NEW ECONOMIES FOR ERADICATING POVERTY

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Transforming the International Economic Order

POLICY PROFILE 5.9

# DEMOCRATIZATION OF INTELLECTUAL PROPERTY REGIMES, TECHNOLOGY SHARING AND ESTABLISHING KNOWLEDGE COMMONS

A contribution to the Roadmap for Eradicating Poverty Beyond Growth

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# EXECUTIVE SUMMARY

This proposal aims to reframe knowledge in health, renewable energy, data infrastructure and other essential sectors as a global public good and shift innovation incentives from private profit toward collective well-being. The current global intellectual property system, as embodied in the WTO TRIPS Agreement, serves the commercial interests of multinational corporations and high-income economies, imposes a "one-size-fits-all" model that creates significant human costs by inflating the price of essential medicines, restricting the rights of farmers to save seeds, and limiting access to affordable learning materials. These outcomes undermine the binding obligations of states under the International Covenant on Economic, Social and Cultural Rights to realize the rights to food (Art. 11), health (Art. 12), education (Art. 13), and science and culture (Art. 15). This policy proposes a human rights approach to intellectual property (IP) law, ensuring that the design, implementation, interpretation, and enforcement of IP rights do not impede human rights but affirmatively protect the substantive freedoms and capabilities of all individuals. The core of this proposal is the normative reframing of TRIPS flexibilities, from optional trade tools into mandatory human rights obligations.

To operationalize this principle, the policy proposes the implementation of the following key instruments: (i) independent national Intellectual Property Review Boards tasked with assessing patent applications and other IP rights against human rights criteria and making pre-emptive public interest designations in sectors like health, food security, and education; (ii) the streamlined operationalization of flexibilities to ensure the highest attainable standard of health, access to learning materials, and freedom from hunger; and (iii) the embedding of human rights safeguards and model clauses in trade and investment agreements to protect the regulatory space of states and prohibit trade retaliation against countries implementing IP measures aimed at fulfilling their human rights duties. The policy further requires national courts to incorporate a human rights approach when resolving disputes involving IP rights. These proposals are based on examples that illustrate that these are achievable and proven. Countries like Brazil, India, Malaysia, and Thailand have utilized compulsory licensing to reduce the prices of life-saving medicines making them accessible for their population. India has embedded stricter patentability criteria under its patent law, preventing the ever-greening of pharmaceutical patents. Evidence on the use of TRIPS flexibilities from the data available reveals TRIPS flexibilities have been used hundreds of times across both high- and low-income countries, demonstrating that these tools work when states are empowered and protected to use them. This proposal is significant because it asserts that human rights must prevail over commercial interests, effectively unlocking the policy space required for states to meet fundamental human needs. It redistributes power from corporate monopolies to governments and communities, enabling a path towards a human rights economy that provides health, food, and knowledge without depending on extractive GDP growth.

# 1. POLICY GOAL

## 1.1 The Problem: Trade-Related IP Rights as a Driver of Poverty and Inequality

The UN Special Rapporteur on extreme poverty and human rights, in his 2024 Report, identified the core problem with the current approach to poverty eradication as the hegemony of "growthism" with its roots in profit maximization and a fixation on economic growth. Under this ideology, development is measured exclusively by GDP growth and capital accumulation, systematically excluding questions of distribution, dignity, and access. However, such an assumption of growth is contrary to the goals of poverty eradication and well-being for all; it exacerbates inequalities, promotes the plundering of resources in the Global South, and adversely affects environmental resources. A key pillar of this hegemony of "growthism" is the current global regime for the protection of intellectual property rights as embodied in the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). By imposing minimum standards of intellectual property (IP) protection, the TRIPS Agreement mandates a "one-size-fits-all" model designed primarily around the commercial interests of multinational corporations and economies of the Global North. Nevertheless, despite narrowing the policy space available to states under international intellectual property law, the TRIPS Agreement does contain certain key flexibilities that states (especially states in the Global South) can and should implement so as to attenuate the impact of IP protection on the enjoyment of human rights and facilitate the eradication of poverty.

