarizes, reveals the characters and trends of the development and evolvement of the institutions of the international protection for intellectual property rights; and then, this book summarizes the characters and trends of the development and evolvement of the institutions of the

international protection for human rights. Through this historical review, the author argues that, the origin that TRIPS Agreement run afoul of basic human rights for example the right to health and the right to culture etc. is that the separate development between the institutions of the international protection for intellectual property rights and that of the international protection for human rights since they had been established.

In order to understand deeply the conflicts between TRIPS Agreement and international protection for human rights, it is quite necessary to anatomize synchronically the international human rights documents, TRIPS Agreement and its implementing practices. In chapter 3, this book analyses concretely the representations of the conflicts Between TRIPS Agreement and the realization of the right to culture, the right to health, the right to food, the right to development etc.. And then, the reasons that the conflicts arose are discussed. Through this transverse factual review, textual analyses and theoretical analyses, the author argues that, the conflicts between TRIPS Agreement and international protection for human rights contain the direct conflict between the rules, and embody more mainly the conflicts of rights. From the internal perspectives of law, this charter analyzes the main reasons of their conflicts in these aspects which contain the interests' conflicts of the different subjects of rights and the institutional conflict in international law. Furthermore, from the external perspectives, this charter comments on the arising of their conflicts through these aspects which contain the economic development level of one's country, the concluding negotiation of TRIPS Agreement.

The most important issue in the research of "the relationship between intellectual property rights and human rights" is how to

resolve the conflicts between TRIPS Agreement and international protection for human rights, and is discussed in the fourth chapter of this book. In chapter 4, firstly, the author argues the effective method to resolve or relieve their conflicts is through legislative approach, namely the institutions reform of TRIPS Agreement, and this reform must harmonize with international human rights law. And then, this author reviews the negotiating status quo of the topics in discussion in relation to TRIPS Agreement in Doha Round, and analyzes the international conditions in which the reform of TRIPS Agreement is going. From the should-be angle of the development of the legal system, this book puts forward the principles of guiding the reform of TRIPS Agreement, discusses the standpoints and strategies choices of China in the issues negotiation in relation to TRIPS Agreement, comments on the concrete advices of the reform of TRIPS Agreement which the other scholars and the WTO members have suggested. On this basis, the author argues that the institutions reform of TRIPS Agreement which is "development orientated" and is instrumental in promoting the realization of human rights will be inevitable. The humanization of International law, including the international institutions of protecting intellectual property which takes TRIPS Agreement as its center is a general trend.

In the concluding part, based on "the major issues to be explored" that are raised in introduction part, basic propositions in this book are summarized.

KeyWords: Intellectual Property Rights; Human Rights; Conflict; TRIPS Agreement



BIP	Bilateral Intellectual Property Rights Agreement (双边知识产权协定)
BIT	Bilateral Investment Agreement (双边投资保护协定)
CBD	Convention on Biological Diversity (《生物多样性公约》)
CBD-COP	Conference of the Parties of the Convention on Biological Diversity (《生物多样性公约》缔约国大会)
CESCR	Committee on Economic, Social and Cultural Rights (经济、社会及文化权利委员会)
CGRFA	Commission on Genetic Resources for Food and Agriculture (粮食和农业遗传资源委员会)
CHR	Commission on Human Rights (人权委员会)
CTE	Committee on Trade and Environment (贸易与环境委员会)
DSB	Dispute Settlement Body (WTO 的争端解决机构)
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes (《关于争端解决规则与程序的谅解》)

ECOSOC	United Nations Economic and Social Council (联合国经济及社会理事会)
FAO	Food and Agriculture Organization of the United Nations (联合国粮食及农业组织)
FIPA	Foreign Investment Protection and Promotion Agreement (对外投资保护和促进协议)
FTA	Free Trade Agreement (自由贸易协定)
GATS	General Agreement on Trade in Services (《服务贸易总协定》)
GATT	General Agreement on Tariffs and Trade (关税与贸易总协定)
GATT1994	General Agreement on Tariffs and Trade 1994 (《1994 年关税与贸易总协定》)
HRC	Human Rights Council (人权理事会)
ICCPR	International Covenant on Civil and Political Rights (《公民权利和政治权利国际公约》)
ICESCR	International Covenant on Economic, Social and Cultural Rights (《经济、社会和文化权利国际公约》)
ICTSD	International Centre for Trade and Sustainable Development (贸易与可持续发展国际研究中心)
ILC	International Law Committee (联合国国际法委员会)
ILO	International Labour Organization (国际劳工组织)
IMF	International Monetary Fund (国际货币基金组织)

INGO	International Non-governmental Organization (国际非政府组织)
ITPGR	International Treaty on Plant Genetic Resources for Food and Agriculture (《粮食和农业植物遗传资源国际公约》)
MAI	Multilateral Agreement on Investment (《多边投资协议》)
MEA	Multilateral Environment Agreement (多边环境协议)
OECD	Organization for Economic Cooperation and Development (经济合作与发展组织)
OHCHR	the Office of the United Nations High Commissioner for Human Rights (联合国人权事务高级专员办事处)
PLT	Patent Law Treaty (《专利法条约》)
RTA	Regional Trade Agreement (区域贸易协定)
SPLT	Substantive Patent Law Treaty (《实体专利法条约》)
《TRIPS 协定》	Agreement on Trade-Related Aspects of Intellectual Property Rights (《与贸易有关的知识产权协定》)
UDHR	Universal Declaration of Human Rights (《世界人权宣言》)
UN	United Nations (联合国)

UNCTAD	United Nations Conference on Trade and Development (联合国贸易与发展会议)
UND P	United Nations Development Programme (联合国开发计划署)
UNEP	United Nations Environment Programme (联合国环境计划署)
UNESCO	United Nations Educational, Scientific and Cultural Organization (联合国教育、科学及文化组织)
UNHCHR	United Nations High Commissioner for Human Rights (联合国人权事务高级专员)(人权高专)
UPOV	International Union for the Protection of New Varieties of Plants (国际植物新品种保护联盟)
WCT	World Intellectual Property Organization Copyright Treaty (《世界知识产权组织版权条约》)
WHO	World Health Organization (世界卫生组织)
WIPO	World Intellectual Property Organization (世界知识产权组织)
WIPO-IGC	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (知识产权与遗传资源、传统知识和民间文学艺术政府间委员会)
WPPT	WIPO Performances and Phonograms Treaty (《世界知识产权组织表演和录音制品条约》)
WTO	World Trade Organization (世界贸易组织)

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