Ping Xiong

An International Law Perspective on the Protection of Human Rights in the TRIPS Agreement

An Interpretation of the TRIPS Agreement in Relation to the Right to Health

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By
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Abstract

Intellectual property protection has entered into the global trading era. This is the consequence of the conclusion of the Marrakesh Agreement Establishing the World Trade Organization (WTO) and the inclusion in it of the intellectual property protection law known as the TRIPS Agreement. Intellectual property protection is a system which is based on a balance between the protection of private rights and public interests. The minimum standard of patent protection under the TRIPS Agreement requires all WTO members to make their respective patent laws comply with those minimum standards.

The TRIPS Agreement requires pharmaceutical patent protection in all member States. As a result of this patent protection under the TRIPS Agreement, pharmaceutical patent holders enjoy a strong monopoly position and can control the price of medicines by taking advantage of this position. If patent holders inflate drug prices, this will impact on the access to medicines. Therefore, pharmaceutical patent protection under the TRIPS Agreement regime is potentially in conflict with the right to health. The right to health, as a basic human right, entails access to medicine as its essential element, and it requires the parties to human rights treaties to respect, to protect and to fulfil the right.

This book analyses the relationship between the TRIPS Agreement and the right to health and relevant human rights norms by using the tools of treaty interpretation of public international law. It explores how the TRIPS regime, and ultimately the whole WTO regime, relates to the relevant human rights norms. Further, it examines the specific relevant provisions of the TRIPS Agreement to determine how far the TRIPS regime relates to the right to health. It ends with an analysis of the TRIPS-plus regime to explore its relationship with the right to health. This book concludes that the TRIPS Agreement should be interpreted with reference to the right to health. This method of interpretation should be applied so that the TRIPS Agreement and the right to health will not be in conflict.

Preface

In this book Dr Xiong makes a cogent argument for the relevance of human rights – specifically the right to health – into the general discourse, and ultimately into the corpus of law to be generated by the dispute resolution procedures of the World Trade Organisation (WTO), regarding trade-related intellectual property rights (TRIPS). A key example is presented by the protected patents of life saving drugs, held by large pharmaceutical companies, and the desperate need of poor people in developing countries to access those drugs.

I come to this subject without a specialised knowledge of trade law or intellectual property law. I am a general international lawyer, and my comments must be understood in that light. I cannot offer a critique of all of the points made by Dr Xiong in her book. However, I join with Dr Xiong in believing that the subject of her book needs to be subjected to examination in a wider context. It seems to me that new areas of international law run the danger of attracting a following of enthusiastic labourers in each vineyard who are unaware of what is happening over the hill. In other words, new bodies of law such as international environment law and international trade law, and even older bodies of law such as intellectual property law, can be treated by some as closed systems insulated against outside influences, and maintained as the preserves of specialised and elite priesthoods. I do not count Dr Xiong among their number. She has indeed made a strong case in her book that one should look over the hill and see that human rights law, and other principles of international law, have a strong claim to a place in the structure and implementation of international trade law.[1]

The notion of international law as an "open" system has been expounded by Professor James Crawford in the collection of his essays entitled "International Law as an Open System".[2] Crawford considers international law to

[1] See e.g. D. Kinley, S. Joseph and J. Waincymer (eds), The World Trade Organisation and Human Rights: Interdisciplinary Perspectives (Elgar Publishing, UK, 2009); D. Kinley, Civilising Globalisation: Human Rights and the Global Economy (Cambridge UP, 2009).

[2] Cameron May Publishers, London, 2002.

be both "open", in the sense of open to new areas of legal activity, and a "system" in that those new areas are accommodated within a stable structure. He writes:

> By contrasting the current situation in a number of fields of international law with the situation as it was, say, in the first third of the twentieth century, it is possible to see two things clearly enough: first, that the present is a period of comparative openness and reformation; and secondly, that the sense of fluidity, opportunity and uncertainty characteristic of the present period coexists with a systematic sub-structure of international law which is recognisably the same as that of, say, the 1920s. Institutions have been created, have changed and developed, many new rules and arrangements have come into existence. But, in principle, the foundations do not appear to have changed (statehood, treaty, custom, consent, acquiescence...). Thus we have the apparent paradox of rapidly expanding horizons and a simple, not to say, elemental set of underpinnings. Our system is one which international lawyers of four generations ago would have had no particular difficulty in recognising or working with, once they had got over its bulk.