From the outset, it should be emphasised that IP rights are not human rights. Article 27(2) of the Universal Declaration of Human Rights and Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) both recognise that creators have a right to the protection of their moral and material interests. However, these 'moral and material interests' should not be conflated with contemporary forms of intellectual property protection. This distinction, also drawn by the UN Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No. 17 on Article 15(1)(c) of the ICESCR, is foundational to this policy. IP rights are regulatory instruments, granted by states for a temporary period, and can be revoked, licensed, or assigned. Human rights, by contrast, are inherent to every person, universal, inalienable, and non-derogable. While Article 15(1)(c) of the ICESCR recognises the right of creators to the protection of their moral and material interests, the UN CESCR's General Comment No. 17 clarifies that those interests are not coterminous with IP rights. Although states can use IP rights as tools to protect the moral and material interests of creators, this does not elevate IP rights to the status of human rights under international law.

In line with the Special Rapporteur's call for a decisive shift away from growth-dependent development strategies towards a human rights economy, this policy proposes a human rights approach to intellectual property rights. According to this approach, the design, implementation, interpretation, revision, and enforcement of IP rights must not impede the

realisation of human rights and IP rights must affirmatively be made to serve the interests that human rights protect. Rather than allowing IP rights to trump the right to health, the right to food, and the right to education, this approach insists that IP rights serve those rights; and that, where a conflict arises, human rights should prevail. Adopting this approach to IP rights at the national, regional, and international levels would contribute to the eradication of poverty, especially in the Global South.

## 1.2 The Human Rights Approach to IP Rights

The international human rights framework imposes binding obligations on states that are directly and materially affected by the design and enforcement of IP regimes. The most relevant instruments are the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the General Comments issued by the CESCR, which constitute interpretation of those obligations. In terms of a human rights economy, the human rights obligations of states that are most impacted by the protection of IP rights include the right to health, the right to adequate food, the right to education, and the right to science and culture. These obligations, and how they implicate IP rights, are briefly discussed below.

### *1.2.1 The Right to health*

Article 12 of the ICESCR recognises "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." The CESCR elaborated on the content and scope of this right in its General Comment No. 14 where it clarified that states bear a tripartite framework of obligations with respect to the right to health: the obligation to respect, requiring states to refrain from directly interfering with the enjoyment of the right; the obligation to protect, requiring states to adopt legislation or take measures to ensure "equal access to health care and health-related services provided by third parties"; and the obligation to fulfil, requiring states to "give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation, and to adopt a national health policy with a detailed plan for realizing the right to health". States also have a core obligation regarding the right to health, from which no derogation is permissible. This obligation entails providing essential drugs as defined from time to time by the WHO Action Programme on Essential Drugs. It follows directly that adopting measures to enable access to affordable medicines, including through the use of intellectual property flexibilities, is not a discretionary trade policy choice but a component of each state's binding right-to-health obligations under international human rights law.

### *1.2.2 The Right to Adequate Food*

Article 11 of the ICESCR recognises "the right of everyone to an adequate standard of living for himself and his family, including adequate food," and Article 11(2) more specifically recognises "the fundamental right of everyone to be free from hunger" and obliges states to take individually and through international cooperation the measures necessary for the realisation of this right, including through the improvement of methods of production, conservation, and distribution of food. The CESCR elaborated on these obligations in General

Comment No. 12, which states that the right to adequate food is realised when everyone has physical and economic access at all times to adequate food or means for its procurement. Further, Jean Ziegler, the former UN Special Rapporteur on the right to food, noted in his 2001 report that the right to food implies not only access to food, but also access to the means of producing it. The General Comment establishes the same tripartite framework applicable to the right to health: the obligation to respect requires states to refrain from taking measures that deprive individuals of their existing access to adequate food; the obligation to protect requires states to ensure that enterprises or individuals do not deprive individuals of access to adequate food; and the obligation to fulfil encompasses both an obligation to facilitate, by proactively engaging in activities that strengthen people's access to food, and an obligation to provide, where individuals or groups are unable to enjoy the right through their own means. Crucially, the CESCR identifies the adoption of incompatible laws and the failure to regulate private actors as direct violations of these obligations. Consequently, states breach the right to food when they implement IP regimes that restrict seed saving (as seeds are an essential means of food production), or enter into international agreements that prioritize commercial IPRs over the essential needs of small-scale farmers and food security.

