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## CHAPTER 8 CONCLUSION & SUGGESTIONS

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In this concluding chapter, the Researcher synthesizes the key findings from the study, which explores the intricate relationship between IPR and global trade, with a particular focus on India and China within the framework of the TRIPS Agreement. This Research provides a detailed examination of how both Nations have navigated the complexities of aligning their domestic legal frameworks with international standards, while also addressing the unique challenges they face.

The journey begins with a thorough analysis of the TRIPS Agreement itself, outlining its binding provisions and emphasizing its role in promoting technological innovation and facilitating international trade. This foundational overview paves the way for a closer look at the significant legislative changes in India following its accession to the WTO in 1995. Here, the Researcher highlights the complete overhaul of IPR laws, the establishment of key regulatory bodies, and initiatives to combat the pervasive issue of counterfeit goods, which pose a significant threat to effective IPR enforcement.

Parallel to this, the Research looks into China's journey of reform, detailing the evolution of its Patent, Trademark, and Design laws. It also addresses the complications that arise from Judicial Interpretations, which can sometimes undermine the effectiveness of these laws. This aspect of the study reveals the nuanced ways in which legal frameworks can impact enforcement and compliance. Additionally, the Researcher investigates the serious challenges both countries face concerning the counterfeit market and the existing legal mechanisms designed to prevent the entry of infringing goods at their borders. The effectiveness of the WTO's Dispute Settlement Body is critically assessed, highlighting its dual role in facilitating compliance and exposing areas where political dynamics and procedural delays have hindered progress.

Another vital component of this Research is the alarming lack of awareness among innovators and manufacturers in India about their IPR rights and the resources available to them. By weaving together these various strands, this chapter not only encapsulates the major findings of the study but also includes suggestions.

## **8.1 Findings of the Study**

To understand the challenges of the enforcement of TRIPS Agreement in India and China, the Researcher conducted the present study. The Research was conducted with the following objectives-

1. To study the historical perspective of IPR laws in India and China.
2. To examine the binding obligations of the TRIPS Agreement on Member Nations.
3. To examine the Dispute Settlement Mechanism of the World Trade Organization in cases of TRIPS violations.
4. To analyze the enforcement of the TRIPS Agreement on Patent, Trademark, and Design laws in India.
5. To analyze the enforcement of the TRIPS Agreement on Patent, Trademark, and Design Laws in China.
6. To study the Judicial Interpretation of China and its impact on China's Patent, Trademark and Design Laws.
7. To study the protection of Patent, Trademark and Design rights with relation to Custom Laws in India and China.
8. To study the awareness of IPR among Start-ups and Small Entities in Gujarat.

In order to examine these objectives, the entire study has been divided into eight chapters.

### **Chapter 1: Introduction**

Chapter 1 introduces the core elements of the thesis, including the objectives, hypothesis, and significance of the study. It highlights the rationale for conducting Research IPR in India and China, providing insights into the methodology used to achieve the study's goals. The chapter outlines the scope and delimitation of the Research, identifying the boundaries within which the analysis is carried out. Additionally, it provides a comprehensive literature review that lays the foundation for understanding existing Research conducted.

### **Chapter 2: Origins and Evolution of the WTO**

Chapter 2 Researches into the historical development of the TRIPS Agreement and its connection to the WTO. It begins with an exploration of key treaties like the Paris and Berne Conventions that laid the groundwork for global IP protection. The chapter discusses the role of the WIPO and its efforts to strengthen international cooperation in IP law. It also covers the

evolution of the Patent Cooperation Treaty and the establishment of the WIPO Arbitration and Mediation Centre. The chapter explains the formation of the WTO, with a focus on the GATT and its Uruguay Round, which gave rise to the TRIPS Agreement. The relationship between WIPO and WTO is also analyzed, underscoring their collaboration in protecting global IP rights.

### **Chapter 3: Intellectual Property Protection in International Trade: The TRIPS Agreement**

Chapter 3 offers a detailed analysis of the TRIPS Agreement, outlining the obligations that Member Nations must adhere under this agreement. The chapter begins by discussing key principles such as National Treatment, Most-Favored Nation treatment, and the Principle of Exhaustion, which forms the basis of TRIPS compliance. It then delves into the specific provisions related to Patents, Trademarks, and Industrial designs, covering the minimum standards of protection required by TRIPS. Additionally, the chapter addresses the enforcement of IP rights, exploring both civil and administrative procedures that countries are obligated to implement.

### **Chapter 4: India's TRIPS Compliance: Intellectual Property and International Commitments**

Chapter 4 examines India's legislative responses to the TRIPS Agreement, focusing on its efforts to align domestic laws with international standards. The chapter begins by outlining India's pre-TRIPS legal framework, providing a baseline for understanding subsequent developments. It discusses key legislative amendments in the areas of Patents, Trademarks, and Designs that were made to comply with TRIPS requirements. Additionally, India's submission to the WTO regarding Articles 51-60 of the TRIPS Agreement, particularly the Automated Recordation and Targeting System, is explored. Overall, the chapter illustrates India's commitment to fostering a strong IP regime in compliance with TRIPS.

### **Chapter 5: China's Approach to Protection of Intellectual Property Rights under TRIPS**

Chapter 5 focuses on China's legislative and enforcement efforts related to its obligations under the TRIPS Agreement. The chapter starts with China's IP laws before its accession to the Agreement, providing context for subsequent changes. It highlights the significant amendments made to align Chinese Patent, Trademark, and Design Laws with international standards. The chapter also explores gaps in China's customs regulations and border in compliance with TRIPS Agreement. Infringement laws, enforcement mechanisms, and the role of judicial

interpretation in IP matters are also discussed.

