

# Constitutional Right to Property in Changing Times: The Indian Experience

By R. Rajesh Babu

Indian Institute of Management (IIM), Calcutta

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## ABSTRACT:

The constitutional right to property has undergone a significant change since India's independence. **In the past few decades, the guarantee of property for both alien and domestic right holders went for considerable dilution to sanction the unrestrained power of eminent domain. The arbitrary expropriation of property was justified in the then social and political context of a nascent state. However, since India embarked on the path of liberalization with the policy of promoting international trade and foreign investments, there appeared a progressive and selective modification of its legal regime on property rights to favour alien property and corporate interests. Part of the policy shift involved guarantee and strengthening of the legal environment for protection of foreign property and investment. India's international commitments under the WTO Agreements and several investment protection treaties guaranteed capital and IP exporting states safe and secure property rights in the host state – India, much beyond the existing protection for citizen's property. Remedies for breach and standard of compensation for expropriation, direct or indirect, were judged by international rules and practices, beyond the control of local courts. To the extent that international expropriation and compensation rules provide foreign investors and IPR holders with stronger rights than India's laws, they are also likely to provide them with stiffer property rights. In addition, change was evident in the nature of ownership of expropriated property. Nationalization (state ownership), which was the primary character of expropriations, was replaced by 'corporate' ownership with no respect for public purpose or just compensation.** The recent stints of compulsory acquisition of land for SEZ underline the 'reverse-discrimination' or double standards perpetrated by the Indian state. The paper attempts to highlight this paradox in India's property rights regime in the changing global context. **The paper argues for a constitutional rethinking on right to property, in the post liberalization context, considering the new social and political realities, particularly from the viewpoint of individual private owners whose identity and livelihood are attached to the property.**

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## ... 3. PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

Another area where property rights have witnessed considerable intensification on a global scale is in 'intellectual property'.<sup>77</sup>

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The World Intellectual Property Organization (WIPO) provides for a comprehensive regime for IP protection. The real thrust, however, came with the WTO Agreement on Trade Related Aspects of Intellectual Property Rights 1994 (TRIPs).<sup>78</sup> The TRIPs Agreement guarantee 'minimum standard' of protection for all intellectual property and mandates a remarkably efficient protection and enforcement regime within national jurisdictions. While the states are free to offer higher protection, the 'minimum standard' in itself was much higher level than the pre-TRIPs regime in most developing countries.<sup>79</sup> The

**TRIPs goes beyond its provisions and mandates compliance with other intellectual property conventions.<sup>80</sup> Moreover, unlike WIPO conventions, the presence of a strong WTO DSU makes implementation and enforcement of TRIPs effective.<sup>81</sup>**

International protection and enforcement of IPRs per se have been the major concern of developed countries whose nationals/multinational corporations (MNCs) own majority of the registered IP. It was their concern over the global dimension of misappropriation of IP that prompted developed countries to include TRIPs in the negotiating agenda and successfully push through the Agreement on TRIPs during the Uruguay Round of trade negotiations.<sup>82</sup> **The TRIPs Agreement tends to favour IP owners, against any state intervention. This is more obvious in the context of 'patents' the protection of which has a wide socio-economic dimension. The legal regime under TRIPs Agreement significantly expands the protection for patent holder's rights.** For instance, TRIPs confer on the patent owner exclusive rights,<sup>83</sup> and prevent third parties from making, using, selling, or importing of the patented products.<sup>84</sup> On the other hand, **the responsibilities of the patent holder and the regulatory control of the host governments have been considerably watered down.<sup>85</sup> The Government's power to tamper with the 'exclusive rights' of the owner is restricted to exceptional circumstances, 'provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner ...'<sup>86</sup>**  
(pp. 226-227)