### *1.2.3 The Right to Education:*

Article 13 of the ICESCR recognises "the right of everyone to education," directed to "the full development of the human personality and the sense of its dignity." Article 13(2) sets out the specific obligations of states, including that primary education shall be compulsory and free, that secondary and higher education shall be made generally available and accessible, and that fundamental education shall be encouraged for those who have not completed their education. The CESCR General Comment No. 13 elaborates that the right to education contains four essential dimensions: availability, accessibility, acceptability, and adaptability. General Comment No. 13 further affirms that states bear the obligation to fulfil the right to education by taking positive measures that enable and assist individuals and communities to enjoy the right to education. This includes, where necessary, re-examining and revising national copyright laws to introduce limitations and exceptions that promote the availability and accessibility of learning materials. The former UN Special Rapporteur in the field of cultural rights, Farida Shaheed, confirmed this in her 2014 report on copyright policy and the right to science and culture, noting that states have a positive obligation to provide for "a robust and flexible system of copyright exceptions and limitations to honour their human rights obligations" and that such limitations and exceptions "expand educational opportunities by promoting broader access to learning materials." Copyright law designed or enforced without regard to the right to education therefore violates a binding human rights obligation.

### *1.2.4 The Right to Science and Culture:*

Article 15 of the ICESCR recognises the right of everyone "to take part in cultural life" and "to enjoy the benefits of scientific progress and its applications" and it also recognises the right of everyone "to benefit from the protection of the moral and material interests resulting from

any scientific, literary or artistic production of which he is the author" . As already discussed above, General Comment No. 17 on Article 15(1)(c) of the ICESCR addresses the relationship between creators' interests and IP law directly, drawing a critical distinction between IP rights and human rights. It makes it clear that the "moral and material interests" protected under Article 15(1)(c) is not coterminous with IP protection as defined by trade agreements. Rather, the human rights recognised by Article 15(1)(c) are aimed at securing the personal (i.e. moral) and financial (i.e. material) interests of creators in their works and these can be done through several legal means including intellectual property laws. For instance, the financial interests of creators (such as authors and inventors) can be secured through prizes or one-time payments or exclusive rights. Thus, the ICESCR does not accord a privileged status to conventional IP rights in this regard as it does not mandate states to protect the moral and material interests of creators via IP laws. States must therefore ensure that IP regimes or any legal framework they implement to protect the moral and material interests of creators do not undermine the enjoyment of other ICESCR rights, including the right to science and culture.

Farida Shaheed's 2014 report advocates for treating human knowledge as a global public good, recommending that states expand copyright exceptions and limitations, specifically for education, research, parody, and marginalized groups, and promote open licensing models to prevent the over-privatization of knowledge from obstructing scientific and cultural progress. In her 2015 report on patent policy and the right to science and culture, Shaheed reframes the status of trade-related flexibilities, arguing that while international trade law may treat exceptions and exclusions as optional, from a human rights perspective, they are often to be considered as mandatory obligations. Shaheed warns that unreasonably strong patent protections can constitute human rights violations if they create arbitrary or disproportionate barriers to technologies essential for a life with dignity. To mitigate these tensions, she recommends that states actively utilize TRIPS-compliant flexibilities, such as compulsory licensing and strict patentability criteria to prevent the "ever-greening" of pharmaceutical patents, and to equally explore alternative incentive models.

## 2. POLICY FORMULATION

### 2.1 The Central Reframing: From Optional Flexibilities to Human Rights Obligations

The TRIPS Agreement contains a range of flexibilities that permit states to calibrate their IP regimes to serve public interest goals. In Shaheed's 2015 report on patent policy, she notes that from a trade law perspective, these flexibilities are optional and states may choose to use them or not, but "from the perspective of human rights, they are often to be considered as obligations." Where a state's failure to use a TRIPS flexibility results in a violation of its binding obligations under the ICESCR, for example, where failure to issue a compulsory licence results in preventable deaths from unaffordable medicines, using that flexibility is no longer discretionary, and it becomes an obligation under international human rights law.

This reframing is the normative core of this policy. It transforms the legal character of TRIPS flexibilities from discretionary instruments of trade governance into human rights imperatives, subject to the accountability mechanisms of the international human rights system. It also shifts the political terrain: bilateral pressure from high-income countries against developing countries' use of TRIPS flexibilities becomes not merely a trade dispute but an interference with the target state's fulfilment of its human rights obligations.