### **Chapter 6: Resolving Trade Disputes: The WTO's Dispute Settlement Mechanism**

Chapter 6 focuses on the Dispute Settlement Mechanism (DSM) within the WTO and its significance in resolving international trade disputes, particularly those related to IPR. The chapter outlines the function of the Dispute Settlement Body (DSB), which manages the panels responsible for investigating trade disputes. It further discusses the appellate process, through which countries can challenge Panel Decisions. The chapter examines India's and China's involvement in the DSM, as Petitioner, Respondents and Third parties.

### **Chapter 7: Analysing the Findings: A Data Examination**

Chapter 7 presents the findings of a non-doctrinal study conducted by the Researcher, which investigates the level of IPR awareness among innovators and manufacturers in Gujarat, India. The results from the non-doctrinal study, provide valuable insights into the awareness and understanding of IP laws among these groups, identifying areas where further education and government initiatives are needed.

### **Chapter 8: Conclusion and Suggestions**

Chapter 8 provides a comprehensive conclusion to the thesis, summarizing the key findings and addressing the hypotheses presented at the beginning of the study.

## **8.2 Objective of the Study**

### **Objective 1: To study the historical perspective of IPR laws in India and China**

Chapter 4 and Chapter 5 address this objective by delving into the legislative evolution of IPR in both countries

### **Objective 2: To examine the binding obligations of the TRIPS Agreement on Member Nations**

Objective 2 has been dealt under Chapter 2 and 3 which talk about the evolution of intellectual property rules through significant international treaties and the founding of institutions such as WIPO and WTO. It describes the evolution of the TRIPS Agreement and its historical background, highlighting the agreement's role in imposing legally binding requirements on Member Nations. The specific duties under the TRIPS Agreement are covered in greater detail in Chapter 3

**Objective 3: To examine the Dispute Settlement Mechanism of the World Trade Organization in cases of TRIPS violations**

Chapter 6 directly addresses this objective by focusing on how the WTO resolves disputes involving TRIPS violations. The chapter deals with how the DSM works, including the Panel's and the Appellate Body's roles in conducting investigations and rendering decisions. It focuses on IPR cases related to India and China and their roles as Petitioner, Respondents and Third parties in the case.

**Objective 4: To analyze the enforcement of the TRIPS Agreement on Patent, Trademark, and Design laws in India**

Chapter 4 examines how India has incorporated and upheld the TRIPS Agreement in relation to Patent, Trademark and Designs laws. The chapter examines the legislative amendments India made to its IP laws in order to comply with TRIPS obligations.

**Objective 5: To analyze the enforcement of the TRIPS Agreement on Patent, Trademark, and Design laws in China**

Chapter 5 addresses this objective by investigating how China has aligned its Patent, Trademark, and Design laws under the TRIPS obligations.

**Objective 6: To study the Judicial Interpretation of China and its impact on China's Patent, Trademark, and Design Laws**

Chapter 5 also covers this objective by examining how Judicial Interpretation influences the enforcement of IP laws in China. The chapter discusses the role of the Judiciary in interpreting and applying IP laws in China

**Objective 7: To study the protection of Patent, Trademark and Design rights with relation to Custom laws in India & China**

Chapter 4 and Chapter 5 address this objective by exploring the integration of IP rights with customs enforcement in both countries.

**Objective 8: To study the awareness of IPR among Start-ups and Small Entities in Gujarat.**

Chapter 7 covers this objective by doing a Non-Doctrinal study amongst Start-ups and Small Entities in Gujarat

### **8.3 Hypothesis**

**Hypothesis 1:** The counterfeit goods market leading to Patent, Trademark and Design violation in India and China undermines the TRIPS obligations.

**Outcome –The answer of this question is positive and is discussed in chapter 4 and 5.**

**Hypothesis 2:** China’s enactment of Judicial Interpretation has resulted in dilution of IPR Laws limiting their effectiveness in safeguarding IPRs.

**Outcome-The answer of this question is affirmative and is based on findings of Chapter 5.**

**Hypothesis 3:** While the TRIPS Agreement has prompted India and China to adopt uniform laws for IPRs, the DSB decisions indicates that, there are still some grey areas.

**Outcome- The answer of this question is also affirmative and is based on findings of Chapter 6.**

**Hypothesis 4:** Border measures to combat trade of counterfeit goods are inadequate in India and China resulting into non-adherence to the obligations under the TRIPS.

**Outcome-The answer of this question is negative and is based on findings of Chapter 4 and Chapter 5.**

**Hypothesis 5:** Start-ups and Small Entities in the State of Gujarat are not aware about Intellectual Property Rights.

**Outcome –The answer of this is positive based on Non-Doctrinal study conducted by the Researcher, which is presented under Chapter 7.**

## **8.4 Conclusion and Suggestions**

### **8.4.1 TRIPS Agreement and its Binding Provisions.**

The TRIPS Agreement has been a comprehensive treaty covering every aspect of IPR, which was adopted as a part of the final act, embodying the result of Uruguay rounds of multi-lateral trade negotiations. The negotiations in the Uruguay round brought it to the notice that IP Protection is a key factor in accelerating international trade, consequently the TRIPS Agreement was incorporated. It aimed to reduce distortion and impediments to international trade, to promote effective and adequate IP Rights, and to ensure that measures and procedures to enforce IP rights do not themselves become barriers to legitimate trade.<sup>433</sup> This Comprehensive treaty ensured in its provisions that IPRs 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>434</sup> Hence the treaty provided for a fair balance between the rights of creators and users. To address the need of the International trade and protect the interest of least developed countries, the principles such as National Treatment and Most Favoured Nation were incorporated. The treaty provides for minimum standards relating to availability, scope, use, acquisition and maintenance of IPR to be adhered by every Member Nations.

