BRILL
NIJHOFF

AFRICAN JOURNAL OF LEGAL STUDIES 9 (2016) 1–19

AFRICAN JOURNAL OF LEGAL STUDIES

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International Intellectual Property Agreements as Agents of Sustainable Development of Developing Countries

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Abstract

The paper examines the implication of International Intellectual Property (IP) laws and agreements on the sustainable development of Least Developed Countries (LDCs) and Developed Countries (DCs) and suggests approaches for improving the development and wellbeing of people in the developing world through national IP laws. The paper argues that generally international IP agreements may appear biased against developing countries and most DCs are reluctant to challenge the status quo and/or use the flexibilities of the international IP agreement to promote the wellbeing of their citizens. However, the article finds that LDCs and DCs could change this trend through the creative use of national IP laws and international agreements to promote the sustainable development of LDCs and DCs. The major instrument suggested for this shift in approach is the establishment of national IP administration institutions and the positive use of compulsory licences.

Keywords

compulsory licences – developing countries – intellectual property – sustainable development – TRIPS

 | DOI 10.1163/17087384-12342069

1 Introduction

It is a generally accepted proposition that the development of a country depends largely on the health of the population and their access to modern technologies.[1] This postulation is backed by evidence showing that when illness and diseases like AIDS, meningitis, polio and malaria ravage countries, their workforce slows down in productivity and the economy becomes sluggish throwing the population into further poverty and health risks. Same theory applies and the problem compounded when such countries lack access to modern technology to help move them away from poverty or access medication to help maintain the health of their human resources. Ironically, for least and developing countries where such problems usually arise, policies, agreements and laws made by and promoted by developed countries tend to worsen the situation instead of resolving it. These laws and agreements are typically biased against LDCs and DCs which are already dependent on the developed nations.[2] Examples of such laws are the international and national laws on intellectual property, with particular reference to those relating to access to medication and information technology. In this paper therefore, we take a look at the implications of international intellectual property (IP) agreements, especially the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement and Foreign Trade Agreements (FTAs) on access to medicine and sustainable development in developing countries. We go further to suggest approaches developing countries and the international community could adopt to combat the unintended negatives of these laws and international agreements.

Given that the TRIPS Agreement, for WTO member states, appears to be the main international legal instrument regulating the use of, and access to intellectual property in the international arena, it has unsurprisingly attracted some controversy since its introduction in April 1994. The key provisions of TRIPS that affects access to medicine and sustainable development in developing countries are its extension of patent protection and protection of data submitted for the registration of pharmaceutical products.[3] These two provisions greatly impede the ability of most developing countries and all least

1 See generally, Anthony Strittmatter and Uwe Sunde (2011) Health and Economic Development: Evidence from the Introduction of Public Health Care. IZA Discussion Paper No. 5901, August. Online. Available at: http://ftp.iza.org/dp5901.pdf (Accessed 8th July 2015).

2 Yu P. K., (2007), "The International Enclosure Movement", *Indiana Law Journal*, Vol. 82. Iss. 4, (827–907) at p. 887 to 888. [Online] Available at: http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1373&context=ilj (Accessed 14th June 2014).

3 See generally Articles 30 and 31 of TRIPS Agreement.

developing countries from access to needed medicines or developing generic alternatives. For instance, prior to the TRIPS Agreement many countries, developing and developed, granted patents for periods between 15 to 17 years.[4] Some countries like India granted as low as between 5 and 7 years.[5] But since after the TRIPS agreement countries have been forced to grant minimum of 20 years protection, with the potential of some countries being forced through FTAs to extend it to 30 years or more. This is not a good development for developing countries, because it locks them into an imbalanced relationship with developed countries and further perpetuates their lack of development. It is also in no way a scenario for sustainable development and therefore requires that such countries initiate active and positive policies and laws that could reverse the trend. The question therefore is whether the supposed reasons for the promotion of patent rights outweigh or is against the access to medicines and sustainable development of developing countries and if not, how can this problem be resolved. To examine this question the remaining part of this paper is structured as follows. The next section takes a look at the major arguments for patent protection. This is followed by a discussion of the legality of local working requirements and impact of IP on sustainable development of developing countries (DCs). Next is a look at how intellectual property agreements (IPAs) are used to perpetuate the underdevelopment of DCs, with examples of its effects. This is followed by a proposal of how compulsory licences could be used to remedy some of these problems. The paper then concludes with a summary of the discussion so far, highlights of recommendations and contributions.

2 Arguments for International IP Agreements

There are several arguments proffered for International IP Agreements. The major arguments are twofold and may seem contradictory. First is the one that suggest it is to ensure reward for the hard work and creativity of the inventor. Second is that it is to ensure that inventions are judiciously used for the good of society. Both of these arguments are discussed below.

4 WHO (2005) "Access to Medicines: Intellectual property protection: impact on public health", *WHO Drug Information*, Vol. 19, No. 3, pp. 236–241 at p. 238. [Online]. Available at: http://www.who.int/medicines/areas/policy/AccesstoMedicinesIPP.pdf [Accessed 14th May 2014].