I am struck by Crawford's phrase "expanding horizons but a simple...set of underpinnings". I think this neatly captures the main point Dr Xiong makes in urging that human rights, as an underpinning of the international legal system, must not be lost sight of in such new horizons as the TRIPS Agreement.

I turn now to a brief exploration of a few other avenues prompted by Crawford and by the issues raised by Dr Xiong in her excellent book.

First, I point to the underpinnings of international law in treaty and in custom. Both are at play in the debate about TRIPS and human rights. Treaties, such as the various instruments constituting the World Trade Organisation, including the TRIPS Agreement, require implementation by the parties in good faith. No State is required to become a party to any treaty. But if it does so, it is then bound by its terms. A State is not bound by a treaty to which it is not a party, but it may be bound in cases where a particular right or obligation, expressed in a treaty, has become so widely observed that it has entered into a parallel existence as a rule of customary international law. Examples include the prohibition of aggression and of torture. In every case, one has to be careful in analysing the precise extent of the right or obligation in question. In the case of treaties, customary international law provides principles and rules, confirmed in the Vienna Convention on the Law of Treaties, 1969, for the interpretation and application of treaty provisions. These include the literal meaning of the words used, their context and their purpose (allowing also for the use of the negotiating history).

Dr Xiong has rightly invoked the Vienna Convention rules in her argument regarding the interpretation of TRIPS. She also rightly recognises that

the right to health is not expressed in terms as peremptory as some of the "negative" human rights expressed in the field of civil and political rights. We begin with the Universal Declaration of Human Rights, adopted by the UN in 1948 as a non-treaty document but as a proclamation of "a common standard of achievement for all peoples and all nations." Article 25 of the Declaration states that:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services....

In time the Declaration has come to be regarded as customary international law, and recognised as such.[3] But it was always intended that the bare bones of the rights contained in the Declaration should be elaborated in a form that would be formally binding on States as a treaty. In fact, in 1966 there emerged two treaties built on the Declaration: the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights. This division took account of the reality that some rights depended for their fulfilment on the different levels of development to be found among States, whereas others, such as the prohibition of arbitrary killing, or torture, or the right to a fair trial, allowed for no such differentiation. The right to health belongs to the former category. The International Covenant on Economic, Social and Cultural Rights (ICESCR) allows for the progressive achievement of these rights for its peoples. Article 2 of the Covenant provides:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The right to health is expressed as follows in the ICESCR, article 12:

1. The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for:

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[3] See e.g. T. Meron, Human Rights and Humanitarian Norms as Customary Law (Clarendon, Oxford, 1989).

(a) ...;
(b) ...;
(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

It is noticeable that the general right, echoing the Universal Declaration, is stated first in article 12 as a right of the individual. The obligations of States are stated afterwards in paragraph 2. It is thus arguable on the basis of the language and context of these provisions, and of the previous Universal Declaration, that the right of individuals to the highest attainable standard of health is a general right antecedent to the particular steps to implement the right that are the obligation of States Parties to take progressively on the basis of their abilities. I take it that this is the argument that Dr Xiong is making in contending for the balancing of this right against the rights of patent holders of medicines. Attention has mostly focused in the past on the obligations of States to implement human rights, expressed in the typology "to respect, to protect, and to fulfil".[4] The invocation of human rights in disputes with third parties is relatively novel. Can the right to health be invoked against a patent holder by a developing State to manufacture or license pharmaceuticals for its own peoples facing a public health crisis?

The second avenue I would like to note briefly is the emergence of new forms of dispute resolution. It is especially relevant in the context of the subject of this book since many would wonder why there has not yet been a definitive judgment of some court, or other competent body, resolving the conflict between BigPharma on the one hand and the victims, for example, of the HIV-Aids pandemic in southern Africa on the other.

