TRIPS and TRIPS Plus Impacts in Africa

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Introduction

The emergence of the World Trade Organization (WTO)\(^1\) as the juridical framework for global trade is one of the most fundamental changes in the second half of the last century.\(^2\) No less epochal is the linkage of intellectual property rights (hereafter, IPR) issues to global trade governance. Prior to the WTO era, matters of IPR at the global level were usually dealt with at various fora of the United

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Nations, especially the United Nations Conference on Trade and Development (UNCTAD) and the World Intellectual Property Organization (WIPO).3

The implication in this transformation has not been lost on commentators. Vincent Chiappetta describes TRIPS as a ‘dramatic shift away from the traditional view that intellectual property law primarily serves the interest of national cultures, values, and politics’.4 On his part, Endeshaw opines that ‘the characterization of intellectual property lawmaking and enforcement as a trade issue was a shrewd device which transposed the internal policies and legal formula concocted by the US in 19745 to the international fora from 1984 onwards’.6 No matter the perspectives on the changes wrought by TRIPS, there is a consensus that the annexing of intellectual property rights issues by the WTO under the Agreement on Trade-Related Aspects of Intellectual Property Rights, 7 hereafter TRIPS, is a radical restructuring of world trade.

How has this transformation of the ground rules in IPR protection affected African countries? For many people, Africa is the place of exotic wild animals, of diseases, political anomic, and the continent where often, ‘terrible things happen’.8 Africa is a huge continent, indeed, the second largest continent. Despite its enormous size—the African continent is four times the size of the United States; it is as large as the United States, Europe, Japan and China put together—little has been said about the impact of TRIPS in Africa.9 Indeed, absent ubiquitous public commentaries and scholarly ruminations on the alleged relationship between TRIPS, the Doha Declaration,10 and access to HIV/AIDS antiretroviral

8 Apologies to Richard Falk, see ‘Collective Insecurity: The Liberian Crisis, Unilateralism, & Global Order’ [Book Review], (2005) 43 Osgoode Hall L 203.
9 R. Mallet, ‘Sub-Saharan Africa in the Global Economy’ (1999) 30 Law and Policy in Int’l Business 569. Africa holds 54 per cent of the world’s gold, 40 per cent of its diamonds, 75 per cent of its platinum and 12 per cent of world population.
drugs, the larger issue of the impact of TRIPS in Africa has somewhat escaped rigorous scholarly attention. The welter of publications on access to HIV/AIDS antiretroviral drugs could lead one to the erroneous conclusion that in the 53 African countries, the TRIPS Agreement is all about HIV/AIDS and nothing more!

In the light of the fact that issues of pharmaceutical patents and HIV/AIDS have been amply documented elsewhere by countless numbers of authors, this chapter would focus, as much as possible, on the overall impact of TRIPS in various African countries. The central objective of this chapter is to gain an understanding of the various linkages that exist between intellectual property rights, trade rules, and socio-economic development of African member states of the WTO by a careful deliberation and analyses of trends and developments in African countries.\(^\text{11}\)

It must be noted at the outset that IPRs affect various societies or types of country in different ways. As a generally convenient method of analysis (but not necessarily accurate in all material respects), one may divide the various countries of the world into three large groups, namely, the industrialized economies (ICs), the non-industrialized economies (non-ICs) and the emerging industrialized economies (emerging ICs).\(^\text{12}\) The desirable level of IPR protection to be accorded to innovations and products in these different groups is a subject that historically has elicited significant scholarly inquiries and controversies.\(^\text{13}\) Despite the near-canonical status of the alleged roles of IPRs in influencing economic and technological development, much of the recent discussion on the subject merely rehashes earlier arguments in the guise of studying the impact or implementation of TRIPS.\(^\text{14}\)

The pertinent question is whether and to what extent the accession of African countries to the TRIPS Agreement has impacted on Africa. This is a difficult task and indeed, in several respects, an impossible mission to accomplish within

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\(^{11}\) For a discussion of the policy options before developing countries see Carlos Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* (Zed Books, 2000).

\(^{12}\) Endeshaw, note 6 above.


\(^{14}\) For example, as Endeshaw observes, regarding Robert Sherwood’s often-quoted work, ‘The TRIPS Agreement: Implications for Developing Countries’, ‘while purporting to study the impact of TRIPS on non-industrialized economies [Sherwood] was merely rehashing the alleged role of IP in industrialized economies as being synonymous with its significance for non-industrialized economies and ended up by merely explaining the TRIPS agreement’. See Endeshaw (note 6 above).
the constraints of space and available empirical tools. Indeed, it must be emphasized that Africa is a vast continent of diverse and complex states, not a monolith. In particular, access to measurable data and statistics are often non-existent. Added to this complexity is the fact that various segments of industries in different African countries have varying needs or competences in some forms of actual or emerging forms of IPR. For example, South Africa is much industrialized and also a leading producer of wine. On the other hand, Nigeria is not as industrialized as South Africa but she is home to Africa’s largest and most vibrant home-video industry. Again, Ghana’s globally acclaimed Kente cloth is in serious need of an effective IPR protection mechanism. It therefore stands to reason that certain forms of IPR that have resonance in one country may be of marginal significance in another. Indeed, in some cases, new forms of IPR may be necessary.

Notwithstanding the aforesaid constraints, this chapter is divided into five parts including this introduction. Part II offers a brief introduction to the historical and theoretical development of IPRs in Africa prior to the emergence of WTO/TRIPS. It also situates the analysis within a comparative and holistic framework. The importance of historical context in the study of IPRs cannot be overemphasized. Scholars cannot any longer persist in the fallacy that economic, technological, and cultural conditions do not influence the structure and content of IP laws.\textsuperscript{15} For too long, many scholars and institutions have pretended that IPRs are universal verities lacking in local flavour and cultural affinities. As Endeshaw laments, this trend is evident in standard IP textbooks and even WIPO publications.\textsuperscript{16} Pick up any of these writings and you will see a discussion beyond the concrete; an outpouring of rules and policies that do not tie in with specific conditions of countries. Perhaps this had to do with the misfortune of IP being in the suffocating care of lawyers and not economists.\textsuperscript{17} Part II affords a historical background to the subsequent analyses of the impact of TRIPS in African countries.

Part III explores the significance and normative impact of TRIPS on Africa. Sections A to E of this Part are more detailed in their treatment of the scope and impact of the implementation of TRIPS in African countries. Given the complexity and manifold impacts of TRIPS in Africa, and the palpable differences among various African states and regions, Part III adopts a regional and in some cases, country-by-country approach. The macro-regions identified


\textsuperscript{17} Endeshaw, note 6 above, 55.
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by the United Nations Department of Statistics are adopted in this analysis.\(^\text{18}\)

There are five African regions in the UN schemata: Northern Africa, East Africa, West African, Southern Africa, and Middle/Central Africa. Part III is thus sub-divided into five mini-parts.


Part I The Colonial Origins and Historical Development of IPRs in Africa

Although IPRs are often promoted as universal verities,\(^\text{19}\) there is no doubt that the specific forms of IPRs recognized by TRIPS have their origins in the cultural, legal, and economic traditions of continental Europe and of Western jurisprudence and economic tradition.\(^\text{20}\) The prevalent notion that TRIPS-compatible IPRs are universal truths distanced from the cultural and genetic fingerprints of its European origins and unmediated by economic impulses is simply false. A careful study of the cultural and ideological impulses of the dominant forms of IPR is crucial in understanding the full range of arguments in support of IPRs, and explicating the inherent challenges faced by policy makers in transplanting IPRs to Africa.

Arguments for the existence or maintenance of IPRs are virtually anchored on the hypothesis that IPRs encourage innovation and commercialization of new


technologies, products, artistic and literary works.\textsuperscript{21} Notwithstanding the axiomatic status of this notion, the most rigorous studies by some of the most reputable economists in the field are undecided as to the veracity of the assumption that TRIPS-compatible protection of IPRs necessarily leads to innovation and economic progress in every society, or that such progress demonstrably outweighs the social cost of TRIPS compliance, especially within the short transitional periods provided under TRIPS.\textsuperscript{22} Curiously, the history of industrialized states shows clearly that they did not adopt strong IP regimes when they were at early stages of industrialization.\textsuperscript{23}

As this author has argued elsewhere,\textsuperscript{24} there is a powerful body of evidence and literature showing that the industrialized economies of today tweaked and adapted their domestic IP policies to suit their perceived industrial and economic needs.\textsuperscript{25} For example, between 1790 and 1836, as a net importer of technology, the USA restricted the issue of patents to its own citizens and residents. Further, in 1836, patent fees for foreigners were fixed at ten times the rate for US citizens and two-thirds as much for British inventors. Indeed, numerous restrictions placed by the USA on foreign copyright delayed US entry to the Berne Convention\textsuperscript{26} until 1989.\textsuperscript{27} Indeed, a 1986 study for the US Congress admitted that the USA was a 'pirate': 'when the United States was a relatively young and developing country it refused to respect international intellectual property rights on the grounds that it was freely entitled to foreign works to further its social and economic development.'\textsuperscript{28}

Although empirical evidence on the alleged relationship between IP regimes and economic development in poorer countries is generally inconclusive, it is becoming increasingly fashionable for policy makers to assert that strong

\begin{footnotesize}
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\item[\textsuperscript{22}] See for example F Machlup, An Economic Review of the Patent System (Study No 15 of the Sub-committee on Patents, Trademarks, and Copyrights of the Committee of the Judiciary, United States Senate, 85th Congress, Second Session).
\item[\textsuperscript{24}] I Mgbeoji, Global Biopiracy: Patents, Plants, and Indigenous Knowledge (UBC Press, 2006).
\item[\textsuperscript{25}] D Brenner-Beck, note 23 above.
\item[\textsuperscript{26}] Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, revised by 14 July 1967, 828 UNTS 221.
\item[\textsuperscript{27}] O Arewa, 'TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks' (2006) 10 Mary Intell Prop LR 155.
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IP regimes potentially generate benefits for poor countries. Some of the alleged benefits include greater trade, inflows of foreign direct investment, and technology transfers. Of course, there are costs which include restricted access to protected technologies, increased price of goods and services, and other social welfare costs. Regardless of the merits (or lack thereof) of the purported benefits of IPRs, there is hardly any question that IPRs moved from the peripheries to the core of global regulation of trade.