**The flexibility known as 'compulsory licensing' i.e., unauthorized use of the IP is limited to exceptional circumstance, permitted under stringent conditions. The scope and duration of compulsory licensing must be strictly limited to the purpose for which such unauthorized use has been authorized.<sup>87</sup> Any deviation would amount to breach of TRIPs provisions. Further, in all circumstances, such compulsory licensing shall be followed by adequate remuneration to the IP holder.** For instance, under the Indian Patent Act when the government allows compulsory license to make, use or sell the patented technology without the consent of the patent owner – the patent owner shall continue to have rights over the patent, including a right to be paid royalty for authorized use.<sup>88</sup> **The TRIPs Agreement does not define 'adequate remuneration,' however, determining adequate remuneration in each case, shall 'taking into account the economic value of the authorization.'<sup>89</sup> In India, such amount shall be determined by the authorities, keeping in view the nature of invention, its utility, expenses incurred in maintaining patent grant, etc.<sup>90</sup> These requirements can only be waived in case of national emergency or other circumstances of extreme urgency or in cases of public non-commercial use.<sup>91</sup> Compulsory licensing, in that sense, is different from expropriation were the ownership in the property shifts.**

**The legitimacy of granting compulsory licencing or the continued existence of circumstances, or the adequacy of remuneration, shall be subjected to judicial review or other independent review by a distinct higher authority, with an authority to order prompt and effective provisional measures.<sup>92</sup> The TRIPs Agreement also mandates that any decisions on the merit of the case shall be based on reason.<sup>93</sup>**  
(p. 227)

The procedures for enforcement of IPRs must be fair and equitable. The procedure shall not designed to create unnecessarily complication or costly or cause undue delays. The state must also notify the WTO Council for TRIPs of the grant of the license and its conditions. Although the notifications by importing and exporting members do not need approval by the WTO, the mechanism is subject to an annual review by the Council for TRIPs where India's practices could be openly challenged by any Member. The existence of judicial scrutiny, in addition to the international scrutiny, of any interference by the host government, enables higher protection and enforcement of IPRs.  
(pp. 227-228)

... The practice relating to compulsory licensing is also revealing. As noted above, **the TRIPs Agreement and the Patent Act does provide the state with freedom to determine the grounds upon which such compulsory licenses or unauthorized use can be granted. This offers the state, some domestic policy space for regulating IP for public interest.**<sup>104</sup>

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However, the comprehensive procedural requirements set out in TRIPs Article 31 have left the flexibilities with limited field of practical application.<sup>105</sup>

(pp. 229-230)

In other words, although theoretically, India could employ **compulsory licensing, the practices are now circumscribed by a legal framework that 'imposes strict conditions and procedural requirements for such issuance.'**<sup>106</sup> To quote one of the commentators:

**Indeed, Article 31 does impose many new procedural or substantive conditions. Under the new rules, each grant of a compulsory license must be considered on a case-by-case basis. The government must first make efforts to obtain a voluntary license. The patent holder must receive 'adequate remuneration.' Production must be predominantly for the domestic market. The license must be non-exclusive. Judicial review must be afforded for any decisions related to the compulsory license. And finally, the 'scope and duration' of the license must be 'limited to the purpose for which it was authorised,' and must be liable to termination if the reasons underlying that authorization cease to exist...These new rules certainly narrow the opportunity for countries to grant compulsory licenses...<sup>107</sup>**

... This token flexibility is further constrained by the provisions in the BITs and FTAs. Most BITs and FTAs require developing countries to undertake commitments beyond those in TRIPs.<sup>111</sup>...

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**106 Daniel Gervais, The TRIPs Agreement: Drafting Analysis and Negotiating History 165 (1998) at 368 in *Patent Exclusions, Exceptions & Limitations*, ITSSD Comments Concerning Document (SCP/13/3) <[http://www.wipo.int/export/sites/www/scp/en/meetings/session\\_14/studies/itssd\\_2.pdf](http://www.wipo.int/export/sites/www/scp/en/meetings/session_14/studies/itssd_2.pdf)>.**

**107 *ibid.***

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