States have been traditionally cautious of accepting the compulsory jurisdiction of international courts and tribunals. States have also been reluctant to allow standing to non-State entities before international courts and tribunals created by them. The International Court of Justice stands foremost among dispute resolution bodies at the international level. However, only about one third of the UN membership has accepted its compulsory jurisdiction, and even then, many acceptances have been hedged by exceptions and qualifications. Moreover, only States may appear before the Court; the interests of individuals/corporations may be addressed by the Court only if "espoused" by their national States. Arbitration has long been a frequent means by which States settle their disputes, but again resort to arbitration is

[4] O. De Schutter, International Human Rights Law: Cases, Materials, Commentary, 242–257 (Cambridge University Press, 2010).

essentially voluntary, either ad hoc or by reason of a compromissory clause in a treaty. The parties to arbitration have a degree of autonomy in the selection of the arbitrators and in the conduct of the proceedings. In some forms of international arbitration, individuals may be parties, such as before the International Centre for the Settlement of Investment Disputes (ICSID). In recent years, arbitration has assumed considerable importance in international investment disputes under ICSID, a facility of the World Bank, and in maritime disputes under the United Nations Convention on the Law of the Sea. In relation to the latter, a remarkable – and unexpected – achievement of the UN Third Conference on the Law of the Sea, 1973–82, was to provide for compulsory resort to arbitration in a range of maritime disputes.

These developments towards greater acceptability of the ideal of compulsory dispute settlement have not been matched within the World Trade Organisation. An extremely cautious approach has prevailed. The Dispute Settlement Understanding (DSU) of the World Trade Organisation, in effect since 1 January 1995, provides for panels of three experts to consider disputes between States. Individuals, including corporations, do not have standing. A panel can only issue a report which is not binding until endorsed by a superior organ called the Dispute Settlement Body (DSB). An Appellate Body exists, consisting of seven members, reflective of the general membership of WTO. The Appellate Body does allow for individuals/corporations to have their say, but only as *amici curiae*, not as parties. The ultimate authority for settling disputes thus rests with the WTO Member States acting through the DSB. This is a very top heavy and creaky system. It tends to explain why difficult issues such as the one discussed by Dr Xiong in this book, have not been dealt with, or rather have been reserved for discussion and possible future resolution within the WTO at the political level.[5] The author refers to the Doha Declaration of 2001 and to a proposal for clarification of the issue of public health-related pharmaceuticals by the General Council of WTO, consideration of which has been deferred twice and is now due for acceptance by Members by the end of 2011.

The proliferation of international tribunals in recent years (including also the International Criminal Court) has led to concern regarding the possible fragmentation of international law. Unlike national systems of law, that recognise a supreme court capable of binding all courts lower in the judicial hierarchy, international law knows no such system. Even the International

[5] A limited exception to this view appears to be a single case before a WTO dispute settlement panel in *Canada-Patent Protection of Pharmaceutical Products* (17 March 2000) WT/DS114/R. However, this case did not address the issues covered by Ping in her paper.

Court of Justice has only a title of honour as the supreme organ of international justice. (Famously, the International Criminal Tribunal for the Former Yugoslavia did not follow a ruling by the ICJ in the Nicaragua case.) Is there a danger that tribunals, especially arbitral tribunals under various instruments, or panels under the DSU, may operate in a cocoon of their own making, with little or no regard to the jurisprudence of other international bodies?[6]

Finally, I wish to make a plea for consideration of public international law as a foundational subject for study in our law schools. Students who are genuinely – and rightly – enthused by such fields as environment law, human rights law, natural resources law, intellectual property law, and trade law ought not to embark on these studies without background preparation. Without a foundation in principles of public international law, they are likely to go seriously astray and in time, if they become significant players in these fields, perhaps unwittingly they may work for the undermining of the integrity of the international legal system.

The present book is an antidote to such isolationist thinking. I commend it.

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[6] Tim Stephens, "Multiple international courts and the 'fragmentation' of international environmental law" (2006) 25 Australian Yearbook of International law 227–271.

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