Despite the globalization of IPRs, the successful transplanting of IPRs to African countries has been beset with several challenges, including the brutal legacies of colonialism, domestic economic difficulties, and cultural dissonance. Historically, the structure and process of international intellectual property regulation has marginalized the Third World, especially Africa. This phenomenon is epitomized by the colonial imposition of IP laws and institutions in Africa, and the contemporary limited relevance of African countries in global IP lawmaking processes.

30 FDI may be described as the act of establishing or acquiring a foreign subsidiary over which the investing firm has substantial management control. Scholarly opinion is divided on whether strong IPRs are necessary for FDI.
35 In 2000, intellectual property assets represented 40 per cent of the net value of corporations in the United States. Similarly, IPRs account for more than 33 per cent of corporate assets in Europe. See Idris, note 31 above, 61–62.
37 For a definition of the Third World see, B Rajagopal, 'Locating the Third World in Cultural Geography' (1998–1999) Third World L Studies 1, (contending that the concept of global south or third world should not be inflexibly moored to a fixed geographical location). For a consideration of the complexity of the Third World see K Mickelson, 'Rhetoric and Rage: "Third World" Voices in International Legal Discourse' (1998) 16 Wisconsin Int'l L J 353 at 360, (describing the Third World as a ‘chorus of voices that blend, though not always harmoniously, in attempting to make heard a common set of concerns’).
39 Endeshaw, note 6 above.
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With respect to colonialism, the colonial legacy of Africa has also left indelible prints and influences in both the law and structural framework of IPR in the continent. The vestiges of the European scramble for Africa is reflected in the discordant and often competing IPR laws and institutions in decolonized African countries. For example, English common law applies in Anglophone countries while Francophone countries operate the French Civil Law system. Lusophone countries in Africa operate the Romano-Germanic civil system. The result is a gaggle of IP laws and institutions in Africa which, in several instances, are a verbatim reproduction of IP laws in the colonial states.

In short, European laws were simply re-enacted in African colonies without regard to local sensibilities and practical realities. Until 1962, patent law in French Africa was governed by French laws. Administratively, the French National Patent Rights Institute (INPI) was the National Authority for members of the African French Union. Similarly, barely two decades ago, a person wishing to obtain patent protection in most British colonies in Africa could do so by re-registering a British patent in the local office in the particular African country. In effect, the content and process of IP governance in Africa was an appendage to colonial dictates and preferences.

At the normative level, the ideological values and world view encoded in the IPRs of the colonizing European powers were often alien to indigenous African ethos and economic traditions. The internationalization of IPRs which started in Europe in the nineteenth century and culminated with the conclusion of the Paris and Berne Conventions was an extension of colonial diktat in Africa. African countries did not participate meaningfully in the law-making process at the international level. This, again, was a re-enactment of domestic alienation from IP law-making processes. A major consequence of this phenomenon was the non-protection of indigenous categories of IPR such as folklore, and the

41 Otherwise known as the Union Française, the group is composed of 16 French-speaking African colonies outside French North Africa. These are Benin, Burkina Faso, Cameroon, Central African Republic, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Mauritania, Niger, Senegal, Chad, and Togo.
44 Large-scale African participation in IP matters started in the late 1970s.
congealed perception in African countries that IP laws were part of the repertoire of colonial oppression and subjugation of Africa.

The process of political independence did not bring about radical changes. Indeed, shortly after formal decolonization, with the singular exception of South Africa, none of the newly-decolonized African states operated functional patent offices. Save for trademarks, which were used to protect merchandise from the imperial states, there was little domestic effort on the protection of IPRs. Consequently, any fruitful discussion of the impact of TRIPS in contemporary Africa must, of necessity, be situated within the contexts of the colonial legacies and absence of infrastructure in several African countries. Such discussion must take into account the fact that a vast majority of Africans live in abject poverty, without adequate food, clean water, sanitation, healthcare, or education. Again, it should be borne in mind that a large number of Africans have been either directly embroiled in civil wars for upwards of five years, or hugely impacted by the effects of civil wars in neighbouring countries.

At the continental and macro-levels, the colonial rupture of Africa left in its wake competing continental institutions and frameworks for the regulation and governance of IPRs. The two continental organizations which deal in IPRs are the African Intellectual Property Organization (OAPI) and the African Regional Industrial Property Organization (ARIPO). The former comprises 14 French colonies in Africa (North Africa excluded). The French colonies decided in 1962 to create The African and Malagasy Patent Rights Authority by the agreement known as the Libreville Agreement. The Libreville agreement was signed to form the African Malagasy Patent Rights Authority (OAMPI). Following the withdrawal of Madagascar and the need to expand coverage to other categories of intellectual property, the Libreville Agreement was revised and a new convention signed in Bangui on 2 March 1977 gave birth to OAPI.

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47 The acronym OAPI is derived from the French name of the organization, which is Organisation Africaine de la Propriété Intellectuelle. OAPI is constituted by French-speaking countries.

48 The Libreville Agreement was based on three fundamental principles. These are: (1) the adoption of a uniform legislation by the putting in place and application of common administrative procedures resulting from a uniform system of patent rights protection; (2) the creation of a common authority for each of the member states; and (3) the centralization of procedures.

49 Bangui Agreement of 2 March 1977, as revised on 24 February 1999; available at <http://www.oapi.int/doc/en/bangui_agreement.pdf>. Art 19 of the Paris Convention permits members to belong to regional IP groupings provided there is no contradiction between the Paris norms and the obligations created by such regional groupings.
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The Bangui Agreement deals with the following categories of intellectual property: Patents; Utility Models, Trademarks and Service Marks; Industrial Designs; Trade Names; Appellations of Origin; and Copyright. With respect to trademarks, the Agreement provides that only visible marks are registrable.50

Although every member of the Bangui Agreement has domestic patent-granting agencies, the OAPI office is invested with powers to grant patents that have efficacy across the board of member states. The patent law of all OAPI members is that set out in the Bangui Agreement. The OAPI office also serves as the registration office for OAPI members of the Trademark Registration Treaty.51 In addition, members of OAPI submit notifications of their domestic legislation to WIPO.52 The Bangui Agreement was amended in 1999 to make it TRIPS-compliant. The revised version of the Bangui Agreement entered into force for all OAPI members in early 2002 following ratification by 16 OAPI member states.

For most of Anglophone Africa, there was the Lusaka Agreement of 1976 which came into effect in 1978. In December 1985, the Lusaka Agreement was amended in order to admit all African states interested. This change gave birth to ARIPO.53 The Harare Protocol adopted by ARIPO members in 1982 empowers the ARIPO office to receive and process patent and industrial design applications on behalf of states party to the Protocol. A patent granted under the Harare Protocol has the same effect in the designated contracting state as a national patent. The Banjul Protocol on marks was adopted by the administrative council of ARIPO in 1993. It establishes a trademark filing system similar to the Harare Protocol. The Protocol came into effect on 6 March 1997.

With respect to the issue of limited African relevance in the law-making processes on international IPRs, the key problem is the absence of congruence between

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51 Art 2 (3) (4) of the Trademark Registration Treaty, 550 UNTS 45.
52 Côte d’Ivoire, Congo, Gabon, Senegal, Togo, Niger, Benin, Guinea, Guinea-Bissau, Malawi, and Mauritania have all notified WIPO on their domestic legislation. Chad simply affirmed that it will abide by the terms of the TRIPS Agreement.
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the formulae adopted in TRIPS, on the one hand, and the domestic and cultural requirements of non-industrialized countries (non-ICs) on the other hand. As Endeshaw observes,

the extant literature on the nature, forms, and impact of IP does not distinguish between the roles of non ICs and ICs in IP lawmaking. It tends to jumble them together as if the state of economic and technological development of nations matters little to the forms and scope of the IP law they adopt. All nations are hence perceived as having to subscribe to universal standards irrespective of any diversity they may have.54

Yet for decades commentators have made the point that the economic and cultural imperatives of many nations are different. As Hanns Ulrich observed in the late 1980s, ‘... is there any hope that laws which have been pressed upon these countries (non-ICs) really will be applied by domestic authorities with any degree of effectiveness? The danger is that [TRIPS] will either remain a dead letter or else become a source of permanent dispute.’55

Part II The Significance and Normative Impact of TRIPS in Africa

As already indicated, an inquiry into the impact of TRIPS in Africa inevitably implicates a host of factors such as the colonial experience and legacies in the continent, the marginal roles by African countries in IPR law making, and of course, the persistent lack of infrastructure and chronic political instability in the continent. Amidst these peculiar endemic factors, the debate among African countries on the implementation of TRIPS and the expected impact of TRIPS has often revolved on what level of protection IPRs should be accorded in the continent.