The Treaty also provided for mandatory provisions to enforced IP rights within the jurisdiction of Member Nations, which included Civil and Administrative procedures and remedies. Further it also provided for dispute resolution between Member Nations. However, apart from having mandatory provisions, the TRIPS Agreement also provides for certain non-mandatory provisions, like the principle of exhaustion which seem to dilute IPR Rights. Also the TRIPS Flexibilities and TRIPS Plus provision have enabled Member Nations to address certain specific needs and requirements to meet the needs of the countries.

### **8.4.2. India and compliance to TRIPS Agreement**

The history of IPR Laws in India dates back to the middle of 19<sup>th</sup> century when the first patent legislation was enacted in the year 1856. With the Paris and Berne Convention coming into force the then British Government amended and implemented the laws relating to Patent, Design, Copyright, and Trademark in India. This shows that India had the existence of IPR

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<sup>433</sup> B.K.Ahuja , *Law Relating to IPRs* 751 (LexisNexis, Third Edition., 2017)

<sup>434</sup> *Ibid*

laws even before its Membership to WTO.

India has been a Member of WTO right from its inception in the year 1995 and thereby was obligated to comply with the mandatory provisions of the TRIPS Agreement. India being developing Nation was given a transition period of 10 years to make changes into its IPR laws. The major change that was required in the law of Patent was to incorporate provisions for product patentability including pharmaceutical products. To this end, it was imperative for India to accept product patent application from 1<sup>st</sup> January 1995 although the same could be processed after the end of the transition period that is after 1<sup>st</sup> January 2005. During the initial year after the WTO Membership, the Indian government showed no response for bringing its IPR laws in alignment with the TRIPS Agreement till it was taken to the DSB of WTO by US and EU.<sup>435</sup> It was a big blow for the Indian Government as it had failed in complying with the initial obligation under the TRIPS Agreement and acted as a trigger to bring the amendments in IPR laws. The period between 1995 and 2005 saw an overhaul in all the IPR laws of the country. While the Patent and Copyright Laws were just amended, the rest of the IPR laws were either re-enacted or introduced. This made the legislative framework of India truly complying the TRIPS Obligations. Some of the major changes in the Patent law viz. a 20 year Patent Term, Mandatory publication of applications after 18 months from the filing date.

Some of the major changes in the Trademark law are that it streamlined registration procedures, clarified definitions and rules, broadened the area of registerable trademarks, provisions for well-known Trademark, provisions for the registration of Service Marks, Certification Marks, and Collective Marks.

In case of the Design Law a new act was drafted, keeping in mind obligations under the TRIPS Agreement. Major changes in the Design Act viz, broader concept of Design, Registration of Design is now valid for 10 years followed by 5 years of extension, simplifying registration Design and prevention of piracy of registered Designs and remedies.

These changes coupled with executive actions like, establishment of the Department for Promotion of Industry and Internal Trade and the Department of Industrial Policy & Promotion has strengthened the country's IPR landscape. This has led to economic growth of the country

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<sup>435</sup> WTO, DS 50 India — Patent Protection for Pharmaceutical and Agricultural Chemical Products , available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds50\\_e.htm#:~:text=The%20Panel%20found%20that%20India,pharmaceutical%20and%20agricultural%20chemical%20inventions](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds50_e.htm#:~:text=The%20Panel%20found%20that%20India,pharmaceutical%20and%20agricultural%20chemical%20inventions) (last visited on 2/5/24) See also DS 79 available at India — Patent Protection for Pharmaceutical and Agricultural Chemical Products, available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds79\\_e.htm#:~:text=The%20Panel%20found%20that%20India,and%20was%20also%20not%20in](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds79_e.htm#:~:text=The%20Panel%20found%20that%20India,and%20was%20also%20not%20in) (last visited on 2/5/24)

and has provided opportunities for foreign investment in India.

With the changing policies in India, the government found it appropriate to de-criminalise minor offences that do not harm public interest or national security and replace them with penalties and administrative actions. Also, there was need to reduce the pressure on the justice system and boost the growth of business by eliminating barriers and promoting a conducive legal environment. To address this, the Jan Vishwas (Amendment of Provisions) Act, 2023 was enacted. The Act amongst other laws covered Intellectual Property laws like Copyright, Patent, Trademark and Geographical Indications. While imprisonment as a punishment for violation of certain patent related rights has been omitted, penalties have been increased exorbitantly in some cases. For example, the penalty for unauthorised claimed for patent rights which was upto 1 Lakh rupees has been extended to 10 Lakh rupees with the further penalty of Rupees 1000 per day during which the claim continues. Further the penalty for providing false information, practice by non-registered patent agents, have also been increased exorbitantly. However, penalty for refusal or failure to supply the information to the Government or to the Controller has been reduced. As Courts in India have always been overburdened with the pendency of cases the law also reduces its burden by empowering the Patent Controller as an Adjudicating Officer to hold the inquiry and impose penalties. Appeals from the Order of the Patent Controller will be filed before the Appellate Authority authorised by the Central Government. This also exhibits India's Commitment to ease the IPR related disputes and provide an encouragement to the business to protect IPR. With respect to the Trademark Law the Jan Vishwas Act has laid down a proportionate penalty for falsely representing Trademark as Registered. The power to adjudicate the penalties has been given to the Registrar of Trademark and Appeals there from can be filed before the Appellate Authority. Further, under the Trademark Act, a registered Trademark holder can give a notice to the Custom Department if he feels that certain imported goods bear false Trademarks. The present Act has also increased the penalty on the infringer and adjudication of the same will be done by the authority empowered under the Customs Act. Hence the provisions of this new law, also seems to have deterrent effect and in fulfilment of the border objective of Article 61 of the TRIPS Agreement which provides criminal procedure and penalties for infringement of IPR. It is hoped, that the implementation of new law will have far-reaching impact on protection of IPR in India.