### 2.2 Policy Objectives

This policy pursues three interlinked objectives:

- To re-characterise national and international IP law from a trade instrument into a human development instrument, anchored in states' binding obligations under international human rights law, particularly the ICESCR.
- To operationalise TRIPS flexibilities as human rights obligations where their use is necessary to fulfil states' duties under the rights to health, food, education, and science and culture thereby transforming them from optional trade tools into justiciable human rights imperatives.
- To strengthen South-South manufacturing and technology-sharing capacity, reducing structural dependency on Northern IP holders and building the domestic innovation infrastructure required for self-determined development.

### 2.3 Adopting a Human Rights Approach to Intellectual Property Law

Rather than assessing IP policy by reference to economic growth, trade flows, or innovation rates defined in purely commercial terms, this policy requires that national IP laws be assessed and reformed based on their measurable contribution to the realisation of the rights to health, adequate food, education, and the benefits of science and participation in culture, as defined in the ICESCR and its General Comments. The central question IP law must answer is not how much wealth it generates for rights holders, but how well it advances the substantive freedoms and capabilities of the many, enabling people to be healthy, well-nourished, educated, and able to meaningfully contribute to their culture.

To operationalise, the policy proposes the establishment of Intellectual Property Review Boards at the national level. These review boards will be independent statutory bodies composed of various experts and representatives such as human rights experts, public health specialists, scientists, educators, librarians, researchers, and representatives of students and learners. The boards will be tasked with the following, among other responsibilities:

- assessing new patent applications and existing patent grants against human rights criteria, drawn from the ICESCR and its General Comments, and identifying patents in sectors critical to health, food security, education, and climate where public interest designations should be made. Such designations would empower governments to pre-emptively activate compulsory licensing without requiring

individual emergency declarations, integrating human rights accountability into the patent system's normal operation rather than treating it as an exceptional response.

- assessing whether the scope of existing copyright exceptions and limitations in national law is sufficient to fulfil states' obligations under the right to education and the right to science and culture and to recommend legislative reform where gaps are identified; assessing the adequacy of educational exceptions in digital and distance learning contexts, where the application of copyright law to online reproduction and transmission directly affects access to learning materials for students in remote and underserved communities.

This policy further requires national courts to incorporate a human rights approach when resolving disputes involving IP rights. Thus, human rights should inform how national courts interpret, apply, and enforce IP rights.

### 2.4 Operationalizing TRIPS Flexibilities as Human Rights Obligations

In line with the recommendations of the former UN Special Rapporteur in the field of cultural rights, Farida Shaheed, states should formulate national IP policies that incorporate TRIPS flexibilities and take into consideration their binding obligations under the international human rights framework. Some specific recommendations are provided below:

- The Right to health:
    - Article 31 of the TRIPS Agreement permits compulsory licensing, a government-authorised production of a patented medicine without the patent holder's consent. Under this policy, compulsory licensing for essential medicines is activated not merely as a trade discretion but as a human rights obligation wherever access to a patented medicine is necessary for the fulfilment of the right to health and affordable access is unavailable. States should implement domestic legislation establishing clear, streamlined procedures for compulsory licensing in public health contexts.
    - Article 6 of the TRIPS Agreement permits states to choose how they address the issue of exhaustion of intellectual property rights, allowing them to adopt a system of international exhaustion, and enable parallel importation. This would enable them to procure medicines at the most affordable globally available price.
    - Article 27.1 of the TRIPS Agreement, which lays down patentable subject matter, states that "patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application." However, the TRIPS agreement does not define the terms "invention", "new", "inventive step", and "industrial application". Hence, states are free to define these terms on their own, and can use this flexibility to adopt strict criteria for

patentability, barring the grant of patents on minor modifications or new uses of known substances.

- The Doha Declaration's affirmation of the sovereign right of member states to protect public health must be given binding legal effect through specific anti-retaliation provisions in trade agreements that explicitly prohibit bilateral trade pressure against states implementing these flexibilities.

- The Right to Adequate Food: Article 27.3(b) of the TRIPS Agreement mandates states to provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. Here, while the protection of plant varieties is compulsory, there is still flexibility regarding how the same is to be done. States should therefore exercise their discretion to design a balanced plant variety protection framework that prioritises farmers' rights and food sovereignty over corporate seed monopolies. National legislation should embed farmers' rights, such as, the right to save, use, sow, re-sow, exchange, share, and sell farm-saved seeds, as a positive right rather than a mere exemption from breeders' rights.