5 Ibid p. 238.

2.1 *Reward for Creativity*

The first argument of most advocates of patent protection, especially amongst corporate interest and developed countries, is that according to the principle of capitalism it is a fair approach at ensuring that creativity is rewarded. It is argued that this will encourage more creativity, inspire development and hopefully ensure the continued growth and development of mankind.[6] The other major point of this argument is that companies (especially pharmaceutical companies) expend huge amounts of money in the research and development of products and it is thus justified that they are granted patent protection to enable them recover the resources spent on the innovation.[7] Proponents of this argument contend that without patent protection there will be a proliferation of copies of products and thereby deprive inventors of the reward for their invention. Especially, as the time and money spent on a product or process may be lost without accruing any money for further research and development of new products or processes.[8] In fact while some have gone as far as suggesting that lack of patent protection impedes competition and the price lowering benefits such competitions could bring,[9] others have been quoted as saying that "without patents, the pharmaceutical industry ceases to exist".[10] This argument appears to be hinged on the supposition that patent right fuels innovation and that the money it brings is put back into funding more innovation.

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6 Goldberg, P. K., (2010), "Alfred Marshall Lecture on Intellectual Property Rights Protection in Developing Countries: The Case of Pharmaceuticals", Journal of the European Economic Association, Vol. 8, Iss. 2–3, 326–353 at p. 327. Available at: http://ideas.repec.org/a/tpr/jeurec/v8y2010i2-3p326-353.html [Accessed 11th August 2014].

7 Ibid.

8 MacQueen H. L., (2009) Appropriate for the Digital Age, Copyright and the Internet: Scope of Copyright in Edwards L., and Waelde C., (eds), *Law and the Internet.* Oxford: Hart Publishing Ltd; p. 183; Geiger C., (2010) The Future of Copyright in Europe: Striking a Fair Balance between Protection and Access to Information. *Intellectual Property Quarterly* Vol. 1 p. 3.

9 Watal, J. (2000). Access to Essential Medicines in Developing Countries: Does the WTO TRIPS Agreement Hinder It? Science, Technology and Innovation Discussion Paper No. 8, Center for International Development, Harvard University, Cambridge, MA, USA., at pp. 2–3.

10 Andemariam S. W., (2007), The Cleft-stick Between Anti-Retroviral Drug Patents and HIV/AIDS Victims: An In-depth Analysis of the WTO's TRIPS Article 31 *bis* Amendment Proposal of 6 December 2005. *Intellectual Property Quarterly* Vol. 4 p. 414–466, A statement by the Chief Executive of GSK Pharmaceuticals, see also "Get Involved: What's your perspective", Against the Odds (online) Available at: http://apps.nlm.nih.gov/againsttheodds/get_involved/perspective1.html [Accessed 14th August 2014].

But a decoupling of the above arguments leads to the recognition of two facts i.e. that: (1) innovation is built on existing knowledge and, (2) Society is impoverished when restrictions are placed on innovations. In other words, innovation may not necessarily be independently original (there are always root knowledge from which they are developed) and therefore does not always deserve unlimited reward or protection. Also, countries and industries could choose to encourage and stimulate innovation through the grant of subsidies, research grants and tax incentives. These measures could help avoid the high cost of products created by patent monopolies. The presence of alternatives like the ones above suggests it is necessary to seek further ways to amend or avoid, for want of a better phrase, the unintended consequences of excessive patent protection laws and agreements like TRIPS and TRIPS related Bilateral Trade Agreement (BTA)/FTA. This perspective appears to support the seeming contradicting objective of patent protection, i.e. promotion of social welfare and development.

2.2 *The Promotion of Social Wellbeing and Sustainable Development*

There are arguments that the protection of patent rights ensures that essential products and processes are duly exploited for the benefit of society.[11] For proponents of this argument, patents help to reward inventors but the ultimate goal is not to maximize profit for inventors but to ensure that inventors release their products for the use and benefit of society.[12] This accords with the argument that the primary objective of patents right is to stimulate innovation through the transfer and dissemination of technological know-how.[13] It is suggested that this is why society through law imposes the limitation of public interest in the sale, use and exploitation of patent rights.[14] In other words, inventors can exploit their inventions to the extent it does not hinder the fulfilment of public interests. Such limitations, it is argued, is aimed to ensure the promotion of social benefits and to cover the cost of the financial benefits given to inventors through international agreements and national laws on IP. Such

11 Abbott, F., (2002) "WTO TRIPS Agreement and Its Implications for Access to Medicines in Developing Countries" Study Paper 2a: *The Commission on Intellectual Property Rights*, at p. 28.

12 Correa, C., (2007) "Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement (Oxford Commentaries on GATT/WTO Agreements)", Oxford University Press, at p. 91.

13 Ibid, see also Article 7 of TRIPS.

14 Correa, C., (1999) "Intellectual Property Rights and the Use of Compulsory Licenses: Options for Developing Countries", *Trade-Related Agenda, Development and Equity Working Paper No. 5*, South Centre, at p. 7.

limitations are usually enforced through instruments like compulsory licences which mandate local working, reasonable pricing, e.g. in cases of pharmaceutical products and processes, in order to promote public health, improve wellbeing, and promote access to technology and sustainable development.[15] This is because patents are expected to help infuse needed knowledge and stimulus to the local talent, which hopefully translates to further inventions, developments, jobs and social wellbeing and security for the immediate society.

