

15th Intellectual Property Scholars Conference

DePaul College of Law, Aug. 6-7th, 2015

**“A Brief Analysis on Least Developed
Countries’ Endless Fight against the
WTO’s Economic-Based IP Policy”**

**©Midjohodo Franck GLOGLO, LL.D.
Intellectual Property & Technology Law;
International Trade Law**

A Brief Analysis on Least Developed Countries' Endless Fight against the WTO's Economic-Based IP Policy

Introduction on the WTO's IP Policy

- 1. The Incentive-rationale of Intellectual Property Rights**
 - 2. The Consistent Complaint of LDCs over the Economic-based IPRs Policy**
- Conclusive remarks**

Introduction: the WTO IP Policy

- 161 Member States including 34 of the 49 United Nations' LDCs;
- The WTO law is a single undertaking ⇔ "Nothing is agreed until everything is agreed" Principles, pars. 47-52;
- The WTO law stands for Free Trade to Attract and Flow Businesses within its Members territories.



**GATT of 1994; GATS;
TRIPS Agreement**



Enforcement mechanisms:

- **Dispute Settlement &**
- **Policy Review**

WTO's IP Policy

- **Policy review:** Governments have to inform the WTO and fellow-members of specific measures, policies or laws through regular “notifications”; and the WTO conducts regular reviews of individual countries' trade policies — the trade policy reviews;
- **Disputes Settlement:** Up-to-date, 34 disputes have arisen from the applicability of the *TRIPS Agreement* at domestic level.

The creation of the WTO has integrated Int'l Economic standards of IP into the Developing and LDCs' domestic legal systems, but these WTO's Members have not really accepted or completely digested the new rules

1. The Incentive-rationale of Intellectual Property Rights

→ **IPRs Determine Locations of R&D Activities:**
High level of patent applications worldwide:

- 194,400 PCT applications were filed in 2012 ⇔ increase of 6.6% on 2011

- 205300 PCT applications in 2013, with China accounting 29%

- 214500 applications in 2014 ⇔ 1st USA, 2nd Japan, 3rd China, 4th Germany, 5th Republic of Korea

→ **At the forefront : USA, Germany, Japan, and China is consistently jumping to a leading position**

→ **Drop: Mexico (-15.6%), India (-9.2%), South Africa (-5.3%) and the Russian Federation (-4%)**

1. The Incentive-rationale of Intellectual Property Rights

In the USA:

Trade Statistics do not convey the importance of IP-intensive products to the U.S. economy, though it is well known that U.S. electronics companies like Apple tend to capture a significant portion of the value added in their global supply chain from products like the iPod and iPhone, two products that are assembled offshore → **Exports of IP-intensive service-providing industries amounted for about \$90 billion in 2007, accounting for approximately 19% of total U.S. private services exports.**

1. The Incentive-rationale of Intellectual Property Rights

The United States does not have a full picture of how, and under what circumstances, small businesses are using the patent system, whether domestically or internationally. The USPTO has recorded huge increases in the numbers of patent applications being filed at the Office, a trend that reflects both the increasing innovativeness of society and also the value of intellectual property protection in a global economy more and more defined by the production of intangible assets. In an increasingly global economy, internationalization strategies can be effective mechanisms to access markets, serve unmet demands, and grow small companies, thereby increasing manufacturing, production... Various ways of entering non-domestic markets—such as licensing, franchising, exporting, and foreign direct investment—have been shown to be related to the growth and successful performance of small companies

1. The Incentive-rationale of Intellectual Property Rights

In many developing countries

- “China's SIPO has jumped from a position of relative obscurity to number three in the world in the number of utility patent applications received each year, and that number is climbing”

Margo A. Bagley, “The New Invention Creation Activity Boundary in Patent Law” (2009) 51:2 William & Mary Law Review 577 at p 583

In the bio and nano-technologies, information and communication technologies, and environment related technologies sector, China is overranking the twenty-eight European Union Members' achievements altogether

OECD, OECD Science, Technology and Industry Outlook 2014, OECD Publishing, Paris, 2014 at p 294

1. The Incentive-rationale of Intellectual Property Rights

Jordan: Jordan's pharmaceutical industry by shifting from generic manufacturing to a biomedical innovation policy ↔ Six out of the twelve Jordanian pharmaceutical companies now own patents, several of which are potential blockbusters. In just five years following the reform of Jordan's patent legislation in 2000, the Jordan Pharmaceutical Manufacturing Company (JPM) alone, for example, built a portfolio of 30 patents, which is estimated to be worth some US\$200 millions. This is a striking development given that, until recently, these companies made little or no use of the patent system.