Policy makers from African countries are virtually unanimous in their belief that the standards set out in TRIPS are the ceiling and not the floor of the protection they are willing to accord IPRs. On the other hand, powerful and influential entities from industrialized economies clamour for a TRIPS-Plus regime of protection of intellectual property rights in Africa.56 A TRIPS-Plus regime would

54 Endeshaw, note 6 above.
generally reflect the type of more stringent protections often embedded in most US bilateral trade agreements. The growing spread of TRIPS-Plus rules via bilateral trade agreements or free trade agreements (FTAs) is a subject of increasing concern to some scholars. The scepticism towards TRIPS-Plus levels of IPR protection derives from the economic and political realities on the ground, and the general perception that the benefits from such strong IPR enforcement are unidirectional and a drain of scarce resources from the continent. While several African countries grapple with political instability, poverty, and other crises, there is little doubt that the greatest beneficiaries of strong IP regimes in the continent are the powerful Western states.

Despite the divergent narratives on the alleged benefits of strong IP regimes, why have African countries suddenly embraced such regimes? The answer may well be located in the immense political and economic pressure mounted on African states by powerful Western states. Why pressurize African states to adopt strong IPR laws and institutions? Again, the answer to this is probably to be found in the increasing industrialization of many states and the narrowing technological divide between industrialized states (ICs) and the newly industrializing states (new ICs). Curiously, at the time when the industrial know-how and manufacturing abilities of the industrialized parts of the world were beyond the reach of other parts, IPRs were not accorded serious and rigorous protection. However, as the technological gap narrowed, it became apparent that the value of innovative products lies not in the paper, metal, or plastic used in making such products. Rather, the value of new products is in the cost of innovation, research, design, testing and marketing involved.

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In short, the emergence of inexpensive and accessible reproduction technologies in new ICs made it possible for newly-industrializing countries to free-ride on the technological breakthroughs of the industrialized states. Coupled with increased access to Western education and significant development of a domestic technological base, cheaper labour, and inexpensive copycat technologies in the newly industrialized countries, the manufacturing advantage hitherto possessed by industrialized states began to dwindle. TRIPS was thus created to plug a hole in the declining industrializing capacity of the US and to deal with the increasing trade deficits in the 1980s and 1990s. It was therefore considered important by the industrialized states that greater attention be paid to the knowledge embedded in innovative products rather than to the actual embodiment of the products. This new era, the birth of the so-called ‘information economy’, makes the protection of IPRs an economic and ideological imperative.

The template shift has global ramifications. A fundamental question is why new ICs should be made to protect assets produced elsewhere in circumstances that largely speak to rent-seeking, especially when non-Western forms of knowledge lack international legal protection. Although opinions are strongly divided on the benefits or lack thereof of the WTO/TRIPS arrangement, the benefits of WTO membership may be twofold: namely, a transparent and systematic review of the acceding country’s trade law and policy, and secondly, the right to use the WTO’s dispute settlement process.

However, there are costs too. For example, upon accession, a WTO member has to undertake and bear the costs of adopting, institutionalizing, and implementing an array of heavy legal commitments to honour concessions and agreements negotiated with other trading partners. The administration of IPRs involves receiving of applications, formal examination, granting or registration of the IPRs, etc. All these would have to be backed up with appropriate laws, personnel, and institutions. Indeed, it costs several million dollars to enact necessary laws, create the relevant institutions and enforcement structures for IPRs in poor countries.

Failure to honour these commitments will ultimately result in direct legal and economic consequences. Whatever benefits are believed to accrue from institutionalized IPRs, protection and enforcement of intellectual property rights directly impacts on vital matters of national policy, especially for weak and impoverished states. Primarily, the capacity and ability of poor states to set policy and standards on matters of grave national importance have been significantly removed. Beyond the issue of diminished local capacity to legislate on IPR issues, the key question is whether TRIPS has made any significant impact in Africa. On this question, the spectre of the HIV/AIDS crisis looms large in sub-Saharan Africa.

Part III  TRIPS in Africa—An Overview

For many commentators, the impact of TRIPS in Africa is all about HIV/AIDS and patented antiretroviral drugs. Since the ‘Africanization’, indeed global

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74 For example, following its ratification of the WTO Agreement, the Philippines had to change at least 40 per cent of its laws and regulations and enact new ones. See W Bello, Multilateral Punishment: The Philippines in the WTO, 1995–2003 (Focus on the Global South, Manila, 20 June 2003).

75 For a summary of the UNCTAD study on the cost implications of acceding to WTO/TRIPS see UNCTAD, The TRIPS Agreement and Developing Countries (UNCTAD/TIE/1, 1996).


79 In the late 1980s and early 1990s there was unprecedented media campaigning and hysteria on the HIV/AIDS 'epidemic', generally believed to have the gay community in the United States
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construction of the HIV/AIDS crisis as a peculiar problem of poor but sexually promiscuous peoples of the Third World, especially sub-Saharan Africa and Thailand, the perceived impact of TRIPS in Africa has been limited to issues of patented HIV/AIDS retroviral drugs. The problematic definition of HIV/AIDS in Third World countries, and the insinuations of reckless sexual habits among sub-Saharan Africans are touchy subjects, especially having regard to the many vested interests in the global HIV/AIDS crisis industry.

Be that as it may, it is beyond doubt that the linkage of the HIV/AIDS crisis in Africa with TRIPS provisions on patents helped precipitate an impact on the TRIPS Agreement as encapsulated in the Doha Declaration of 2001.

More impetus for a reinterpretation of TRIPS comes from the attempt by multinational pharmaceutical companies and the US government to prevent the implementation of measures by the South African government to address the HIV/AIDS epidemic, and the complaint brought by the US government, against Brazil in relation to compulsory licenses. These incidents were perceived as manifestations of a conflict between the recognition of IPRs and essential public health objectives, especially in the developing world.


In many African countries, HIV/AIDS is largely 'diagnosed' on the basis of unspecific symptoms. Needless to say, in a continent where infectious diseases, poverty, and unhygienic living conditions have kept the average life expectancy at 50 years, it is not a coincidence that people who are suffering from well-known infectious diseases are often officially described as suffering from AIDS. See for example, T Irova & J Ninane, 'AIDS-Resembling Disease in a non-HIV-infected African Born to an HIV-Positive Mother' (1995) 12 Pediatric Hematology and Oncology (September–October) 495–8.


This chapter does not concern itself with the juridical status and effect of the Doha Declaration.\textsuperscript{86} It would suffice to observe that the Doha Declaration affirms that the TRIPS Agreement should be interpreted and implemented so as to protect public health and promote access to essential pharmaceuticals, and represents a significant development in international law.\textsuperscript{87} At the normative level, the Doha Declaration represents a significant political adoption by WTO members that provides members with the capacity to enact measures necessary to ensure access to healthcare under the framework of the TRIPS Agreement.

Since the adoption of the Doha Declaration, the WTO council responsible for IPR, on 27 June 2002, approved a decision extending until 2016 the transition period during which least-developed countries (LDCs) are exempted from providing patent protection for pharmaceuticals. This decision formalized part of paragraph 7 of the Declaration on the TRIPS Agreement and public health. In addition, Article 31 of the TRIPS Agreement has been amended to make it easier for poorer countries to import cheaper generics made under compulsory licensing, if they are unable to manufacture the medicines themselves. The decision covers patented products or products made using patented processes or methods in the pharmaceutical sector. This is a temporary waiver that would last until the WTO's intellectual property agreement is amended.\textsuperscript{88} However, as subsequent pages would demonstrate, there is often a huge gap between juridical prescriptions and actual ability and capacity of African countries to make use of those prescriptions. Thus, notwithstanding the amendment to Article 31 of the TRIPS Agreement, it is doubtful whether African countries have fared much better in terms of developing local industrial manufacturing capacity and

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86 Under Art 31 §1 of the Vienna Convention a treaty is to be interpreted in good faith using the ordinary meaning of its terms in context and in light of the treaty's object and purpose. See Agreement Establishing the World Trade Organization, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, 33 ILM 112, Art. 3.2, available at <http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf> (last accessed 20 April 2003). The legal status of the Declaration under international law, specifically the Vienna Convention, has been suggested to include three separate possibilities:

1. as a subsequent agreement under Art 31 §3(a) of the Vienna Convention regarding the interpretation and application of the TRIPS Agreement;
2. as a subsequent practice under Art 31 §3(b) of the Vienna Convention in the application of the TRIPS Agreement, establishing an agreement of WTO members regarding the interpretation of the TRIPS Agreement; or
3. as a declaration of commitment and intent that does not constitute an enforceable legal obligation.


thus significantly addressing the dire health challenges in Africa that compelled the amendment of Article 31 of the TRIPS Agreement.