This argument and support for the use of international agreements and national laws to promote the fair exploitation of patents is particularly true for developing and least developed economies. Especially as evidence show that developed nations have been successfully operating on the same principle to the detriment of LDCs.[16] But this is not the case as restrictions imposed by international IP agreements on national patents are continually restrictive and damaging. They are damaging in the sense they are restricting social and economic development of least developed countries (LDCs) and DCs while expanding the financial benefit to patent owners and developed countries. This is against the principles of fairness and social responsibility expected from developed countries, patent owners and multinational corporations. This skewed state of affairs is possible because of the economic and political dominance of developed economies over LDCs and DCs that is keeping them stagnated at different levels of underdevelopment and dependence.[17]

However, there appear to be a varying degree of carelessness in the promotion of national interest amongst LDCs and DCs. For instance, Ghana, appear to be ceding more ground to international IP agreements instead of harmonising and empowering its patent regime.[18] This is in spite of evidence of the

15 Ibid Correa, C., note 9 above and note 11; Stephen Ladas, (1975), *"Patents, Trademarks, and Related Rights-National and International Protection"*, Volume 1, Harvard University Press, at p. 536; Lemley, M, Menell, P and Merges, R., (2007) *"Intellectual Property in the New Technological Age"* (4th Revised Edn), Aspen Law, at p. 13.

16 See generally Yu, P. K., (2007), at note 1 above.

17 Ayodele A. Adewole (2010) "Globalization, the Trips Agreement and Their Implications on Access to Essential Medicine for Developing Countries: A Case Study of Nigeria". *NIALS Law and Development Journal. Pp. 172–192, at p. 187.* (Online). Available at: http://www.nials-nigeria.org/journals/Ayodele%20A.%20Adewole.pdf [Accessed 8th August 2014].

18 Cohen J. C. et al (2005) TRIPS, the Doha Declaration and increasing access to medicines: policy options for Ghana. *Globalization and Health*, 1:17, at p. 4, Doi: 10.1186/1744-8603-1-17. (Online). Available at: http://www.globalizationandhealth.com/content/1/1/17 [Accessed 7th August 2014].

unavailability and unaffordability of essential quality medicines in Ghana.[19] Nigeria on the other hand, despite the availability of constitutional provisions that make the protection and promotion of life a fundamental responsibility of the government, remains stagnant in its patent laws.[20] All attempts to improve the patent regime through harmonised patent administration institution remain stagnant.[21] India appears to be the only developing country that has actively promoted its public health and the growth of its local economy through a harmonised patent administration regime.[22] Accordingly, India appear to be wining the patent monopoly war because of its recognition that the undue restrictive nature of international IP agreements can at times be tantamount to breach of fundamental human rights of right to life, education and dignity of work.[23] Practical instances of how these restrictions have affected and continue to affect LDCs and DCs include cases of restriction of access to medicines, increase in the digital divide and slowing down of national development. Some of these impacts are discussed below.

19 Center for Pharmaceutical Management (2003), Access to Essential Medicines: Ghana. Prepared for the Strategies for Enhancing Access to Medicines Program. Arlington, VA: Management Sciences for Health. (Online) Available at: http://apps.who.int/medicinedocs/documents/s18071en/s18071en.pdf [Accessed 14th August 2014], at p. 48.

20 Chapter 2 of the Nigerian Constitution provides for right to life of all. The Constitution being superior to all statutes, including International IP agreements, its fundamental rights provisions could be leveraged to ensure that the human rights provisions are promoted. This is in addition to other provisions in the Patents and Design Act, Chapter 344, 1990, which provides for instruments like compulsory licences. There is however little evidence that Nigeria has fully taken advantage of these provision either to develop its economy or provide essential medicines for illnesses like AIDS, Malaria, TB, etc.

21 Nigeria recently introduced a bill aimed at harmonising the patent regime and administration to the National Assembly, which is yet to be passed into law. It was tagged as "A Bill for an Act to provide for the Establishment of the Intellectual Property Commission of Nigeria, Repeal of Trademarks Act, Cap. T13, LFN 2004 and Patents and Designs Act, Cap. P2, LFN 2004 and Make Comprehensive Provisions for the Registration and Protection of Trademarks, Patents and Designs, Plant Varieties, Animal Breeders and Farmers Rights and for other Related Matters (Bill for the Establishment of the Nigerian IP Commission)".

22 India leverages just its Constitutional human rights provisions, e.g. Article 47, and the Indian Patent Act 1970 in its administration of patent regulation in India. See also the case of Bayer V. Natco below.

23 See the groundbreaking decision in India in *Bayer Corporation v. Natco Pharma Ltd.*, Order No. 45/2013 (Intellectual Property Appellate Board, Chennai), available at http://www.ipab.tn.nic.in/045-2013.htm (Accessed 8th August, 2014).