Roya Ghafele and Antony Taubman, "INDONESIA AND JORDAN: Capturing the Benefits of Biomedical Innovation" (2007) 24 "IPM" 11

1. The Incentive-rationale of Intellectual Property Rights

- **In India**

the TRIPS, by insisting on a shift to product patents from process patents for all manufactured products, shifts the compensation for innovation creation, from second innovators to first innovators. [...], this means that firms will now be motivated to invest in the creation of innovation and become first innovators. [...]. According to a recent report, there are currently about 23,000 manufacturing units in the Indian pharmaceutical industry (Gross and Patel, 2002).

1. The Incentive-rationale of Intellectual Property Rights

The “prospect of monopolistic returns deriving from the exclusivity in the production and commercialisation of patented products induces firms to be pioneers in the market and invent better technologies and new products”

Claudia Desogus, Competition and Innovation in the EU Regulation of Pharmaceuticals: The Parallel Trade, Cambridge, Intersentia, 2011 at p 83

2. The Consistent Complaint of LDCs over the Economic-based IPRs Policy

- IPRs issue has been a subject of criticisms from the Developing and LDCs regrouped under G77, since the Uruguay Round (1986-1994) of the GATT of 1947.
- "For Developing countries [and especially the LDCs], a second battle began after the TRIPS negotiations"

Carolyn Deere, The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries, Oxford, Oxford University Press, 2009 at p 1.

The *TRIPS Agreement* has become the battle subject after its negotiation

2. The Consistent Complaint of LDCs over the Economic-based IPRs Policy

Since the *TRIPS Agreement* was integrated into the WTO Law in 1995, there has been consistent Requests from LDCs for transitional period:

→ In the beginning: 10 years from the date of application ⇔ end 2016

→ June 11th 2013, considering a Request made in 2012 by Haiti, on behalf of LDC : Council for Trade-Related Aspects of Intellectual Property Rights, *Extension of the Transition Period Under Article 66.1 for Least Developed Country Members, Document n° IP/C/64* ⇔ end 2021

Resolution A/HRC/23/L.10/Rev.1 of 11 June 2013 adopted by the UN Human Rights Council on Access to Medicines in the context of the right of everyone to enjoy the highest attainable standard of physical and mental health urges States to promote access to medicines for all, including through the use, to the full, of the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights which provides flexibility for that purpose

→ February 23rd 2015, Bangladesh, on behalf of the LDC Group, submitted a Request for an Extension of the Transitional Period Under Article 66.1 of the *TRIPS Agreement* for Least Developed Country Members with Respect to Pharmaceutical Products and for Waivers from the Obligation of Articles 70.8 and 70.9 of the *TRIPS Agreement*, Document n° IP/C/W/605 ⇔ till 2030

2. The Consistent Complaint of LDCs over the Economic-based IPRs Policy

Jul. 2009 at a WIPO forum:

LDCs Reaffirmed Commitment to Integrate IP Policy in their National Development Strategies... " Access to technological information, and acquiring the human capital to use it, was key to realizing the creative potential of LDCs, and to speeding their integration into the global knowledge economy" **Dr. Francis Gurry, D.-G. WIPO**

2. The Consistent Complaint of LDCs over the Economic-based IPRs Policy

Many of the LDCs have built a domestic IP Policy after the 2000s, with regard to the Int'l standards of the TRIPS

- The 17 OAPI Member States,
- The 18 ARIPO Member States,
- Bangladesh, Cambodia, Nepal, Vanuatu
- The Republic of Benin decreed in March 2008 a national fund to support cultural creations with 1 billion francs CFA ↔ 2 millions \$US a year : Decret n° 2008-112 of March 12th 2008 aiming to approve the "Statuts du Fonds d'Aide à la Culture (FAC)".

LDCs' position "is often distorted by exaggeration and, sometimes, by pure diplomatic gestures. It has become increasingly difficult to distinguish genuine trade issue from propaganda and purely ideological stances" Richard E. Mshomba, *Africa and the World Trade Organization*, Cambridge, Cambridge University Press, 2009 at p 4

Conclusion: Is there a reason to fight the *TRIPS Agreement*?

- **There are some meta principles that apply equally well to all countries regardless of history, geography and stage of development, which any country has to take on board, and among which are the importance of incentives, the power of competition, the importance of property rights**

Brian Snowdon, *Globalisation, Development and Transition. Conversations with Eminent Economists*, Cheltenham, Edward Elgar Publishing, Inc., 2009 at p 371

- **With many respects and like the prisoner's dilemma, the intellectual property issue vastly underlies many trade issues, for the benefit of all. In the prisoner's dilemma, each party is better off if the parties cooperate but is worse off if the parties do not. In the typical trade issue, the United States needs Thailand to open its borders and Thailand needs the United States to open its borders**

Peter Gerhart, "Reflexions: Beyond Compliance Theory-TRIPs as a Substantive Issue" (2000) 32 *Case Western Reserve Journal of International Law* 357 at p 368.