A. TRIPS in Northern Africa

Northern Africa comprises Algeria, Egypt, Libyan Arab Jamahiriya, Morocco, Sudan, Tunisia, and Western Sahara. Northern African countries are a reflection of historical patterns of conquests, colonialism, Arabization, and Islamization of the Maghreb, Nile Valleys, and the Saharan parts of the African continent. The Arab conquests of the seventh century AD, and European (mainly French) colonialism of the eighteenth century have largely defined the legal framework of Northern African countries. However, the economies of some Northern African countries such as Algeria, Libya, and Sudan have been affected by the discovery of oil and natural gas in their deserts. Like many other countries with low levels of industrialization, the economies of many northern African countries are often dominated by agriculture and extractive activities such as mining. Egypt, however, has the most diversified industrial base of North African countries. The general picture, thus, is that IPRs have played marginal roles in the economies and juridical life of northern African countries.

With specific reference to Algeria, there are various legislations dealing respectively with patents, trademarks, industrial designs, copyrights, appellations of origin, and topographies of integrated circuits. Algeria, however, is not a member of the WTO and therefore need not detain us here.

Egypt is a member of the WTO and arguably has the most diversified industrial base in northern Africa. Like many African countries, prior to the emergence of TRIPS, pharmaceutical products were not eligible for patent protection under Egyptian law. Since its accession to TRIPS, however, Egypt has enacted a TRIPS-compliant patent law. It is arguable that the accession to TRIPS has

89 Law No 03–19, November 2003.
90 Law No 03–18, November 2003.
91 Decree No 66–87, April 1966.
92 Executive Decree No 98–366, November 1998.
93 Decree No 76–121, July 1976.
94 Law No 03–20, November 2003.
96 For a summary of the national IPR system in Algeria, however, see the Algerian National Institute of Industrial Property (INAPI) website at <http://www.inapi.org>.
97 Intellectual Property Law No 82 of 2002 (Egypt).
had legal and economic impacts in Egypt. On the legal plane, as already indicated the Egyptian patent law has been modified to permit the patenting of pharmaceutical products and processes. Additional changes have been made with respect to mailbox applications with respect to patents; protection of undisclosed information; and the regulation of compulsory licensing in compliance with Articles 30 and 31 of TRIPS. These new legal changes came into effect in January 2005.

Despite the changes to Egyptian patent law, a significant problem in the Egyptian pharmaceutical industry is the unauthorized use of data by generic drug manufacturers desirous of obtaining quick approvals for their drugs. However, with the passage of the new Egyptian patent law, the Ministry of Health is obliged to ensure that there is no access to the test data except for the purposes of examining the application of the originator of the information. In some respects, the Egyptian patent law exceeds the minimum requirements of TRIPS.

Changes to Egyptian patent law have come with some severe costs. For example, the cost of establishing a patent office in Egypt was conservatively put at about US$2 million. Economically and socially, given the economic and healthcare infrastructures' limited ability to absorb or redistribute the higher costs of patented products through effective health insurance, there is an increase in the costs of those items; a burden that now falls on the poor. Roughly 20 per cent of Egypt's 70 million people live below the poverty line and thus millions of people are hit by increases in the prices of pharmaceuticals. Studies have shown that since the introduction of TRIPS in Egypt, prices of drugs have increased. Whether this is a coincidence or a direct cause and effect relationship is unclear.

In addition to its patent law, Egypt has enacted TRIPS-compliant legislation on trademarks and industrial designs. With respect to copyright protection, collective management societies have been created. Some Egyptian policies such as the imposition of higher taxes on foreign-produced films, and a screen quota that gives priority to Egyptian films, may be problematic in the context of TRIPS.

100 Arts 55 and 56 of Law 82.
101 UNCTAD, TRIPS and Developing Countries, note 75 above, 23–24.
On enforcement, infringement of IPRs may be litigated in Egyptian courts. Statistics show that Egypt has one of the busiest IPR offices in Africa. In 2002, more than 1,400 patents were granted by the Egyptian patent office. Nearly 2,000 industrial designs were granted, and nearly 200,000 trademarks were approved within the same period. There is little doubt that Egypt's significant industrial base accounts for the large number of activities in the IP sectors.

Morocco is located at the north-western tip of Africa. Until 1953 Morocco was a French colony. Consequently, Morocco has been largely influenced by French civil law traditions. Morocco promulgated a new industrial property law to comply with its obligations under TRIPS. Under the new law, the following categories are considered industrial properties: patents, integrated circuit topographies, industrial designs, trade- and service marks, trade names, geographical indications, and appellations of origin. The new law came into effect on 9 March 2000. The law on patents in Morocco permits the patenting of most subject matters except discoveries, theories, computer programs, and aesthetic creations. Plant varieties are not yet protected under Moroccan law. Sudan is different because it is not a member of the WTO. Tunisia has enacted TRIPS-compliant laws on patents, trademarks, industrial design, copyright, and integrated circuit topographies. Although Tunisia has one of the best IPR offices in Africa, Egypt grants more patents and trademarks than either Tunisia or Morocco.

B. TRIPS in Western Africa

Western Africa comprises Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Nigeria, Senegal, Sierra Leone, and Togo. The colonial imprint on West African countries is palpable in the present day. Throughout the colonial era, Britain controlled a wide swath of West Africa including The Gambia, Sierra Leone, Ghana and

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105 Ibid.
Nigeria. On the other hand, France controlled Senegal, Guinea, Mali, Burkina Faso, Côte d’Ivoire and Niger. The remainder territories were controlled by Portugal (in Guinea-Bissau) and Germany (Togo until the end of the First World War). Liberia is the only country in West Africa to escape direct imperial control, although it saw itself as an American outpost in Africa.

Since the attainment of formal political independence in the 1960s, West Africa has been plagued by political convulsions including chronic coups and counter-coups, civil wars of continental dimensions, and political corruption. Indeed, West Africa is the most politically unstable region in Africa, with more military coups in the region than all other regions combined. The economies of most West African countries are agrarian and extractive, especially of petroleum. With respect to industrialization, there have been spasms of industrial activity in the sub-region, especially in Ghana and Nigeria. Despite the absence of a strong manufacturing and industrial base, West African countries have historically filled their statute books with IP law and, in recent times, TRIPS-compliant legislation. On a case-by-case analysis, West Africa presents a mixed picture.

The Republic of Benin, a founding member of OAPI, has enacted TRIPS-compliant laws on patents, trademarks, and industrial designs. As a member of OAPI, Beninoise laws on patents and trademarks are anchored on the 1999 amendment to the Bangui Agreement. Like most African countries, the supervision of IP matters is generally handled by government ministries such as the Ministry of Industry and the Ministry of Culture. Virtually the same as in Benin may be said for the republic of Burkina Faso. With a special Industrial Property Tribunal and a Copyright Tribunal, Burkina Faso in theory has complied with its obligations under TRIPS. As a member of OAPI, Côte d’Ivoire’s regulations on patents, trademarks, and industrial designs are premised on the annexes to the Bangui Agreement as amended in 1999. A new copyright bill has recently been enacted. There is also a collective management society for copyright royalties. Enforcement of IP matters are handled by the courts, the police and the Customs. Records from the relevant IPR offices in Côte d’Ivoire show that trademarks and industrial designs often dominate in the grants issued by the relevant offices.

Further west, like most British colonies in Africa, the acquisition of patent rights under Gambian law was largely dependent on re-registration of patents already issued by the British Patent Office. However, since 1989, The Gambia has enacted a local patent law. Similar laws have been made with respect to trademarks, utility models, unfair competition, and industrial designs. This legislation is generally compatible with TRIPS. However, the position with respect to copyright is different. The Gambia is a member of ARIPO. In the year 2001, nearly 100 patents were granted in The Gambia through the auspices of ARIPO.
Ghana has recently enacted TRIPS-compliant laws on patents, trademarks, copyrights, and industrial designs. A law on plant variety protection is pending before the Parliament. The situation in Ghana compels a careful reappraisal of the peculiar needs of some African countries for certain IP laws. Ghana is a member of ARIOPO and thus uses the examination processes established under the ARIOPO framework. It is significant that Ghana's world-famous Kente cloth designs are often the victim of illegal copying and dumping from Asian countries, especially China. Perhaps, if IPRs are to have local relevance and resonance in African countries, products such as Kente cloth ought to anchor the move towards making IPRs relevant to the local populace.

Guinea is a former colony of France and a member of OAPI. Hence, her laws on patents, trademarks, and industrial designs are premised on the terms of the Bangui Agreement. The Guinean copyright law\(^{110}\) needs to be amended to comply with the minimum requirements of TRIPS. The situation in Guinea-Bissau is slightly different. A former colony of Portugal, Guinea-Bissau's laws on patents, trademarks, and industrial designs are TRIPS-compliant. A law on copyright and neighbouring rights is currently under consideration. Liberia is not a member of the WTO and thus need not detain us here.