3 Impact of International IP Agreements on Public Health and Sustainable Development of LDCs and DCs

Ordinarily, IP agreements should not constitute significant problems to DCs since sovereign states should be able to formulate national IP laws that suit their local needs. However, this will be ignoring the fact that DCs are often unable to do this due to their obligation under the multilateral legal framework to maintain particular standards of IP protection and the immense economic and political dominance exercised by developed nations over DCs and LDCs.[24] These obligations often mean that the various international treaties relating to IP protection, to which they are signatories, negatively influence their national IP legislations.[25]

Such negative influences usually manifests in two major areas which result in the deepening of the underdevelopment of LDCs and DCs. The first is in the area of expansion of copyright protection, which directly and negatively impacts the ability of people in DCs to access information to develop or manufacture products for health, developmental and educational purposes. The second is in the area of patent protection and its resultant monopolies, which also has a damaging effect on DCs in that it makes it difficult for DCs to be able to purchase essential products like cheap generic medicines needed for promoting public health. Both scenarios are discussed further in the next section.

3.1 *IP Protection and Access to Information and Educational Materials in DCs*

The role of information and education in the development of any society, not least DCs, can never be over emphasised. Under a logical order of things education produces a better and more sophisticated workforce, which in turn leads to an increase in the productive capacity of a nation.[26] It is therefore safe to say that DCs will need to rely on the quality and strength of their manpower in

24 Ayodele A. Adewole (2010) "Globalization, the Trips Agreement and Their Implications on Access to Essential Medicine for Developing Countries: A Case Study of Nigeria". *NIALS Law and Development Journal. Pp. 172–192, at p. 187.* (Online). Available at: http://www.nials-nigeria.org/journals/Ayodele%20A.%20Adewole.pdf [Accessed 8th August 2014].

25 Xue H., (2008) Copyright Exceptions for Online Distance Education, Intellectual Property Quarterly, Vol. 2 at p. 214.

26 See generally Jee-Peng Tan, Robert McGough and Alexandria Valerio (2010) Workforce Development in Developing Countries: A Framework for Benchmarking. Human Development Network World Bank, The World Bank Group, particularly at pp. 1 to 2, and 27. Online. Available at: http://siteresources.worldbank.org/EDUCATION/

order to drive their development. This is why capacity building and manpower development are very important to DCs. However lack of access to information and knowledge especially in the digital age greatly reduces the ability of people in DCs to obtain quality education. In this regard, the current trend whereby IP law appears to be contributing to the ever-increasing restriction of public access to digital information and knowledge in DCs is a matter of great concern.

With regard to access to information and digital resources in DCs, some of the provisions of the current multilateral agreements for IP protection, which appears to negatively impact DCs, include those relating to protection of original databases and legal protection for circumvention of technological measures. For example, Article 10 (2) of TRIPS and Article 5 of WIPO Copyright Treaty (WCT)[27] both require contracting parties to provide legal protection of original databases in their national IP legislation. Similarly, Article 11 of the WCT[28] places an obligation on those who ratify the agreement to enact legislation to deal with those who try to avoid those technological measures, which owners of copyright utilise to protect their works. In the same vein, Articles 18 and 19 of WPPT[29] mirror the forgoing provisions of WCT with regard to provision of adequate legal protection against circumvention of technological measures adopted by authors and copyright owners in connection with exercise of their rights under the treaty.

These provisions have been criticised by commentators in DCs because they ignore the potential difficulties that DCs face in seeking to implement such provisions in their national legislation and the negative impact such implementation will have on their education and personnel development. For example, legal protection for circumvention of technological measures such as Digital Rights Management (DRM) systems are difficult to implement and require very sophisticated legal framework. To meet these requirements, LDCs

Resources/27820012905209492 27/WfD_Benchmarking_Framework.pdf (Accessed 8th July 2015).

27 WIPO Copyright Treaty.

28 WIPO Copyright Treaty; See the argument that compensation must equal social value of invention in Trebilcock M. J. and Howse R., (2005) *The Regulation of International Trade*, 3rd ed., (New York: Routledge) at p. 398.

29 WIPO Performances and Phonograms Treaty; Developed countries enforce and justify these provisions with the disingenuous argument that non-restrictive protection of patents are damaging on trade when in effect the trade is one-sided and greatly disadvantages LDCs. See Jackson J. H., (1997) *The World Trading System: Law and Policy of International Economic Relations*, (2nd ed.), Massachusetts: Massachusetts Institute of Technology; at p. 311.

will have to expend large sums of money and other resources (in many cases being trained in the patentee country) before they can meet the infrastructural and human capital standards required of them. Even where they are able to implement such measures, it may not also bode well for their overall development because by then the world may have moved on with new products developed and new problems to resolve. This inevitably puts LDCs in a catching up mode with the goal post being moved whenever they appear to be succeeding. This achieves nothing but to frustrate any attempt at achieving a sustainable development for their country and a healthy life for their citizens. Thus commentators have criticised some of the provisions of the international treaties which regulate IPRs protection for the way they tend to over prioritise the interest of owners of IPRs to the detriment of the interest of the LDC's public.[30]

3.2 *IP Protection and Access to Essential Medicines in DCs*

As noted above, as members of World Trade Organisation (WTO), DCs are obliged to take account of WTO treaties in formulating their domestic IP law. In the case of the TRIPS Agreement, it created particular difficulties for DCs and led to calls for clarification of some of the relevant provisions, especially those sections that appeared to make it more difficult for DCs to purchase generic medicines which they need in order to deal with public health issues in their countries. The fall out of these calls was the Doha Declaration.