TRIPS Agreement under Article 63 mandates the Member Nations to publish its laws, regulations, judicial decisions and Administrative rulings of General Applications to be published so as to enable Government and rights holder to become acquainted with them. India

publishes all the laws regulations, and decisions of High Court and Supreme Court on its varied official websites, so as to give an open access to all the concerned. However, much of the IPR infringement cases are decided by the District Courts in India and the same may not be available until and unless the name of the parties or the case registration number is known. Also the administrative rulings of the Patent Controller, Registrar of Trademark and Designs is not available. To this extent, the TRIPS Agreement compliance seems to be inadequate. To strengthen India's compliance with the TRIPS Agreement, one key measure is suggested that, transparency in judicial and administrative rulings should be improved by making District Court decisions and rulings from IP Authorities accessible. Also, TRIPS Agreement provides for certain flexibilities which include Parallel Imports. India has adopted the Principle of International Exhaustion which means that, the owner of IPR may not have remedies for the original goods entering the Indian market through illegal routes. This affects the rights of the owners of IPR and requires interventions from the Government to address the issue.

#### **8.4.3 China and compliance to TRIPS Agreement**

China's journey with IPR reflects its broader socio-political transformations. After the People's Republic of China was established in 1949, initial IPR laws were hindered by the socialist ideology, which de-emphasized private ownership. Early laws on patents and trademarks were ineffective due to weak enforcement and state appropriation of rights. During the Cultural Revolution (1966-1976), IPR systems were further dismantled, with intellectuals persecuted and private ownership suppressed. The late 1970s marked a turning point with Deng Xiaoping's "Reform and Opening-Up" policy, which led to a gradual rebuilding of China's IPR framework. The country joined the WIPO in 1980 and enacted Patent Law in 1984 and Trademark Law in 1983 to align with international standards. Despite these efforts, enforcement remained problematic, and China faced international criticism, especially from the United States.

China was late entrant to the WTO System and joined its Membership in 2001 thereby it got few more years to comply to the TRIPS Agreement. Its Membership to WTO was influenced due to International pressure from various countries as it was affecting its trade relationship. Hence to protect the interest of its economy and its people, it accepted the membership of WTO. Even before its Membership to the WTO, China already had Patent, Design and Trademark laws, and with time, amendments were made. Primarily these amendments were made, to maintain business relation with other countries and to fulfil the obligations under TRIPS Agreement.–China's efforts to be TRIPS-compliant nation were not only limited to amending laws, its adherence to the Paris Convention and Madrid Agreement further

emphasize its commitment to International IP standards.

The major changes brought in the Patent law were patentable subject matter, omitting the provisions relating to prohibition on the sale of invention, amendment in the standards of granting compulsory licenses, increasing the tenure of Patent protection from 15 to 20 years and strengthening the enforcement mechanism. With regards to Design Law, it widens the scope of Design protection, more protection to the IP owner of Design in term of years, for 15 years. However, there is no independent statute on either Patent or Design law hence it lacks the clarity and introduces some complexity with respect to protection and enforcement of the rights.

The major changes in Trademark Act are expanding the scope of trademark, protection for well-known marks according to international standards, certification and collective marks, geographical indications and removal of time-limit for challenging fraudulent registrations. These provisions aim to address domestic market needs and ensure active use of registered trademarks, reflecting a balance between international compliance and local enforcement priorities.

In the case of Parallel imports, the China has a different view. For example, Article 75 of China's Patent Law states that using, offering to sell, selling or importing patent products or products made through patent process after they have been sold by the patent holder or their licensed entity or individual is not violation of patent rights. In 2016 the Beijing High Court released a trial guideline in relation to IPR, which states that parallel imports are not to be considered as violation of Trademark rights. Similarly, in 2018 the Tianjin High Court issued guideline which mainly focused on resolving the disputes of parallel imports and which explained that Parallel imports are not counterfeit goods as the original seller has already benefited financially from the first sale, there is no legal cause to prevent others from reselling or marketing products. This step was not only limited to Courts making guidelines but also the Ministry of Commerce along with other departments issued documents to promote the pilot project of parallel car imports in certain free trade zones , which surely indicates China efforts to encourage parallel imports. In 2021, Hainan's Provisional People's Congress introduced a policy permitting import and sale of parallel imports in its Free Trade Port, except using the Trademark which might harm the reputation of a company. Neither the current Trademark Law nor the Judicial Interpretation in China don't address the parallel imports, they neither permit nor forbid it, the law is silent on parallel imports.

Unlike China, India has address this issue of parallel imports under its Patent Law, section 107A(b) which is based on Doctrine of Exhaustion, which is concept found in TRIPS Agreement. It is important to note that the TRIPS Agreement doesn't define Doctrine of Exhaustion directly, Article 28 grants Patent holders the exclusive right to prevent others from making, using, selling, or importing their products without permission. However, these rights, including those related to importing, are subject to the provisions of Article 6 of the TRIPS Agreement.