Like fellow signatories to and members of OAPI, Malian laws on patents, trademarks, and industrial designs are all governed by the annexes to the Bangui Agreement as last amended in February 1999. These international provisions are generally compatible with TRIPS. With respect to copyrights, Malian Law No 84/AN–RM of October 1994 on copyright and neighbouring rights is compatible with the minimum requirements of TRIPS. Mauritania is also a member of OAPI and the position in Mali is comparable to what obtains in Mauritania, save for the absence of TRIPS-compliant legislation on copyright and neighbouring rights. Like other OAPI members, Niger is a signatory to the TRIPS-compliant annexes to the Bangui Agreement on patents, trademarks and industrial designs. Its 1993 law on copyrights, neighbouring rights and expressions of folklore exceeds the standards set by TRIPS by its protection of folklore. There are Tribunals respectively created for the purposes of dealing with industrial property and copyright cases.

Despite the existence of TRIPS-compliant laws on patents, trademarks, and industrial designs, it is virtually impossible to highlight benefits that have accrued to Guinea, Guinea-Bissau, Ghana, Mali, Mauritania, or Niger solely on the basis of their accession to TRIPS. In any event, Guinea, Guinea-Bissau and

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\(^{110}\) Law No 043/APN/CP/80, of August 1980.
\(^{111}\) Decreto lei No 6/96, Capitulo 1, February 1997.
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The Gambia are desperately poor countries. It is therefore doubtful whether any reasonable or compassionate person would expect such countries to spend their meagre resources on creating IP laws and institutions at the expense of health, education, and shelter. Yet, the usual refrain from advocates of the WTO is that such countries have 'an urgent need ... to enact a new Industrial Property Legislation which will take into account new developments in the field'.

Nigeria is a member of WIPO and a signatory to several international IPR treaties and conventions including the Universal Copyright Convention, the Berne Convention, and the Paris Convention (Lisbon text). Nigeria is generally regarded as the largest and most important market in the African region. Its patents and trademarks offices are relatively busy. However, a huge proportion of patents granted by the Patent Office belong to foreigners. For example, in 1999-2002 1,458 patents were issued to foreigners while local applicants obtained 986 grants. Records from the trademarks office shows that for the same period, 4,613 approvals went to foreigners while local applicants obtained a total of 8,694 approvals. In Nigeria, the regulation of technology transfer associated with patented technology is handled by the National Office of Technology Acquisition and Promotion (NOTAP). The registration of licenses and agreements on technology transfer is voluntary. Failure to register a license or contract does not nullify the contract under NOTAP.

Nigeria's current IPR laws are TRIPS-compliant. This may be related to the fact that, unlike many African countries that have flirted with several economic ideologies such as communism, socialism, etc, Nigeria has consistently been a capitalist economy and has participated in international IP conventions. Thus, Nigeria has a comprehensive body of IP law and boasts a growing segment of the population with vested interests in the protection of diverse forms of intellectual property, especially, copyrights and trademarks. Notwithstanding the availability of modern IP laws, the USTR alleges that Nigeria has done little to eradicate the widespread production and sale of pirated tapes, videos, computer software, and books. Analysts have pointed out, however, that the problem is with the lack of institutional capacity, low morale among enforcement personnel, poor training, and limited resources. More worrisome, the court process in Nigeria is notoriously slow and cumbersome.

112 Zikonda, note 46 above, Annex Two, 1.
114 Beecham Group Ltd. v Essdee Food Prods Nig Ltd (1985) 3 NWL Pt 11, 112.
However, Nigerian authorities, especially the Nigerian Copyright Commission and the National Agency for Food, Drug Administration and Control (NAFDAC) have been quite active in combating the menace of piracy and counterfeit drugs, respectively, in the country. In many cases, people operating video rental clubs have been arrested and prosecuted by the Nigerian Copyright Commission. In such arrests thousands of pirated videocassettes and equipment worth millions of dollars have been seized and confiscated. A number of high-profile charges have been laid against IP violators. There are collective management societies in Nigeria and also a Copyright Council. With respect to counterfeit drugs, NAFDAC has gained global fame and recognition in its fights with importers and retailers of counterfeit drugs.

With respect to Senegal, as a member of OAPI, its patents, trademarks and industrial design regimes are governed by the annexes to the Bangui Agreement as amended in 1999. Its copyright law, however, does not meet the standard set out in the TRIPS Agreement. There are cases of piracy and illegal copying of copyrighted products. The situation in Sierra Leone is typical of unstable and strife-ridden Africa. Sierra Leone was embroiled in a bloody war for nearly ten years. As a former British colony, however, its IP laws were largely premised on British laws and institutions. Given that Sierra Leone has been the theatre of one of the most brutal and savage conflicts in modern history, it is not surprising that modernization of IP laws and institutions is not a priority. Togo is very much in the same situation as all Francophone West African countries but the noticeable difference is that Togolese copyright law protects folklore expressions and thus is superior to the minimum standards set out in TRIPS.

C. TRIPS and Post-TRIPS in Eastern Africa

Eastern Africa comprises Burundi, Comoros, Djibouti, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Mozambique, Rwanda, the Seychelles, Somalia, Uganda, United Republic of Tanzania, Zambia, and Zimbabwe. Like most of the smaller and poorer African member states of the WTO, little IP business is done by the Burundian IP offices. Indeed, in 2002, only ten patents were issued by the Patent Office in Burundi. Similarly, only 152 trademarks were issued in 2002. The situation in Djibouti is bleaker. Currently, laws dealing with patents, trademarks, industrial designs, appellations of origin, and copyright respectively are under consideration. Djibouti is one of the Least Developed Countries in Africa.

116 'Copyright Commission Arrests 30 Over Piracy' Thistedy 7 August 2006.
With respect to Kenya, the situation is very much different. Kenya has witnessed significant positive developments in its Trademark Act of 1994 which has expanded the scope of trademark protection to cover service marks, and shapes and packaging of goods. Similarly, the Kenyan Copyright Act of 2001, Industrial Property Act of 2001, and the Seed and Plant Variety Act of 1977 are all compatible with the minimum requirements of TRIPS. Kenyan patent law is equally TRIPS-compliant. In 2004, nearly 150 patents were issued by the Kenyan patent office, 89 of which were granted to foreign inventors. In the same year, 1,303 trademarks were issued to foreigners while 539 trademarks were issued to domestic applicants. Similarly, 46 industrial designs were approved for foreign applicants while local applicants obtained 193 approvals. 326 plant breeders' grants went to foreign applicants while the number for local applicants was 252. On the aspect of IPR enforcement, the customs authorities in Kenya have reportedly made 50 seizures of counterfeit goods. In addition, more than 50 IP-related criminal cases were dealt with by Kenyan authorities in 2004. Kenya has a functional collective management society. The courts in Kenya regularly deal with cases involving IP matters.

Madagascar has a relatively effective system of laws and institutions for the protection of IPRs. Its patent and trademarks offices issue patents and trademarks to both domestic and foreign applicants. Malawi has not modified its IPR laws to conform to the standards set by TRIPS. Similarly, Mauritius and Mozambique have not yet modified their IPR laws to conform with TRIPS standards. Rwanda has emerged from one of the worst genocides in world history. Not surprisingly, it has not yet modified its IPR laws to conform to TRIPS standards.

Tanzania and Uganda present a somewhat similar case. In both cases, domestic laws on patents, trademarks, industrial designs, and copyright hitherto were anchored on colonial British laws that have now been reformed to meet the minimum standards set out in the TRIPS Agreement. Tanzania has also created a collective management society. The High Courts of Tanzania are empowered to adjudicate on suits pertaining to IP matters. Uganda is a LDC and a staunch supporter of the WTO. The Ugandan patent law of 1991 is compatible with TRIPS. Its copyright and other laws on IPRs are currently being revised. There is a pending law on the protection of plant varieties. For the year 2001, 14 trademarks were approved in respect of foreign applicants while local applicants obtained three approvals. In the same year, 406 patents were granted to foreigners while local applicants obtained two grants.

Uganda's international trade is small and lopsided with agriculture as the backbone of the Ugandan economy.\textsuperscript{119} Uganda exports agricultural produce and imports merchandise goods. As a member of the Common Market for Eastern and Southern Africa (COMESA), Uganda is part of an ambitious economic liberalization agenda. However, it is generally accepted in Uganda that few benefits have flowed from its membership of the WTO. Indeed, Uganda's GDP has deteriorated significantly in the past six years. The deterioration in GDP has been blamed inter alia on 'deterioration in terms of trade'.\textsuperscript{120}

The Zambian experience with TRIPS is somewhat similar to the situation in Kenya, albeit on a smaller scale. Prior to formal political independence, IP matters in Zambia were administered from Harare in Zimbabwe. It was only in 1968 that an IP office was created in Zambia. Currently, the Patents, Companies Registration Office (PCRO) administers the industrial property aspects of IPRs, while the Ministry of Information and Broadcasting deals with copyright and neighbouring rights issues. The PCRO was transformed into an executive agency in 1998. In terms of administration, lack of adequate funding of the PCRO has stunted the development of the office.\textsuperscript{121} From the juridical perspective, the administration of IPRs in Zambia is governed by five statutes.\textsuperscript{122} IPRs, however, are enforced by the High Court of Zambia. There is a collective management society for the collection and sharing of royalties from certain copyrighted rights in Zambia. However, commentators have pointed that Zambia's huge foreign debt and domestic poverty make it unlikely that IPR enforcement would receive priority attention from government funds.