The main objective of the Doha Declaration was to clarify certain sections of the TRIPS Agreement and to affirm the flexibilities inherent in the Agreement. It was also a way of resolving the confusion associated with the proper interpretation and implementation of the agreement. The development was essentially necessitated by the need to affirm that the TRIPS Agreement recognises the value of balancing the protection of IPRs with that of making essential medicines easily accessible to people in DCs who need such medicines to deal with their public health needs.[31]

The TRIPS Agreement obliges WTO members to maintain minimum standards of IP protection within their respective domains but does not prescribe any particular form in which this can be done. Instead, it allows them to decide on the most suitable way of doing this in their respective legal systems. However, in spite of this apparent freedom to decide, Articles 30 and 31 limits

30 See generally Correa C. M., (2007) *Trade-Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement.* Oxford: Oxford University Press.

31 Correa C. M., (2007) *Trade-Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement.* Oxford: Oxford University Press; p. 94.

the flexibility of DCs by limiting their ability to implement instruments that could help reduce the price of essential and generic medicines required to tackle public health crisis. For instance, although Article 30 allows signatory countries to reduce the damaging effect of the exclusive right of a patent holder some clauses makes this possible only in exceptional circumstances.

Also, Article 31 allows member states, through compulsory licences, to permit other use of a patented product without seeking the permission of the original owner of the work. However, this permission is subject to subsections 'a' to 'f' of Article 31. For instance, the condition stipulated in Article 31(f) is that compulsory licences can only be issued to enable products to be manufactured for predominantly local consumption. In other words the licencee must produce the product within the country issuing the licence and not in a third party country. Strictly speaking, this limited interpretation of Article 31(f) may seem the appropriate position especially, as the absence of local manufacturing is usually the ground for granting compulsory licences in DCs.[32] This is the line taken and supported by most developed countries and the international pharmaceutical industry.[33] However, the legality, social and human benefit of this interpretation is vigorously questioned by many scholars and health activities, especially in relation to medicine. The argument is that although local working is a legitimate ground for granting, waiting for the establishment of local manufacturing base may impede and defeat the objective of the licence, especially in emergency cases like epidemics. In such cases it is advocated that the licence be granted to a third party who can manufacture in another country and supply the country of need.[34] This is the present position for most DC. However, there is yet to be established a generally accepted legal precedent for this position especially by most developing countries like the USA.

In other words, for developed countries, the position remains that those countries like India who have the local manufacturing capacity cannot invoke

32 See Murthy, Divya (2002) "The Future of Compulsory Licensing: Deciphering the Doha Declaration on the TRIPs Agreement and Public Health." *American University International Law Review* 17, No. 6, pp. 1299–1346.

33 Amir Attaran (2002) The Doha Declaration on the TRIPS Agreement and Public Health, Access to Pharmaceuticals, and Options under WTO Law *12 Fordham Intellectual Property, Media & Entertainment Law Journal* 859 to 885 at p. 862.

34 This interpretation recognises and promotes the original basis of such grant which was to protect and promote national self-interest. In other words, if working in a neighbouring country could solve the immediate problem of the grantor state, TRIPs should not be interpreted to negate such objective. See Paul Champ and Amir Attaran (2002) Patent Rights and Local Working under the WTO TRIPS Agreement: An Analysis of the U.S. – Brazil Patent Dispute. *The Yale Journal of International Law*, Vol. 27: 365, at pp. 370–373.

this provision when producing generic medicines for use in other least developed countries. This situation has a negative implication on LDCs and DCs because it means that DCs which can manufacture generic medicines locally cannot export such medicines to other DCs that do not have such local manufacturing capacity. This is irrespective of whether such countries desperately need such generic medicines to tackle public health problems or whether they are sold at very affordable prices to a least developed country for a legitimate purpose.

The above situation has been recognised as a serious impediment for DCs in their efforts to access affordable essential medicines which they need to fight diseases like HIV/AIDS, tuberculosis and malaria.[35] Accordingly, to remedy this situation, the General Council adopted a recommendation of the TRIPS Council to temporarily waive the obligations of Article 31(f) so as to enable DCs that are WTO members and have the capacity to manufacture generic medicines to export same to those DCs who do not have such capacity. Emerging evidence however, suggest a new impediment, which also affects the development of DCs as far as IP protection is concerned. This is the disingenuous use of TRIPS flexibilities to limit compulsory licences by imposing stricter IP agreements in bilateral trade agreements between DCs and developed countries. The next section examines this impediment.

4 TRIPS-Plus Provisions and FTAs that Impede Sustainable Development of DCs

The inclusion of what is now widely referred to as TRIPS-plus clauses or provisions in bilateral or free trade agreements (BTAs/FTAs) between DCs and developed countries, is another way patentees through their home countries (usually developed countries), circumvent TRIPS intentions. They bully countries into imposing more restrictive IP laws. For purposes of clarity 'TRIPS-plus' clauses refer to clauses inserted in BTAs and FTAs between developed countries and DCs which require DCs to maintain higher levels of IP protection than those required of them under the TRIPS Agreement. Article 1.1 of TRIPS appears to be the enabling provision for this phenomenon. This is because

35 AFRICAN UNION (2013) Declaration of the Special Summit of African Union on HIV/AIDS, Tuberculosis and Malaria "Abuja Actions toward the Elimination of HIV and AIDS, Tuberculosis and Malaria in Africa by 2030" Abuja, Nigeria, 16 July.at p.4. Online. Available at: http://sa.au.int/en/sites/default/files/2013%20Abuja%20Declaration.pdf (Accessed 8th July 2015).

it allows WTO members flexibility to either increase or decrease the level of IP protection granted to patentees. Evidence however, shows that developed countries are only using this flexibility to impose higher levels of IP protections on DCs in order to avoid use of compulsory licences and to maintain monopoly.