One of areas where China is falling short of TRIPS compliance is in relation to Article 63 which mandates publication of Laws and Judgements. While the IPR laws are available on the official portal of IPR, the judgements by the lower and the higher courts are not available to this extent its becomes challenging for the stakeholders to comprehend the Chinese IPR Laws.

To improve China's compliance with the TRIPS Agreement, several key areas should be addressed. First, China must enhance transparency by ensuring that IPR-related court judgments, especially from lower courts, are readily accessible to stakeholders, aligning with Article 63 of TRIPS. Strengthening the enforcement mechanisms for both patent and design laws is crucial, as current complexities in protection and enforcement can undermine IPR effectiveness. Furthermore, establishing clear, standalone statutes for patents and designs would eliminate legal ambiguities and improve clarity for rights holders. Finally, continued collaboration with international bodies like WIPO can reinforce China's commitment to global IPR standards and practices.

#### **8.4.4 China's Judicial Interpretation and Legal Maze**

Safeguarding IPR, is not possible only with the Legislative provisions but, a robust enforcement mechanism is also needed through the Court procedures. The Court also needs clear Guidelines which can be uniformly and consistently be applicable for protection of IPR. In China, Judicial Interpretation formulated by SPC and SPP provide clarity and guidance for the application of IPR laws while adjudicating its infringement. Judicial Interpretation serves as binding rules across all courts in China, with an aim to standardise Legal interpretation and ensure consistent judicial outcomes. However as discussed in Chapter 5, these Judicial Interpretation tend to weaken the legal framework on infringement. because of broad criteria and the discretion power to any judges which can lead to complexity and legal uncertainty and dilution of IPR laws. For instance, many provisions in the Judicial Interpretation offer broad criteria for what constitutes "serious" or "especially serious" circumstances in IP infringement

cases, often leaving these determinations to the subjective judgment of individual courts. This flexibility, while intended to allow for case-specific considerations, can result in inconsistent application of laws, thereby diluting the uniformity and predictability that strong IPR protections require. While Judicial Interpretations in China are intended to clarify and strengthen the application of IPR laws, their role can, in practice, lead to a dilution of these laws. For fair and equitable procedure under Article 42, handling evidence under Article 43, Injunctions under Article 44 and calculation of damages under Article 45 as all of these laws are on discretions of Courts. This dilution in law arises from the discretionary power and complexity that Judicial Interpretation introduce, which can limit the effectiveness of IPR safeguards by fostering inconsistent enforcement and legal uncertainty.

To address the issues arising from China's Judicial Interpretations in the enforcement of IPR, several suggestions can be made. First, the SPC and SPP should introduce more precise and detailed guidelines for IPR adjudication. This would help reduce the broad discretion currently available to judges, ensuring a more consistent and predictable application of the law. Clear definitions for terms such as “serious” and “especially serious” circumstances in IPR infringement cases would eliminate ambiguity and foster uniformity across courts. Furthermore, creating mechanisms for reviewing and standardizing judicial decisions, particularly regarding the calculation of damages and the issuance of injunctions, could enhance fairness and adherence to TRIPS principles. Lastly, greater transparency in court proceedings and publishing rulings could further bolster legal certainty and stakeholder confidence in the judicial system.

#### **8.4.5 Counterfeit Market in India and China: A threat to IPR**

Counterfeit goods available in the market, adversely impacts the protection of IPR especially Patents, Trademarks and Designs. Fake, duplicate and first copy goods available in the market exactly resemble to the original goods. It not only violates IPR but also can be a threat while being used by ultimate consumer. The counterfeit goods market also affects the economic growth of the country and discourages the rights holder. These goods are available worldwide and has posed challenges to the governments for its prevention. The present study has been conducted to analyse the IPR laws in India and China in context of counterfeit goods available in the market. Both these jurisdictions are vulnerable to the counterfeit goods despite legislative mechanism in place.

India faces intricate and multifaceted issues in context of counterfeit goods market due to huge and dispersed markets at local levels. These markets are located in every cities and towns of country which makes the enforcement of law a challenging task. Reports such as the U.S. Trade Representative's Notorious Markets List highlight India's role as a major source of counterfeit goods, raising concerns about the country's ability to fully comply with its TRIPS obligations. These concerns are particularly relevant in sectors like fashion, electronics, and automobiles, where the protection of patents, trademarks, and designs is jeopardised. The TRIPS Agreement, with its stringent requirements for the protection and enforcement of IPRs, sets a high bar for Member Nations. India's struggle with counterfeiting highlights the tension between compliance with international obligations and the practical realities of enforcement on the ground. Although the USTR Report presents that the number of these notorious markets have reduced over a period of time, the report ignores a large number of counterfeit goods sold online and offline, in the country.

Post 1995 India has introduced and amended IPR laws in tune with the TRIPS obligations and has exhibited a strong commitment in providing a robust legal framework for protecting IPR. Even before the signing of the TRIPS Agreement, the judiciary and police authorities were empowered to take legal actions for infringement of IPR. The same continues with stronger commitment after becoming the Member of WTO. Apart from this, the Government has also taken pro-active steps, like framing of the National IPR Policy, strengthen the Custom department with the ARTS System, designing of IPR Enforcement Tool kit and conducting of training programmes to the authorities.