Zimbabwe is a signatory to the WIPO Convention of 1981, the Paris Convention, the Berne Convention, the Patent Cooperation Treaty, and also a member of ARIPPO. Domestic laws were enacted after 2000 specifically to meet Zimbabwe's obligations under the TRIPS Agreement with particular respect to copyrights,\textsuperscript{123} trademarks, geographical indications, industrial designs, plant varieties,\textsuperscript{124} and

\begin{itemize}
\item \textsuperscript{119} WT/MIN (01)/ST/111, Doha, 9–13 November 2001.
\item \textsuperscript{120} Ibid. This is often explained in terms of increased price of crude oil and the relative decline in the price of coffee.
\item \textsuperscript{121} Zikonda, note 46 above, 3.
\item \textsuperscript{122} The respective statutes are: The Patents Act, Chapter 400 of the Laws of Zambia; The Trade Marks Act, Chapter 40 of the Laws of Zambia; The Registered Designs Act, Chapter 402 of the Laws of Zambia; The Copyrights and Performance Act, Chapter 406 of the Laws of Zambia, and The Competition and Fair Trading Act, Chapter 417 of the Laws of Zambia.
\item \textsuperscript{124} Plant Breeders' Rights Act, Chapter 18'16, October 1974; Plant Breeders' Rights Regulations 1998 SJ 113/98; Plant Breeders' Right Amendment Act No 11, July 2001.
\end{itemize}
integrated circuit topographies. Given that the Zimbabwean Patent Act of 1972 passes the minimum threshold set out in TRIPS, Zimbabwe did not have to amend its patent law. The Zimbabwean copyright law provides protection for literary, dramatic, musical or artistic work, cinematograph films, sound recordings, broadcasts and computer programs as provided for in the TRIPS Agreement. The ambit of works covered in the Zimbabwean copyright law is not different from what is provided for under the Berne Convention. There is, however, no express mention or definition of ‘databases’ in Zimbabwean legislation. An argument has been made that Zimbabwe should amend her laws to provide for the protection of databases, preferably in accordance with the EC Database Directive. Be that as it may, by the combined operations of sections 5(1) and 42 of the Zimbabwe Copyright Act, copyright protection is extended to Zimbabwean nationals, persons domiciled in Zimbabwe, and nationals of states who are signatories to the Berne Convention.

Although Zimbabwean law guarantees protection for the holders of copyright, copyright infringement is common. This is particularly serious and rampant with respect to the piracy of videocassettes and computer software. There is evidence that, while Zimbabwean law protects the rights of copyright holders, enforcement in this area is lax. However, legal actions against resellers of pirated computer software are usually successful. It is noteworthy that Zimbabwean jurisprudence in this area is heavily influenced by European law as implemented or interpreted by English courts.

Zimbabwe protects trademarks under the Trade Marks Act. The general incidents of rights associated with ownership of trademarks in member states of the WTO apply with equal force to rights holders in Zimbabwe. Geographical indications are protected under the Geographic Indications Act. Theoretically,


126 Copyright Act, note 123 above; Berne Convention, note 26 above.


129 Trade Marks Act (Chapter 26:04) 1974 (1994).

130 Geographic Indications Act 2002, Chapter 26:06. Under the Zimbabwe Geographic Indications Act, no person shall apply a misleading geographical indication to any product, and no person shall sell any product; import any product for sale in Zimbabwe; export any product for sale outside Zimbabwe, or manufacture any product for sale, if a misleading geographical indication is applied to the product.
D. TRIPS in Central Africa

Central Africa comprises Angola, Cameroon, Central African Republic, Chad, Congo, the Democratic Republic of the Congo, Equatorial Guinea, Gabon, and the twin islands of São Tomé and Príncipe. Central Africa has been the stage of one of the most chronic and brutal wars in Africa, the Congo war, otherwise known as Africa’s World War. Similarly, the Congo war is the widest interstate war in modern African history. The war has involved nine African countries. Between 1998 and 2004, more than 3.8 million people have died, either directly
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in the conflict or from circumstances precipitated by it. The contextual circumstances and experiential exigencies in Central Africa are imperative factors in any useful analysis of the impact or lack thereof of the TRIPS Agreement in that region of Africa.

Angola fought a long war of independence and also witnessed a bloody post-independence conflict. However, as a member of the WTO, Angola has enacted TRIPS-compliant laws on patents, trademarks, industrial designs and copyright. There are also laws on utility models, appellations of origin/geographic indications, and unfair competition. The administration of patents and utility models is undertaken by a special office attached to the Angolan Ministry of Industry. Copyright matters are overseen by the Ministry of Education and Culture. There are presently no collective management societies for copyright royalties in Angola. With respect to enforcement, there is an Industrial Property Tribunal for infringement of patents and a Copyright Tribunal for copyright-related cases. Despite these remarkable efforts, and perhaps as a result of the long years of civil conflict, in the past 29 years only 30 trademarks were registered on Angolan industrial products.

The situation in Cameroon is somewhat different, maybe because Cameroon has been one of the most politically stable countries in Africa. As a signatory to the WTO treaty, Cameroon has amended its IPR laws to conform to the requirements of TRIPS. Being a member of OAPI, Cameroonian laws on patents, trademarks and industrial designs are anchored on the provisions of Annexes 1–IV of the Bangui Agreement as last amended in February 1999. For copyrights and neighbouring rights, Cameroon has enacted Law No. 2000/011 on Copyright and Related Rights. This legislation meets the minimum standards set out in the TRIPS Agreement. With respect to enforcement, Cameroonian courts regularly hear cases on infringement of IPRs. However, there is a high level of piracy in Cameroon despite its modern patent law, and industrial and technological activities in Cameroon are at insignificant levels. Like Cameroon, in the Central African Republic (CAR) the regulation of patents, trademarks, and industrial designs respectively are anchored on the provisions set out in the annexes to the Bangui Agreement as last amended in February 1999. The independent legislation on copyright is in conformity with the requirements of TRIPS. Virtually the same pattern of compliance with TRIPS is repeated in Chad.

136 Copyright Law No 4/90, March 1990.
138 Ordinance No 85–002 on Copyright.
The epicentre of the Congo war, the Democratic Republic of the Congo (formerly Zaire) adhered to the WTO in January 1997. Congo enacted a law in 1986 for the protection of copyright. The 1986 law abrogated the colonial decree of 1948. Congolese copyright law provides for the protection of both the economic and moral rights of the author. As a signatory to the Berne Convention, Congolese copyright law covers most of the recognized categories and types of copyright. Congolese copyright law is generally TRIPS-compliant notwithstanding its omission of folklore from copyrightable categories. However, despite the apparent compliance with TRIPS, it has been observed that ‘works of authors are not adequately protected, particularly in respect of neighbouring rights. The collective society in charge of safeguarding author’s rights is incompetent to cope with these complex issues and it lacks the means to bar the export or import of infringing works and fight against pirated works’. It has been suggested by one scholar that a special police be created to deal with this problem. One wonders how a country beset for decades with civil war, and where daily life is fraught with grave personal risk, should be asked to create a special police for the enforcement of copyright.

The situation in Gabon is akin to what obtains in Cameroon, CAR, Chad, and Congo. Gabon’s laws on patents, trademarks, and industrial designs are premised on the Bangui Agreement as last amended in February 1999. With respect to copyright, the Copyright Law No. 1/87 of July 1987 makes provisions for the regulation and enforcement of copyright-related rights in Gabon.

In sum, in spite of grave political and social challenges Central African countries have generally complied with their obligations under TRIPS. However, it is difficult to point out the benefits that they have derived from changing their IPR laws and creating the institutions for the enforcement of IPRs. The paradox here is that Central Africa is home to some influential and world-respected genres of music such as ‘Makosa’, ‘Lingala’, etc. These are expressions and products which ordinarily should have benefited from certain forms of IPR such as copyrights.

E. TRIPS in Southern Africa

Southern Africa is composed of Botswana, Lesotho, Namibia, South Africa, and Swaziland. Save for South Africa, with its very diverse industrial base, much

139 Article 4 of the Copyright and Neighbouring Rights Act.
140 T Kongolo, ‘Does the Congo’s Copyright and Neighbo ring Rights Law Conflict with the TRIPS Agreement?’ (1999) 2 J of World Intell Prop 311.
141 Ibid.
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of southern Africa is dependent on mining, agriculture, and tourism. As a member of WTO/TRIPS since 1995, Botswana has largely complied with its obligations under the WTO regime. Patents-related issues in Botswana are governed by the Industrial Property Act No. 14 of 1996 as amended in 1997.\(^\text{142}\) Appellations of origin and geographic indications are also covered under the 1997 legislation. A bill on Layout Designs of Integrated Circuits is under consideration. Botswana also enacted the Copyright and Neighbouring Rights Law in 2000. In terms of implementation and enforcement of IPRs, the patents office in Botswana is supervised by the Ministry of Trade and Commerce. The High Courts of Botswana have jurisdiction to hear cases of infringement of IPRs.