- The Right to Education: Article 9.1 of the TRIPS Agreement incorporates Articles 1 to 21 of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), with the exception of Article 6bis of the Convention, into the TRIPS Agreement. Crucially, Article 10(2) of the Berne Convention permits states to allow the use of literary and artistic works for teaching purposes to the extent "justified by the purpose". Further, there are no quantitative restrictions under this provision. This policy requires that national copyright laws incorporate broad, flexible educational exceptions firmly anchored in Article 10(2), extending without additional restriction to digital and online distance learning contexts. The policy further requires that states permit parallel importation of books under the principle of international exhaustion of copyright (permitted by Article 6 of the TRIPS Agreement as discussed above).

### 2.5 Human Rights Obligations in Bilateral and Multilateral Trade and Investment Agreements

States must take their ICESCR obligations into account not only when designing domestic IP law but when negotiating and entering into bilateral and multilateral trade and investment agreements. These agreements often include TRIPS-plus provisions that exceed TRIPS minimum standards. Because these terms limit the use of existing flexibilities, states must evaluate them against human rights obligations before ratification. In particular, states should resist provisions that require data exclusivity periods, restrict compulsory licensing triggers, or extend patent terms in ways that foreclose access to affordable medicines.

This policy proposes the development of model bilateral agreement clauses that expressly protect the right of states to use TRIPS flexibilities without triggering trade retaliation, and that embed human rights impact assessment as a mandatory pre-ratification requirement for all trade agreements containing IP provisions.

# 3. EXPECTED BENEFITS, EVIDENCE, EXAMPLES & BEST PRACTICES

## 3.1 Facilitating Access to Medicines

The most direct anticipated benefit is expanded access to affordable essential medicines, reducing preventable mortality from diseases for which effective treatments exist but are priced beyond the reach of patients in developing countries. Compulsory licensing and parallel importation, operationalised as human rights obligations, would eliminate the gap between the existence of an effective medicine and its availability to those who need it.

Evidence on the use of TRIPS flexibilities from the data available reveals that TRIPS flexibilities have been used hundreds of times over the past 25 years across both high- and low-income countries, covering HIV/AIDS, COVID-19, rare diseases, cancers, and other non-communicable diseases. Far from being a marginal or exceptional measure, compulsory licensing and related tools have become a mainstream instrument of medicine access policy worldwide.

The use of compulsory licensing can help reduce prices significantly. In May 2007, Brazil issued a compulsory license for the HIV/AIDS drug efavirenz, allowing the government to import generic versions from India at a significantly lower cost. Before the compulsory license, Merck & Co. was selling the drug to the Brazilian government at approximately US$1.59 per dose, however, the generic alternative imported from India cost approximately US$0.45 per dose. In 2002, Malaysia was able to reduce the prices of antiretroviral drugs by 83% through compulsory licensing. Thailand's compulsory licences between 2006 and 2008 reduced prices for cancer, coronary disease, and HIV/AIDS drugs by up to 98%. States can also implement provisions similar to that contained in Section 3(d) of India's Patent Act to prohibit the patenting of new forms of known substances and new uses of known substances where the enhancement of the known efficacy of the previously known substance cannot be demonstrated by the patent applicant. This can be an effective way of preventing the "ever-greening" of pharmaceutical patents.

National courts have also played a key role in this regard. For instance, courts in Kenya and India have incorporated a right to health perspective into the resolution of disputes involving pharmaceutical patents and this has equally helped to facilitate access to affordable medicines.

## 3.2 Food Security and Agricultural Benefits

The restoration of farmers' rights to save, exchange, and replant seeds directly improves food sovereignty and agricultural resilience, particularly for smallholder farmers in South Asia and sub-Saharan Africa who have practised seed saving as the foundation of subsistence agriculture for generations. Affordable access to improved crop varieties would enhance agricultural productivity and food security for the world's most food-insecure populations.

India's Protection of Plant Varieties and Farmers' Rights (PPV&FR) Act of 2001 represents a good example of a sui generis plant variety protection system that affirmatively centres farmers' rights. The Act not only protects the traditional rights of farmers to save, use, sow, resow, exchange, share or sell seeds, it also creates rights in favour of farmers through registration of farmers' varieties which are traditionally cultivated and evolved by the farmers in their fields. It establishes compulsory licensing where a registered variety is not made available to the public at a reasonable price within three years.