The USA, EU and Japan appear to be foremost in taking advantage of these flexibilities by inserting stricter restrictive IP clauses in their BTAs with DCs. A recent example is an FTA between the USA and Singapore that used a TRIPS-plus flexibility to impose a higher IP protection on patents in Singapore.[36] Thailand and Chile also suffered a similar fate when the US used the flexibilities to demand greater access for its exports and preferential treatment for US IPRs holders.[37] The European Union (EU) has also used similar tactics through its use of the EU Regulation 1383, which demands higher IPRs protection from certain countries particularly with respect to border enforcement.[38] In other words, the Doha Declaration appear to have been tailored to allow flexibilities in the TRIPS Agreement which developed countries can legitimately use to support their actions, through instruments like BTAs/FTAs.[39]

These TRIPS-plus provisions in BTAs are accordingly major problems for DCs because while it grants monopolies to developed countries it does not allow DCs to adopt sustainable IP protection measures. Example of this is the way such IP rights hinder the availability and affordability of cheap generic medicines for public health needs. In particular, such provisions negatively impact DCs in the following ways:

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36 See generally, Kang, P. H., and Stone, C. S., (2003) IP, Trade, and U.S./Singapore Relations – Significant Intellectual Property Provisions of the 2003 U.S.–Singapore Free Trade Agreement, *Journal of World Intellectual Property.* [Online] Available at: http://onlinelibrary.wiley.com/store/10.1111/j.1747-1796.2003.tb00238.x/asset/j.1747-1796.2003.tb00238.x.pdf?v=1&t=hyu22sev&s=d419beaf9265066c9520c626ab5d526f9fc29bdd [Accessed 14th August 2014].

37 See generally, Roffe P., (2004) Bilateral Agreements and a TRIPS-Plus World: The Chile-USA Free Trade Agreement, *Quaker International, Ottawa. See particularly pp. 5, 8, and 9,* [Online] Available at: http://www.twnside.org.sg/title2/FTAs/Intellectual_Property/IP_and_other_Topics/Chile-USAFTAP.Roffe.pdf [Accessed 14th August 2014].

38 See generally, Kumar S. P., (2009) European Border Measures and Trade in Generic Pharmaceuticals: Issues of TRIPS, Doha Declaration and Public Health. *International Trade Law and Regulation* Vol. 15 (6) *pp*. 176–184, [Online] Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1515224 [Accessed 14th August 2014].

39 Ibid also see Endeshaw A., (2006), Free Trade Agreements as Surrogates for TRIPS-plus. *European Intellectual Property Review* Vol. 28 (7) *pp*. 374–380.

4.1 *High Cost of Essential Products like Medicines*

TRIPS-plus provisions are very expensive for DCs. This is because they usually require DCs to maintain high levels of IP regimes. Maintaining such high regime is very expensive, as it means that the DC concerned has to develop its weak legal and enforcement systems. This requires the channelling of huge financial and human resources into the development of these weak (usually peripheral) infrastructures instead of using them to manufacture or develop essential products like medicines. The result is the increase in the cost of doing business with the developed countries in two more ways while acutely impoverishing the LDCs. The first way is that, these LDCs are forced to recruit consultants from the developed countries to help bring up their infrastructure to the levels demanded by developed countries. The second way is that impositions of IP agreements have been shown to invariably increase the cost of related products or in some cases restrict any possibility of fall in cost due to the monopoly it creates. Usual examples are pharmaceutical companies. This has negative effect on LDCs as the product, e.g. medicines become very expensive and available only to the very rich, thus contributing to making the development of DCs both sluggish and very expensive.[40]

4.2 *Excessive Delay in Availability of Essential Products*

TRIPS-plus provisions in BTAs also negatively impact DCs because of the delay it creates in the introduction of new essential medicines into the market. This phenomenon is usually forced on LDCs through data exclusivity clauses between developed nations and LDCs. Although the EU appears to currently comply with Article 39(3) of TRIPS,[41] which should curtail this problem, the USA is yet to relent in its use of exclusivity clauses in BTAs/FTAs, with DCs.[42] The USA, have been leveraging its political and economic dominance to pressure the DCs to agree to the inclusion of these clauses, although it is evident they are unfavourable to development of DCs. These include clauses on exclusivity/prohibition of use of original research data for products like

40 Fink C., and Reichenmiller P., (2005), Tightening TRIPS: The Intellectual Property Provisions of Recent US Free Trade Agreements. *World Bank Trade Note* No. 20. Pp. 289–303., at pp. 290–291 [Online]. Available at: http://siteresources.worldbank.org/INTRANETTRADE/Resources/239054-1126812419270/24.TighteningTRIPS.pdf [Accessed 14th August 2014].