Lesotho is the only country in the continent that is completely surrounded by another country—South Africa. Lesotho is also the only LDC in the Southern Africa Customs Union (SACU). Despite this status, Lesotho benefits from the good rail, road, and air transport links with South Africa. Lesotho has various laws dealing with a variety of IPRs such as patents, trademarks, industrial designs, copyrights, utility models, unfair competition, and employee's inventions. The patents and trademarks offices in Lesotho issue patents and trademarks. Litigation on matters pertaining to IPRs are resolved by the High Court of Lesotho. The garment and apparel industry in Lesotho is its largest employer and this sector has grown largely as a result of trade preferences, such as the now-defunct Multi-Fibre Agreement (MFA).\(^\text{143}\) Indeed, more than 250,000 jobs were lost in Africa when the MFA was ended. Namibia also enacted a Copyright and Neighbouring Rights law, in 2002. This bill contains measures intended to implement the WIPO treaties.\(^\text{144}\) Namibia's trademarks law is also TRIPS-compatible. However, Namibia has not yet made the necessary changes to its patent law. As with Lesotho, the demise of the MFA agreement was a big blow to Namibia.\(^\text{145}\)

South Africa signed the TRIPS Agreement in 1994 and has since taken various steps to comply with its treaty obligations. Prior to the TRIPS agreement, South Africa's Patent Act No 57/1978 reflected the perceived national economic interests of South Africa in that it permitted compulsory licensing. That Act was amended by the Intellectual Property Laws Amendment No 38/1997 in an

obvious attempt to comply fully with the TRIPS Agreement. It must be noted, however, that in the wake of the HIV/AIDS crisis, South Africa amended its Medicines and Related Substances Control Act to allow the Health Minister to abrogate patent rights for pharmaceuticals, to issue compulsory licenses and to allow parallel imports of pharmaceuticals.

In addition, the government of South Africa in 2002 enacted the Electronic Communications and Transactions Act which contains strong provisions on service provider liability. The bill also contains anti-hacking provisions against the unauthorized access to data, or the unlawful manufacture of devices that circumvent technological protection measures on a specified computer system to protect data. Further, South Africa has enacted a TRIPS-compliant copyright law. However it may be argued that, despite this legislative initiative, there is an impression that widespread copyright piracy exists in South Africa. Indeed, the Business Software Alliance reported that US copyright holders lost an estimated $196 million in South Africa during 2004.

The impression of rampant piracy is largely fostered by the low number of convictions by the courts. Some of the problems implicated in the low level of convictions in South Africa include the lack of evidentiary presumptions of subsistence and ownership in copyright infringement cases. Beyond the issues of procedural law, some critics have argued that South African courts accord low priority to copyright infringement cases. This argument fails to take into consideration the political and economic challenges that South Africa has had to deal with, especially gun violence and gross economic disparities, since the demise of apartheid. Further, it has to be noted that the advancement of technologies that facilitate copying makes it exceedingly difficult to apprehend pirates.

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149 It is arguable that these figures, representing the full market price of each pirated copy, are somewhat inconsistent with common market practices. Publishers rarely sell copyright items at full market prices, especially to poorer countries. In addition, it is well known that prices of copyright items are usually reduced for a variety of factors. Accordingly, the figures estimated by the BSA represent the highest end of the market, a position inconsistent with common experience.

150 According to the International Intellectual Property Alliance, 'whereas in certain former Commonwealth countries, ownership by the plaintiff is presumed unless proof to the contrary is introduced, in South Africa a mere denial by the defendant shifts the burden to prove ownership to the plaintiff'. See IIPA Comments to the TPSC on IPR Provisions in AGOA, 13 October 2005. On file with the author.

151 There is evidence, however, that South African prosecutors are indeed very active and that more cases on infringement have gone to court.
Cultural factors may also influence attitudes to copying. At the economic level, legitimate products are not available to consumers, thus leaving pirates with an open lucrative market. These are real challenges that may be dealt with in constructive ways rather than the name-calling that has largely characterized Western attitudes to illegal copying and piracy in southern African countries.

Like South Africa, Swaziland has enacted a copyright law which contains WIPO treaty language on implementation. However, Swaziland has not yet amended its law on patents to comply with TRIPS.

**Part IV TRIPS in Africa: The Paths Not Taken**

From the foregoing, it seems clear that African states have stocked their statute books with various laws on IPR issues. At the continental level, African states are also making efforts to join the IPR bandwagon. For example, in addition to complying with TRIPS, African countries have developed a continental treaty on access to plant genetic resources. The Ministerial Council of the OAU has recommended that African States enact domestic legislation based on the draft law and that they develop a common African negotiating position on the revision of Article 27(3) of the TRIPS Agreement. Indeed, African members have shown significant willingness to grant broad exceptions to enable farmers to save and exchange seeds.

The model legislation includes an array of provisions impacting on intellectual property rights. A key provision in the draft legislation prohibits the collector of the biological resource from applying for any form of IPR over the resource, or over any community innovation, practice, knowledge, or technology, without the prior informed consent of the original provider. A potentially controversial aspect of the draft legislation is the provision removing recognition of patents over life forms and biological resources. How the draft legislation seeks to enforce this is unclear.

Another area where there has been some interesting international activity with potential relevance for African countries is geographic indications and

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appellations of origin. Under WIPO's initiative, a pilot project for the promotion of geographic indications has been launched. The first areas covered are Côte d'Ivoire, Burkina Faso, Cameroon and Guinea. In addition, WIPO has begun a process of identifying two or three products within the textile sector, capable of potential protection and development in four countries of Africa, namely Ethiopia, Ghana, Kenya and Nigeria, with a 'view to illustrating how intellectual property can contribute to wealth creation in small and medium-sized enterprises (SME)'.

But beyond the outbreak of IP laws, the second and perhaps more profound issue is whether the chasm between the promise of law and the redemption of that promise has been bridged. In this regard, it bears repeating that there is significant evidence that most African members of the WTO have enacted or are in the processes of enacting IP laws that are compatible with their minimum obligations under the TRIPS Agreement. Indeed all but three of the 30 LCDs in Africa are 'apparently already providing patent for such products despite not having to do until 2016 at the earliest'. However, it seems that there is a huge gap between what exists in the statute books and the practical realities on the ground. This may be a function either of a theoretically flawed thesis that laws by themselves give rise to 'development'; or, the anomalous situation in Africa may be a function of the adoption of the wrong laws. Whatever the cause, the result so far is the same: IP laws have not delivered on their promises.

For example, while it may be said that some African members of the WTO are cognizant of the legislative possibilities provided under TRIPS, there is little evidence that many have taken advantage of the flexibilities embedded in TRIPS. In particular, the provision for international patent exhaustion and the use of patented product without the consent of the patent holder for regulatory approval purposes, otherwise known as the Bolar exception, has not been generally utilized by African states. Interestingly, a majority of the patents issued in Africa go

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158 Named after the case of Roche Products Inc v Bolar Pharmaceutical Co (735 F 2d 858, Fed Cir, certiorari denied 469 US 856, 1984) in which the US Court of Appeal found infringement where, before patent expiry, the patented product was made and used in research to obtain data necessary for an application for approval of the generic drug. It is now settled law that Art 30 of TRIPS allows for exceptions to exclusive patent rights in the case of early working. In response to Bolar, the first early-working provision was introduced in the Drug Price Competition and Patent Term Restoration Act (1984) of the US, under which a generic producer is allowed to import, manufacture and test a
to medicines. Ironically, industrialized states are the most frequent users of compulsory licenses.\textsuperscript{159} It may therefore be argued that a majority of African countries have focused more on letter compliance than on a pragmatic use or deployment of TRIPS in the service of perceived national economic interests. It seems to be the trend that patent laws play marginal roles in the domestic policy making of African states. Perhaps African countries would need to learn some lessons from India and Brazil, two countries that achieved significant domestic competence in industrialization through a deft manipulation of the patent system.\textsuperscript{160}

The chasm between the promises of IP laws and industrial development in Africa may also be a result of institutional problems and challenges, rather than a demerit in the laws themselves. For example, in many cases, 'patent offices' in African countries tend to be located in the office of the Minister for Justice and are usually headed by a registrar who performs other functions unrelated to the business of running a fully-fledged patent office. Neither are the Patent Offices staffed with scientists, or other qualified officials. More worrisome, there is often an absence of organic relationship between the Patent Office and other relevant government departments or agencies.

At the macro-level, patent law and other IPR subjects are not often taught in the universities. Further, it is plausible that the gulf between IP laws and industrialization in Africa is a function of the low level of educational and scientific training in the continent. There is little question that technical progress can help stimulate the economies of poor countries.\textsuperscript{161} If technical progress is to be made in Africa, there would have to be strong focus on areas such as science education, and the training of technologists. In comparative terms, African countries have a pathetic number of researchers, scientists, mathematicians, etc working in them. The truth of the matter is that African states have not devoted significant resources to education, research and development. Creating world-class patents or copyrights offices in African state capitals cannot transform the continent into a net producer of innovations. Indeed, evidence shows that while industrialized states


\textsuperscript{161} E Malecki, Technology and Economic Development: The Dynamics of Local, Regional and National Competitiveness (2nd ed., Longman, 1997) at 192.
spend an average of 2.0 per cent of their GNP on R&D, Africa spends only 0.28 per cent of her GNP on R&D. An UNCTAD Report also shows that there are only 83 scientists and engineers per 1 million of the population in sub-Saharan Africa, while developing countries have an average number of 514 scientists and engineers per million of their population.