A recent decision of the Kenyan High Court declaring certain provisions of the Kenyan Seeds and Plant Varieties Act and Regulations criminalizing the selling, sharing and exchange of unregistered seeds to be unconstitutional and a violation of farmers' rights and the right to food is also a good example of the benefits of the incorporation of a human rights approach into the resolution of disputes involving IP rights.

### 3.3 Educational and Knowledge Benefits

Broad educational copyright exceptions would dramatically reduce the cost of accessing learning materials for students in developing countries, improving literacy rates and educational attainment. The Delhi University Photocopy case provides a landmark example of the application of broad educational copyright exceptions in a developing country context. The case concerned the compilation of course packs that photocopied extracts from academic books published by Oxford University Press, Cambridge University Press, and Taylor & Francis, for sale to Delhi University students. The publishers sought a permanent injunction against the photocopy service. The Delhi High Court upheld Section 52(1)(i) of the Indian Copyright Act, which permits the reproduction of any work "by a teacher or a pupil in the course of instruction," interpreting it broadly to cover the entire instructional process, including pre-lecture preparation and post-lecture study, without quantitative restrictions on the amount reproduced. The Division Bench of the High Court further held that reproduction is permissible without restriction as to quality or quantity so long as it is to the extent justified by the purpose of instruction, explicitly acknowledging that the more indigent the learner, the greater the responsibility to ensure equitable access.

In the same vein, South Africa's Constitutional Court recently read-in certain exceptions into South Africa's copyright law for people with all disabilities permitting, among other things, cross-border exchange of accessible materials without authorisation. These exceptions are currently included in section 19D of the Copyright Amendment Bill already passed by South Africa's parliament. The Constitutional Court intervened due to the reluctance of the South African President to sign this Bill (and the court is set to rule on the President's objections to certain provisions of the Bill in a separate case). Notably, however, the President did not have any reservations regarding these particular exceptions for people with disabilities in the Copyright Amendment Bill. The Constitutional Court thus gave effect to South Africa's obligations to protect the rights of people with disabilities and this further demonstrates the crucial role that incorporating a human rights approach into the resolution of IP disputes can play in ensuring that IP rights do not impede the enjoyment of human rights.

# 4. OBJECTIONS, POTENTIAL BARRIERS & COUNTERARGUMENTS

## 4.1 Trade Retaliation and Claims of Incompatibility with the TRIPS Agreement

States seeking to implement the flexibilities available under the TRIPS Agreement may be concerned about potential retaliation from developed countries who may question the compatibility of certain limitations and exceptions to IP rights with the TRIPS Agreement and some states may also be concerned about the limited role of human rights discourse in the WTO's dispute settlement system.

There are a number of legal responses to this objection. To begin with, a correct interpretation of the TRIPS Agreement, read in light of its object and purpose as specified in its Articles 7 and 8, supports the full use of compulsory licensing and other flexibilities. The 2001 Doha Declaration on TRIPS and Public Health explicitly affirmed that the TRIPS Agreement "does not and should not prevent Members from taking measures to protect public health" and that members have the "right to determine what constitutes a national emergency." Bilateral pressure exercised to obstruct states from exercising these clearly affirmed rights is contrary to the spirit, object, and purpose of the Agreement itself. Furthermore, a state that threatens trade sanctions against a developing country for implementing any of the TRIPS flexibilities (as part of measures to fulfil that developing country's human rights obligations) is itself acting inconsistently with its own obligations under Article 2(1) of the ICESCR, which requires progressive realisation of the rights in the ICESCR "individually and through international assistance and cooperation."

In addition, while the ICESCR is not directly justiciable within the WTO's dispute settlement system since the Dispute Settlement Understanding does not formally incorporate non-WTO treaties, WTO panels can and should take human rights obligations into account as relevant context under Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which provides that treaty interpretation must take into account "any relevant rules of international law applicable in the relations between the parties", particularly where the parties to the dispute are also parties to the ICESCR. Moreover, human rights obligations can be tendered as evidence establishing the justification for measures implemented by a state, and in determining whether those measures constitute good-faith exercises of sovereign authority rather than disguised trade barriers. There is some precedent for the use of non-WTO law as evidence in a WTO dispute involving IP rights as seen with Australia's reliance on the WHO's Framework Convention on Tobacco Control as evidence in its defence of its tobacco plain-packaging measures and this reliance was accepted by both the WTO Panel and the Appellate Body in this case.