However, the challenge, therefore, lies not just in the existence of laws but in their effective implementation. India's legal and judicial systems, while robust, face significant hurdles in curbing the counterfeit market, which undermines the obligation of the TRIPS Agreement and also poses a danger for violation IPR's. Hence there is dire need to take specific and consistent nationwide steps to reduce the availability, manufacture and sale of counterfeit goods.

China has been known as a hub for counterfeit market through the Shanzhai Culture. This culture is prevalent in China since ages and people in China have moulded themselves to manufacture and produce duplicate goods. This has resulted to a huge counterfeit market not only in China but across the world. The vastness of counterfeit market has raised major challenges for the enforcement of IPR, and in fulfilment of China's obligations under the TRIPS Agreement. Because of the prevalence of counterfeit goods in China and in other

countries of the world there have been widespread violations of Patents, Trademarks, and Design Rights which undermines the obligations of the TRIPS Agreement.

China entered into the WTO framework in the year 2001, thereby it was mandatory for China to fulfil the TRIPS obligations. China did make the amendments in its IPR laws to comply the TRIPS obligation and also strengthen its enforcement measures to fight against the issue counterfeit market. Along with the governmental efforts to check the counterfeit market, private entities like Alibaba and JD.com have also taken steps to combat the counterfeit goods. However, the Governmental and actions from private entities remain inconsistent and continues to be a challenge.

Apart from making legislative changes in the IPR laws, China also amended the laws on Anti-Unfair Competition and E commerce. These laws explicitly prohibit practices like falsifying product information and engaging in deceptive advertising, which are common in the counterfeit market. Also, through these laws the sale of the counterfeit goods sold of online platform is included. This reflects that China is committed to align its domestic laws with international standards so as to fulfil TRIPS Agreement and to reduce the magnanimity of counterfeit market. Further, the Custom department in China has also initiated operations such as "Dragon Action" and "Blue Net Action" which demonstrates a concerted effort to tackle IPR infringements at the border. These initiatives have led to the seizure of counterfeit items<sup>436</sup>

E-commerce platforms like Alibaba and JD.com have also taken proactive steps to combat counterfeit goods by implementing advanced IPR protection systems and consumer-friendly policies. Alibaba's establishment of the Platform Governance Department and the Alibaba Anti-Counterfeiting Alliance are notable examples of private sector initiatives aimed at enhancing IPR protection. These measures, also incorporate refund policies for counterfeit goods sold on their platform thereby indicating their response to combat counterfeit goods. However, the effectiveness of these measures is still subject to scrutiny, as counterfeit goods continue to be sold on these platforms and action is taken on consumers request only, which suggest that a lot need to be done to protect the IPR rights.

However, despite these legislative advancements, the effectiveness of enforcement remains a critical issue. Key markets, such as those in Shenzhen, Guangzhou, and Yiwu, continue to serve as hubs for counterfeit goods, with enforcement efforts often falling short due to the varied

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<sup>436</sup> In 2023, the National customs seized 62,000 batches of suspected infringing import and export goods by People's Daily Online available at <http://finance.people.com.cn/n1/2024/0124/c1004-40165826.html> (last visited on 2/6/24)

reasons which at times goes beyond the reach of authorities. Although, some raids and seizures have been conducted, the long-term impact of these actions is limited, as sellers quickly adapt by moving their operations or changing their sales strategies.<sup>437</sup> The data suggests that while these efforts are necessary, they are insufficient on their own to significantly reduce the volume of counterfeit goods entering global markets.<sup>438</sup> Hence, to reduce the scale of counterfeit markets, more comprehensive and sustained efforts are required especially by the Government. To tackle the issue of counterfeit goods effectively, India and China must implement several key measures. Both nations should enhance cooperation between government agencies and private companies to improve enforcement. In India, strengthening local enforcement, increasing penalties, and better tracking of counterfeit goods in both online and offline markets are essential. China needs to impose stricter penalties and develop long-term strategies to address the cultural tolerance of counterfeiting, alongside establishing specialized task forces for major counterfeit hubs. E-commerce platforms, including Alibaba, should enhance their proactive monitoring systems, and other companies in the sector should also adopt similar measures to combat counterfeit goods. Both countries would benefit from increased international collaboration, sharing data and best practices to address counterfeiting globally. Additionally, educating consumers about the risks of counterfeit goods and ensuring transparency in judicial decisions related to IPR violations are crucial for long-term success.

#### **8.4.6 Infringement of IPR from the Border: Legal Mechanism**

The Research discusses how counterfeit goods leads to infringement of Patent, Trademark and Design, rights of its creators. Much of these infringed goods enter the countries through borders and hence a stringent legal mechanism is needed to prevent the influx of infringed goods. The TRIPS Agreement also in its Article 51 mandates the Member to ensure that the border measures are put in place to stop infringement of IPR. In furtherance to this mandate both the Jurisdictions covered under the Research have made substantial efforts through its legislative and executive mechanisms. To stop the entry of such counterfeit goods that infringe IPR, India has made provisions in its Trademark Act and has also strengthen the Customs Act 1962. Further the Customs Department introduced the ARTS system which enable the right holders

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<sup>437</sup> James Choi and Nicle Huo, China: Multi-pronged approach proves best fit to tackle rise in counterfeits by Alan Chiu, *available* at <https://www.worldtrademarkreview.com/guide/anti-counterfeiting-and-online-brand-enforcement/2024/article/china-multi-pronged-approach-proves-best-fit-tackle-rise-in-counterfeits> (last visited on 2/5/24)