41 Ibid, note 30 above. Also see O'Farrell G., (2008) One Small Step or One Giant Leap towards Access to Medicine for All? *European Intellectual Property Review* Vol. 30 (6) *pp.* 211–215 at p. 213;

42 Ibid O'Farrell at p. 214.

medicines.[43] The effect is that manufacturers of generic medicines in DCs are forced to wait, for upwards of 5, 10 to 20 years, for the expiration of patents before using such data to support their manufacture of generic medicines.

This means that the introduction of new generic medicines is delayed and this in turn results to an increase in the prices of available alternative generic medicines because demand for such medicines especially in DCs becomes greater than their supply. The overall implication of this is that while the delay lasts, thousands of lives are lost due to the inability of their governments to access cheap essential medicines. This is a public health issue for DCs. As some authors have argued, it is fundamentally wrong to suggest that only patented medicines with exclusivity restrictions should be used to deal with health crisis in emerging economies.[44]

4.3 *Lack of Transparency*

TRIPS-plus provisions in FTA and BTAs generally tend to undermine one of the most basic protections afforded by the multilateral framework. Multilateral agreements should increase transparency and a level playing field but BTAs do not guarantee these because of the differences in the bargaining power of the parties involved.[45] Often DCs agree to the inclusion of these provisions in their BTAs with developed countries out of desperation and fear developed countries will deny them other privileges if they do not go along with these provisions. It is not usually because they like it or believe that any benefits will come from it. In other words, the mechanism of BTAs basically allows the stronger party to arm-twist the weaker party into agreeing to provisions, which may not benefit them. For example Art. 10.1.2 of the US-Chile FTA permits parties to the agreement to adopt a dispute settlement mechanism that is different from the one provided by the WTO framework.[46] This trend have been criticised because it does not guarantee transparency and public access, which invariably

43 Ibid O'Farrell pp.213–214.

44 Abbott F. M., (2002), "The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO" *Journal of International Economic Law. Vol. 5 (2), 22. Pp. 469–505 at pp. 5 and 14.* [*Online*]. *Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1493725* [*Accessed 14th August*].

45 Some may however argue that multilateral agreements are also skewed against LDCs and DCs, but this imbalance is far less than what is exists when only two unequal economies are involved.

46 Lin T., (2009) Compulsory Licenses for Access to medicines, Expropriation and Investor-State Arbitration under Bilateral Investment Agreements – Are there Issues beyond the TRIPS Agreement? *International Review of Intellectual Property and Competition Law* Vol. 40 (2) pp. 152–173.

equates to an unfair adjudicatory system.[47] In other words, a dispute resolution mechanism that is lacking in transparency and public access can hardly guarantee fairness and justice. In this scenario, the LDCs and DCs are always on the disadvantaged end.

4.4 *Impeding Sustainable Development of DCs by Restricting Transfer of Technology and Development*

TRIPS-plus provisions in BTAs/FTAs between DCs and developed countries also negatively impact DCs because of the way it hinders the transfer of technology to indigenous firms and thereby hinder them from improving their local manufacturing capacity. Because of the various restrictions which TRIPS-plus provisions place on these indigenous companies they are not able to fully engage in the development of the technology or learn from existing ones. Often as compensation for this, developed countries tend to promise DCs increased foreign direct investment (FDI) in exchange for maintaining these high IP standards but in reality there is no evidence of a link between higher IP protection standards and increased FDI especially as it relates to the issue of technology transfer.

5 Resolving the IP and Social Welfare Conundrum

The above problems are not insurmountable. There are already clauses in the TRIPS agreement and in many national patent laws[48] that seek to resolve these seeming conflicts or what sometimes amount to the abuse of patent and FT/BT agreements. The intent of this paper therefore is to provide rationale for LDCs and the developed nations, to question the immediate gratification, which these FTAs appear to offer, and realise that in most cases such gratifications are far less beneficial and creates an inequitable society than what a more responsible and sustainable patent agreement can offer. In other words a more responsible and sustainable IP agreement has a better potential at improving, in the long term, a country's social wellbeing, safeguarding the public health, improving education and encouraging economic growth, development and trade, than any restrictive patent agreement entered in exchange of trade agreement may achieve. Accordingly this paper posits that the creative use of compulsory licences and in extreme cases, parallel importation could help

47 Ibid.

48 Unfortunately most LDC and DC including Nigeria lack streamlined patent administration institutions like the one available in India.

resolve the above problems.[49] Compulsory licenses could be used to achieve two major requirements, i.e. ensuring reasonable affordability of products and ensuring local working of patents.[50] On the other hand, patentees could meet these requirements if they wish to avoid local compulsory licences or parallel importations. Parallel importation is however only advocated here as a temporary measure for countries that lack the technical base to develop or manufacture essential products, especially medicines even through compulsory licences, or for short-term resolution of emergencies like epidemics.