## 4.2 Investor-State Dispute Settlement (ISDS)

Corporate actors may attempt to use investor-state dispute settlement mechanisms under bilateral investment treaties (BITs) to challenge the implementation of TRIPS flexibilities by

host states, claiming that these constitute expropriation of their investment or a violation of fair and equitable treatment. The decision of the investment tribunal in Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia v. Argentina provides a significant counterargument in this regard. The tribunal in that case recognised that corporate expectations in investment protection must be calibrated against the pre-existing human rights obligations of the host state, and that investment protection cannot extinguish the policy space that states need to fulfil those obligations. Thus, where a state's use of TRIPS flexibilities is grounded in its binding human rights obligations under the ICESCR, that measure falls within the legitimate exercise of sovereign regulatory authority. At the same time, while some host states have been able to successfully defend measures relating to IP rights before investment tribunals, it should still be noted that the potential threat of litigation before an investment tribunal can result in regulatory chill that prevents some states (especially developing countries) from implementing measures to fulfil their human rights obligations. States should therefore further ensure that their BITs contain explicit carve-outs for public health measures and human rights-mandated IP policies, using model investment agreement clauses designed to preserve regulatory space.

### 4.3 Lack of Technical Capacity and Local Manufacturing Capacity

Some developing countries may lack the technical capacity and expertise to design or amend their national IP laws to incorporate this proposed human rights approach. A potential means of redressing this is through South-South cooperation or regional arrangements such as the African Union to provide the necessary technical assistance and training to states that may require such support in implementing this policy. In addition, several developing countries do not possess local manufacturing capacity to produce medicines and this inhibits their ability to use flexibilities such as compulsory licensing. South-South cooperation and partnerships between companies from developing countries with manufacturing capacity and companies from developing countries with no manufacturing capacity can also be helpful here. Such partnerships, which can be facilitated and coordinated by regional institutions, can help to foster the sharing of technology between developing countries and help to reduce the dependence on technology from developed countries.

## 5. IMPLEMENTATION STEPS

### 5.1 Short Term Actions (0-3 years)

*International Level*

- The TRIPS Council should formally reaffirm the full scope of TRIPS flexibilities and issue interpretive guidance confirming that bilateral trade pressure against states exercising those flexibilities is inconsistent with the Doha Declaration and the object and purpose of the Agreement.

- States party to bilateral trade and investment agreements containing TRIPS-plus provisions should conduct human rights impact assessments of those agreements, identifying provisions that constrain the use of flexibilities.

*Regional Level*

- Regional organisations (such as the African Union) should coordinate the provision of technical assistance and training for states that require such assistance to enable them to successfully implement TRIPS flexibilities.
- Regional organisations should initiate the relevant process for regional cooperation and partnerships to enhance local manufacturing capacity for medicines and vaccines.

*National Level*

- All member states should conduct comprehensive legislative audits of their national IP laws to identify gaps in TRIPS flexibility implementation by mapping their existing IP laws against the human rights standards established in ICESCR General Comments 12, 13, and 14. Based on the identified gaps, states should take measures to implement relevant flexibilities.
- National seed and plant variety protection laws should be reformed to embed farmers' rights as positive rights and to include compulsory licensing provisions for unaffordable registered varieties, drawing on India's PPV&FR Act as a model.
- Pilot IP Review Boards should be established, developing and testing human-rights-based assessment criteria for IP law and policy in sectors critical to health, food security, education, and climate-relevant technologies.

### 5.2 Medium Term Actions (5 years)

*International Level*

- Multilateral negotiations within the TRIPS Council should be concluded for binding anti-retaliation protections, making bilateral trade pressure against documented exercises of TRIPS flexibilities a treaty violation actionable under WTO dispute settlement.
- Member States of the World Intellectual Property Organisation should adopt a binding treaty that contains clear limitations and exceptions to copyright to facilitate access to learning materials (including digital learning materials).

*Regional Level*

- Regional organisations should institute mechanisms to monitor the human rights compatibility of national IP laws to ensure that national IP laws are not undermining the enjoyment of human rights.
- Regional organisations should accelerate investment in the development of local manufacturing capacity to facilitate the production of medicines and vaccines.

*National Level*

- IP Review Boards should be fully operationalised in all participating countries, with interoperability between national databases and a shared international information platform.
- States should review BITs to include carve-out clauses for measures relating to IP rights.