The low number of formally trained scientists in African countries would help account for the low number of patents issued to Africans in Africa. Statistics from the UN Development Program and US Patent Office reflect that in 2001: 2.5 technology patents per 1 million people in South Africa compared with 25 in Australia and 779 in South Korea. The analysis above clearly shows that IP laws are not enough in and of themselves to transform a politically unstable and economically dysfunctional continent into an innovative and technologically advanced society. Africa desperately needs to accelerate the pace at which human capital is built. It would be silly to expect modern IP laws and ultra-modern IP offices to be a catalyst for technological growth, when children are dying of preventable diseases, and adults cannot feed themselves, or live in a secure and peaceable environment.

Another area of disconnect between statutory provisions and practical realities is the enforcement of IP laws. The institutional framework for the administration of IPRs are woefully inadequate, and in some cases non-existent. Of course, it would cost a fortune to implement IPRs in poor African countries. Although WTO Agreements have provisions for technical assistance that member countries, upon accession, could theoretically utilize to create or improve domestic technical capacity to implement the agreements entered into, the reality is that such provisions are neither legally binding nor enforceable. Indeed, non-industrialized states have not received technical assistance and support from richer and more experienced member states. Given that TRIPS may be construed as

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163 World Investment Report, 1999 (Foreign Direct Investment and the Challenge of Development), UNCTAD.
165 WIPO, 'WIPO's Legal and Technical Assistance to Developing Countries for the Implementation of the TRIPS Agreement From January 1, 1996 to December 31, 2000', WIPO, Geneva.
a rent-seeking mechanism in poor countries, it would be immoral to ask impoverished countries of Africa to spend their scarce resources in enacting and implementing laws that would only exacerbate the divide between rich and poor countries. Indeed, as the World Bank has pointed out,

Given other pressing needs in education, health and policy reform it is questionable whether the LDCs would be willing to absorb these costs, or indeed whether they would achieve much social payoff from investing in them. Moreover, note that poor countries are extremely scarce in trained administrators and judges, suggesting that one of the largest costs would be to divert scarce professional and technical resources out of potentially more productive activities. Indeed, in many poor countries, devoting more resources to the protection of tangible property rights, such as land, could benefit poor people more directly than the protection of intellectual property.  

In the circumstances, the relevance of TRIPS for poor African countries is questionable. As noted by a Judge of the Court of Appeal of South Africa, ‘many of those living in the South reside in insulated communities cut off by a lack of infrastructure and education. They cannot benefit from IP. How can they understand the merits of its protection? … If one does not have bread, why should one protect gourmet recipes?’

In a just world, intellectual property rights would be made to accommodate the diverse range of stakeholders to ensure that the limited monopoly costs of the protection afforded do not outweigh the welfare gains. A credible way of achieving this is to ensure that only innovative products truly deserving of protection enjoy the benefits conferred by IPRs. At present, there is a palpable feeling across the African continent that IPR rights holders are over-compensated. It can hardly be doubted that while many industrialized countries of Africa have the necessary intellectual property laws in their books, such laws are under-utilized and barely serve any useful purpose save to satisfy powerful states that the poor states have ‘complied’ with their international obligations.

Since the emergence of economic liberalism in the 1980s, industrializing countries have been fed with the message that attraction of foreign direct investment (FDI), with the attached conditions of strong IPRs will automatically yield economic development. Yet, since the accession of African countries to the

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WTO, there is virtually no empirical work on the relations between IPRs and FDI in Africa.\(^{172}\) It is arguable that if TRIPS has any influence in Africa, such influence might be limited to the perceptions of foreign investors about the African environment generally rather than any direct relation between strength or lack thereof of IPRs with FDI.

Another touted benefit of membership in the WTO is the dispute settlement mechanism. While much scholarly ink has flowed on the WTO dispute settlement system, it should be noted that it is an extremely complex and expensive mechanism with little tangible benefit to poor African countries.\(^{173}\) African countries are only minimally involved in the WTO dispute settlement system.\(^{174}\) Indeed no African country has ever been a complainant in any dispute and in only six cases has an African country been a respondent. Of the six disputes, Egypt was a respondent in four, while South Africa was a respondent in two.\(^{175}\) Many African countries cannot afford the princely fees commanded by international experts in trade/IP laws.

In sum, it seems that the impact of TRIPS on a country would depend on the economy and current technological state of that country.\(^{176}\) For example, Egypt and South Africa have felt a noticeable impact on their drug policies, especially on the price of drugs and medicines, since the emergence of TRIPS. On the other hand, agrarian African countries such as Uganda and Tanzania can hardly point to any noticeable impact arising from the TRIPS Agreement. Second, despite adopting strong IP regimes, sub-Saharan African countries have attracted little FDI.\(^{177}\) Third, despite their dubious merits, desperately poor African countries are required to internalize the enormous costs associated with IPRs, especially patents\(^{178}\)

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\(^{175}\) Ibid.


while foreigners are the main beneficiaries of IPRs in those countries. Fourth, the small size of the African economy relative to other regional economies of the world has not been mitigated by strong IPRs. Only 1 per cent of US trade is tied to sub-Saharan Africa. The economy of the city of Los Angeles is larger than the entire economy of South Africa. Yet South Africa has the largest economy in Africa. Indeed, all sub-Saharan African countries, with the exception of Nigeria and South Africa, are classified as small economies.

Fifth, there is some evidence that since the advent of the WTO, there has been a stagnation of GDP in Africa. Recent statistics from the World Bank show that gross national income per capita in sub-Saharan Africa actually declined by 0.2 per cent from 1990 to 2001. Life expectancy has decreased over the past two decades. Poverty levels have increased. Africa's share of world trade and FDI has decreased. Despite the scramble to enact IPR laws across the continent, there is little or no funding for research on diseases that afflict Africans. In fact, most of the medicines in Africa for the treatment of tropical diseases have no relationship with the institutionalization of modern patent laws. According to MSF [Médecins Sans Frontières],

\[n\]eglected diseases which threaten the lives of tens of millions of people, mainly in Africa, accounted in 2002 for less than 0.001% of the $60–70bn spent a year on medical research throughout the world. Most of the treatments now available in Africa were devised during the colonial period and destined for use by the white population, or else developed by the US Army with the aim of protecting its soldiers.

Conclusion

What, then, is the way forward? Perhaps it is time for African countries to focus on those industrial and economic activities in Africa that would best respond to certain types of IPR. For example, many African state economies are largely agrarian. In this regard, it would be sensible to adopt and implement IP regimes that are proven to be responsive to agriculture and agri-based industries. For example, a considerable number of African countries such as Kenya, Ethiopia,
etc are known to produce high-quality coffee. Others such as Mali and Sudan produce world-class cotton. Nigeria, Côte d’Ivoire, Ghana, etc produce some of the finest cocoa in the world. These countries have been known to have significant problems marketing their produce. An IP regime such as certification marks could have resonance and relevance to such producers of high quality, niche-market agricultural produce. Similarly, some African countries produce distinctively designed cloths such Ghana’s Kente, Nigeria’s Adire, etc. It would be useful for such countries to devise and implement IPRs that are particularly responsive to those niche markets.

As a net importer of technology, there is no question that modern IPR laws per se have not worked for African countries. We may therefore need to reject a ‘one size fits all’ mentality when it comes to IPRs. African countries would do well to reflect critically on what they need in terms of technology, how such technological needs are to be addressed via the instrumentality of IPRs, and how best to create a local critical mass in those identified niche areas of need and competence. For example, countries such as South Africa, with an emerging global reputation in wine-making would benefit from a functional regime on appellations of origin and geographic indications. On the other hand, countries such as Nigeria, with an emerging home movie industry would benefit a lot from an efficient and responsive copyright regime. Africa can no longer remain a dumping ground for both ill-considered ideas and irrelevant technologies.

Ultimately, it has to be noted that development economists have long discarded the notion that more laws are more synonymous with more development. Economic and cultural life cannot be reordered merely on the diktat from a Tsarist ukase. The creeping notion that the existence of rigorous IP laws on the statute books of nations and the construction of ultra-modern IP offices is a reliable indicator of their level of technological and economic development is simply silly. The rash of IP laws in Africa may be of intellectual or academic interest to lawyers and policy makers but the facts show that those laws have not transformed the lives of ordinary Africans. The current state of IP laws in Africa, that is, theoretical compliance but practical public indifference to actual implementation, may be characterized as one form of ‘passive resistance’.

Chapter 7: Impacts in Africa

IP laws in Africa have largely remained fig leaves for the inadequate concealment of serious economic and socio-political challenges in the continent. The tragedy here is that if the multilateral arrangements fail, there is a real prospect of a return to bilateral relationships with its grave implications of a divide-and-rule pattern; \(^{187}\) a method of governance that Africans are painfully familiar with. \(^{188}\)

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