The affordability requirement for the implementation of compulsory licences should be determined not by the price of the product in the patentees' home country or by that set by the patentee company but on what citizens of the recipient country can afford. The premise of patents is to make products legally available for the public to purchase and use. Setting the price of such products, especially medicines at highly unaffordable prices defeat the availability objective and negate the social welfare justification for the grant of patents. This approach is especially necessary in LDCs because in most cases citizens of DCs and LDCs cannot afford the product at prevailing inflated prices.[51] More importantly, arguments about the high cost of Research and Development (R&D) should not hold because in most cases, such companies would have recouped a greater percentage if not all the cost of development of the product (which many pharmaceutical companies inflate with cost of clinical trials) before venturing into LDCs.[52] Also evidence suggests that most R&D

49 Some authors, with regards to medicines, have suggested other measures like pooled/bulk procurement. As attractive as these measures may seem, being temporary measures, depending on them has a higher potential of worsening the situation in LDCs than resolving them. This is apart from the administrative complexities involved and the fact that LDCs are still forced to play by the rules of the developed countries. See Ayodele A. Adewole (2010) note 8 above and Cohen J. C. et al (2005) TRIPS, the Doha Declaration and increasing access to medicines: policy options for Ghana. *Globalization and Health*, 1:17 doi: 10.1186/1744-8603-1-17. (Online). Available at: http://www.globalizationandhealth.com/content/1/1/17 [Accessed 7th August 2014].

50 Yosick, J., (2001), "Compulsory Patent Licensing for Efficient Use of Inventions", *University of Illinois Law Review* 5, pp. 1275–1304 at p. 1290.

51 Baker, B., (2004) Arthritic Flexibilities for Accessing Medicines: An Analysis of WTO Action Regarding Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, *14 Indiana International and Comparative Law Review*. 613, at p. 1.

52 DiMasi J., Hansen, R. and Grabowski, H. (2003) " The Price of Innovation: New Estimates of Drug Development Costs" Journal *of Health Economics* 22, (151–85) at p. 180. Available at: http://moglen.law.columbia.edu/twiki/pub/LawNetSoc/BahradSokhansanjFirstPaper/22JHealthEcon151_drug_development_costs_2003.pdf (Accessed April 2014).

cost is highly inflated in other to justify high cost, especially in the pharmaceutical industry.[53] In other words, any price setting must take into consideration the economic power of the grantee country and not just that of the patentee.[54]

The local working requirement (with transitional adjustments to accommodate emergency circumstances[55]) is another element that should be fiercely promoted and protected by LDCs. This is important because it fulfils many goals for a poor country. For instance in the case of medicines, it provides the country with medicines at affordable prices, help provide jobs to its citizens, inspire further development of new and local technology and improves the countries' economic outlook. This is achieved when either a foreign patentee company chooses to produce within the country and at affordable prices or the country grants compulsory licence to another or local company which can achieve the same objectives. This is necessary because, in many cases, foreign companies refuse to produce the products locally, especially medicines, in other to justify high prices. As has already been stated earlier, this creates and perpetuates many problems for the grantor countries. These include forcing prices to remain high, slowing technological growth, development, and deepening unemployment while the country's meagre financial resources is funnelled outside to purchase products like medicines at inflated prices.

6 Conclusion

International Intellectual Property protection and exploitation is a phenomenon that has come to stay and should not be removed. It has its very important contributions to society. As demonstrated earlier the main ones are the reward for creativity and improving the exploitation of talent for sustainable social and economic development. These are benefits which society deserve and therefore should be promoted. However, we should not sacrifice one just to promote the other, especially when the other is the growth and develop-

53 Ibid; also generally see Marcia A., (2004) *"The Truth About the Drug Companies". The New York Review of Books*. (Online) Available at: http://www.nybooks.com/articles/archives/2004/jul/15/the-truth-about-the-drug-companies/ (Accessed April 2014).

54 See Article 7 of the TRIPS agreement: "The protection and enforcement of intellectual property rights 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", Also see Penrose E. T., (1951) *The Economics of the International Patent System*. Baltimore: The Johns Hopkins Press at p. 116.

55 See paragraph 3.2 above.

ment of the entire humankind, to which the inventors and owners of patent belong. This is an option which inventors, patent owners and WTO countries should take seriously. One of the ways this goal should be maintained is the sustenance of instruments like compulsory licences.

As shown above when this is not done, society, especially the poorer section of the global society suffers unimaginable and preventable hardships, with seeds of discord and conflicts sown, and the world turned into an incubator of deadly diseases and illness which eventually catches up with the strong, the rich, the weak and the poor.[56] Society is better off when systems, policies and laws are fairer, healthier and just. A fair, just and sustainable set of IP agreements and laws is a building block to achieving such a society. All that is needed, as demonstrated in the previous sections, is a show of political will, creativity and resilience. This is what this paper advocates. It contributes to exposing the hardships that restrictive IP regimes creates and opens a window to a far better and fairer IP regime that enhances a sustainable social economic development for all. A goal fully enshrined and demanded of all governments in all human rights laws and international human rights conventions.[57] All that is left is for DCs and LDCs to be courageous in crafting IP laws that opens opportunities for its citizens and ensures their growth and development.

56 The spread of diseases like Ebola and HIV/AIDS demonstrates this fact.

57 See for example the Nigerian Constitution: Constitution of the Federal Republic of Nigeria (CFRN), 1999, section, 33; Article 11(1) International Covenant on Economic, Social and Cultural Rights.