### 5.3 Long Term Actions (10 Years)

*International Level*

- The WTO trade policy review mechanism should fully integrate human rights impact assessment, including assessment of IP provisions' effects on ICESCR rights, as a standard element of each member state's review, creating ongoing accountability linkages between trade governance and human rights obligations.

*Regional Level*

- Domestic innovation capacity in LMICs should be sufficiently developed through South-South consortia investment to address the primary health, agricultural, and climate challenges of each region through locally produced and freely licensed technologies. These can be organised through existing regional arrangements such as the African Union.

*National Level*

- Human-rights-oriented IP governance should be constitutionally or legislatively embedded in national legal systems, creating justiciable domestic rights of action where IP enforcement violates ICESCR rights.

## 6. INTERNATIONAL HUMAN RIGHTS FRAMEWORK AND INTERNATIONAL COMMITMENTS

This policy is grounded in States' obligations under international human rights law to ensure that intellectual property regimes do not obstruct the realisation of economic, social and cultural rights. Under the International Covenant on Economic, Social and Cultural Rights (Art. 2(1)), States are required to take steps, individually and through international assistance and cooperation, to the maximum of their available resources, to progressively realise the rights recognised in the ICESCR.

The ICESCR rights most directly engaged by this policy are the right to an adequate standard of living, including adequate food, and the fundamental right to be free from hunger (Art. 11); the right to the highest attainable standard of physical and mental health (Art. 12); the right to education (Art. 13); and the rights to take part in cultural life, to enjoy the benefits of

scientific progress and its applications, and to benefit from the protection of the moral and material interests resulting from one's scientific, literary or artistic production (Art. 15). These obligations are also supported by the Universal Declaration of Human Rights (Arts. 25, 26 and 27), the Convention on the Rights of the Child (Arts. 4, 24, 27, 28 and 31), the Convention on the Elimination of All Forms of Discrimination against Women (Arts. 10, 12 and 14), the Convention on the Rights of Persons with Disabilities (Arts. 24, 25, 28 and 30), and the International Convention on the Elimination of All Forms of Racial Discrimination (Art. 5).

A human rights approach to intellectual property starts from the distinction between the protection of authors' moral and material interests and intellectual property rights as such. The CESCR has clarified that the right protected under Article 15(1)(c) of the Covenant should not be equated with intellectual property rights (§3). With regard to the right to health, the Committee has also clarified that health facilities, goods and services must be available, accessible, acceptable and of good quality, and that States have a core obligation to provide essential medicines as defined by the World Health Organization (§12, 43, 50-51), so the use of TRIPS flexibilities, it is a means through which States can comply with their obligation to ensure access to essential health goods.

The UN 2030 Agenda for Sustainable Development further reinforces the link between public health, access to medicines and the appropriate use of intellectual property flexibilities. It calls upon States to support research and development of vaccines and medicines for diseases that primarily affect developing countries, and to provide access to affordable essentials (SDG 3). The SDG 3.b expressly situates this obligation within the framework of the Doha Declaration on the TRIPS Agreement and Public Health, reaffirming the right of developing countries to make full use of TRIPS flexibilities in order to protect public health and promote access to medicines for all.

The CESCR also identifies several risks arising from intellectual property regimes. First, they may direct private research funding towards commercially profitable areas while leaving insufficient investment in fields that are essential for the realization of ESCR, such as research on neglected diseases. Second, certain intellectual property rules may restrict access to scientific information, including through data exclusivity, limited sharing of research results, or the high cost of scientific publications. Third, patents and other exclusive rights may create serious barriers to access when they allow essential products, such as life-saving medicines, seeds, educational materials or technologies, to be priced beyond the reach of low-income individuals or developing countries (§58-62).

The UN Special Rapporteur in the field of cultural rights has further emphasised that there is no human right to patent protection as such, and that where patent rights and human rights are in conflict, human rights must prevail. The Doha Declaration on the TRIPS Agreement and Public Health confirms that the TRIPS Agreement should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and promote access to medicines for all.

Finally, the Special Rapporteur on the right to food, recommended that States ensure that the protection of intellectual property rights as applied to agriculture does not discourage innovation, including by establishing exceptions for research. He further recommended that States encourage alternative mechanisms, such as patent pools, clearing houses and other arrangements, in order to overcome barriers to research on patented material, thereby fostering innovation while also protecting agricultural biodiversity.

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