<sup>438</sup> Xue Zhang, Deceptive Practices and Countermeasures on China's Online retail platform, *available* at <https://thediplomat.com/2024/03/deceptive-practices-and-countermeasures-on-chinas-online-retail-platforms/> (last visited on 2/5/24)

to conveniently register their rights with the Customs Authorities online and enable the Customs Administration to provide assured protection and fool proof monitoring to a greater degree. However, in spite of these legislative and executive mechanism in place the grey market in India is prevalent throughout which poses a major challenge before the enforcement authorities. It's not only IP Laws and Custom laws that talk about counterfeiting goods even the Indian Penal Code, under Section 486 law punishes those who sell, display, or possess goods with counterfeit property marks, unless they can prove they acted innocently, took reasonable precautions, or provided information on the source of the goods when asked. The punishment includes up to one year of imprisonment, a fine, or both. This provision is also carry forwarded in the Bharatiya Nyaya Sanhita under Section 349.

In summary, India's Customs Rules demonstrate a strong alignment with the TRIPS Agreement, incorporating the necessary procedures and safeguards to enforce IPRs effectively at the border. The framework balances the protection of intellectual property with the need to safeguard legitimate trade, reflecting a comprehensive approach to compliance with international standards.

On the other hand, China also has provisions to stop the trade of counterfeit goods through its border in its Customs Laws. The Custom Law in China provides for a mechanism to raise actions against counterfeit goods being traded however as provisions for destruction of counterfeit goods comes as a last option, prior to that authorities can allow the counterfeit goods to be circulated in the market by removing Trademark or by donating them to the institutes, which dilutes the IP Protection.

In both the jurisdiction the law permits Ex-officio actions to be taken by the Custom Authorities which is a positive step towards fulfilment of the TRIPS Agreement. However, in many of the cases the infringed goods may go unnoticed or unidentified as it impossible for the authorities to check each and every package. The Owner of right can file a request /complaint to the Customs Authorities for the suspension of infringing goods but such request of complaint should mention the complete details of the container consisting infringing goods which is a difficult task even for the IP owners.

To improve the current system for addressing IPR infringement at borders, several key enhancements are suggested. First, strengthening enforcement mechanisms is essential; investing in advanced technologies and comprehensive training for Customs Authorities can significantly enhance their ability to detect and intercept counterfeit goods. In China, it would

be beneficial to reform legal provisions that currently allow the circulation or donation of counterfeit goods. Implementing a policy mandating their immediate destruction would provide stronger protection for IPRs.

Additionally, simplifying the complaint procedures for IP owners could alleviate the burden on them. Streamlining the process for filing complaints with Customs Authorities and creating a more user-friendly system for tracking complaints would improve efficiency. In India, addressing the challenges posed by the grey market is crucial; targeted strategies such as increased coordination between Customs and other enforcement agencies, along with public awareness campaigns, could help mitigate this issue. Also, the Customs Department has not released any data with respect to infringements of IPR on their websites, which raises concerns as to the necessary actions taken against IPR infringement. If the data is made available it can throw light on the influx of infringed goods entering the Indian market and can help in steps taken by the Customs department in protecting IPR.

Enhancing international collaboration is also important. Greater cooperation and information sharing between Customs Authorities and IP enforcement agencies across borders can improve the tracking and management of counterfeit goods. Lastly, introducing incentives for businesses and right holders to actively participate in monitoring and reporting counterfeit goods could foster more proactive engagement. Rewards for successful enforcement actions or support for advanced monitoring technologies could drive better compliance and enforcement outcomes. Furthermore, identifying regions from which there is a significant influx of counterfeit goods and collaborating with the countries where these goods are produced or exported from will be essential in curbing the issue at its source.

#### **8.4.7 Effectiveness of DSB**

The GATT Agreement which preceded the establishment of WTO attached a significant importance to bilateral consultations and many disputes were settled in this manner. With the establishment of WTO, it continued to incorporate bilateral consultations as its First stage to resolve the issue so as to maintain the relation between the disputed parties. The DSU of WTO provided for procedures for establishment of Panel and Appellate Body if the consultations failed. The approach of Dispute Settlement is to create a balance between legal scrutiny and diplomatic resolutions offering both a formal and informal way to solve the dispute. Over the years Members have requested the DSB to resolve their issues relating to TRIPS Agreement

on several occasions. As on September 2024, 44 disputes have been presented by the Members which exhibits faith in the dispute settlement machinery.

India and China both have presented disputes before the DSB, with regards to the TRIPS Agreement, however on analysing these decisions it is found that there is mixed effectiveness. While certain decisions of DSB has led to comply the TRIPS obligations,<sup>439</sup> others have failed due to inordinate delays, complex nature of dispute and political will.<sup>440</sup>

Post the Decision by the Panel and Appellate Body the implementation phase is critical as it assesses the true effectiveness of DSB. While the DSB can issue rulings and recommendations, the actual enforcement depends largely on the willingness and capacity of the Member Nations to comply. In the case of India, the DSB's decisions have generally led to substantial legal reforms, albeit with delays and prolonged negotiations, as seen in **DS50** and **DS79**. This suggests that while the DSB's methods can be effective, their success often requires extended timelines and significant pressure from the international community.

China's cases, such as **DS542 (USA v. China)**, further illustrate the challenges in implementation. Despite DSB rulings, China has been slower to fully comply with some recommendations, particularly in areas requiring systemic changes, like IPRs enforcement. The partial implementation of DSB decisions in these cases underscores a recurring issue: the DSB's lack of direct enforcement power. The DSB can recommend and supervise, but it relies on the Member Nations to voluntarily bring their practices into compliance.

Thus, while the DSB is a crucial tool for maintaining global trade order, its effectiveness in fully resolving disputes and enforcing compliance remains contingent on broader geopolitical dynamics and the commitment of individual Member Nations.

It is important to acknowledge that the DSB's effectiveness is heavily influenced by geopolitical dynamics, which extend beyond the legal decisions it renders. Political will, domestic legal reforms, and international pressures all play critical roles in the compliance process. For instance, one of the weaknesses is that, even with deadlines, the full dispute settlement process takes a long time. During this period, the complaining party continues to face economic losses if the measure being challenged violates WTO rules. There's no interim relief available to protect the complainant's economic and trade interests while the case is being resolved. Additionally, even if the complainant wins the case, they don't receive any

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<sup>439</sup> DS 362, DS 50

<sup>440</sup> DS 372

compensation for the damage suffered during the time it took for the ruling to be enforced, nor do they get reimbursed for legal fees. If the losing party fails to implement the ruling, not all WTO Members can easily suspend obligations in response. In some rare cases, even suspending concessions hasn't led to proper implementation, though these cases are exceptions.

In the specific cases of India and China, the challenges in meeting DSB rulings are particularly pronounced. For India, there have been notable delays and a reliance on external pressure to drive necessary legal reforms. Meanwhile, China has faced difficulties in implementing systemic changes, especially concerning IPRs enforcement, resulting in only partial compliance. These country-specific issues highlight the need for a more collaborative approach to dispute resolution. Engaging global institutions and Member Nations in continuous dialogue and monitoring could help address compliance challenges more effectively. Looking ahead, proposing future reforms that strengthen the DSB's effectiveness is essential. This could include enhancing multilateral enforcement mechanisms or developing more robust compliance procedures that consider the complexities of global trade dynamics. By addressing these areas, the DSB can continue to serve as a vital tool in maintaining global trade order while adapting to evolving challenges.

#### **8.4.8 Enforcement of IPR by Start-ups and Small Entities**

The Researcher conducted a Non-doctrinal study to know the basic awareness on IPR's amongst with Start-ups and Small Entities in Gujarat. The questionnaire was divided into 5 parts, covering various aspects of IP. It is alarming to know that 54.3 % of Respondents were not aware about the nature of IPR. Start-ups and Small Entities are the stakeholders of IPR and the lack of basic understanding relating to IPR is a signal for the government to enhance its sensitisation. Government of India came out with National IPR Policy with an objective to create awareness, accelerate registration of IP and provide incentives to the creators. Despite these efforts from the government a significant number of respondents were not aware about the Policy and various financial schemes made available for them. IPR protection would be incomplete for businesses looking for exploring cross border opportunities. Hence, these Start-ups and Small Entities who would look forward for extending IPR protection beyond the boundaries of the countries lack awareness with respect to global IPR enforcement.

The National IPR Policy 2016 was introduced to foster innovation and creativity in India while strengthening the country's IPR framework. It set ambitious goals for raising IPR awareness,

enhancing IP generation, improving the legal framework, and promoting the commercialisation of intellectual property. While the policy has made significant strides in some areas such as reducing backlogs in IP applications, modernising IP offices, and boosting India's ranking in the Global Innovation Index (from 57th to 39th between 2018 and 2024) challenges remain in terms of public awareness and the effective reach of its initiatives. The Non-Doctrinal study conducted among Start-ups and Small Entities in Gujarat revealed a concerning gap in basic IPR awareness. Majority of respondents were unfamiliar with the nature of IPR, indicating that the policy's outreach efforts have not been entirely successful in engaging key stakeholders. Moreover, the study showed that many respondents lacked awareness about government initiatives and financial incentives aimed at supporting IPR registration and protection. This disconnect suggests that while the policy outlines comprehensive measures for IPR protection and enforcement, its on-the-ground implementation, particularly in terms of sensitisation and education, has been less impactful.

Thus, while the National IPR Policy 2016 has strengthened India's institutional and procedural framework for IP, it has fallen short in creating the widespread awareness necessary to fully harness its potential. The government needs to intensify its efforts in educating Start-ups and Small Entities, particularly in rural and less-connected areas, and enhance access to global IPR knowledge to ensure the policy's objectives are fully realised.

Furthermore, a significant portion of Start-ups and Small Entities in India still lack basic awareness about IPR, despite government initiatives aimed at improving education and outreach. This gap in understanding suggests that while India has made structural progress, there's still a long way to go in ensuring that stakeholders fully benefit from the protections TRIPS is meant to provide. Moving forward, stronger enforcement, clearer legal guidelines, and more robust public education campaigns will be a key to building a more resilient and globally compliant IPR system in India.

To conclude, the TRIPS Agreement has set the stage for a global system of IPR, prompting both India and China to align their national laws with international expectations. While both countries have made significant progress in adhering to TRIPS requirements, they still face distinct hurdles in enforcing IPR effectively. India has revamped its legal framework, particularly in patents and trademarks, improving compliance but continuing to struggle with issues like counterfeiting and border enforcement. China, on the other hand, has introduced important reforms in its IPR legislation but still faces challenges due to complex Judicial Interpretations and inconsistent enforcement practices. Both Nations continue to grapple with

the persistent threat of counterfeit goods, which undermine IPR protection and expose gaps in their enforcement strategies. The Dispute Settlement Body of the WTO has played a role in resolving compliance disputes, but its effectiveness has been mixed, with some successes marred by delays and political complexities.