On the impact of TRIPS on ‘least developed countries’: a tale of double standards?

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FOREWORD

As the dynamics of economic integration keep working to alter existing equilibria in international trade relations, it seems useful that the ‘timeless’ debate about how and with what effect the rules governing intellectual property rights (IPRs) intervene in relations between developed and developing countries, be focused on the *least* developed countries (Article 66 TRIPs). This is not simply because said countries are obviously in the direst need to ‘catch up’, but also because they constitute today’s most relevant frontier of that international – better: geopolitical – trade competition issue that still divides the ‘two worlds’ sorted out from the colonial era.

Indeed, the qualification itself of countries as ‘developing’ is increasingly subject to continuous revision in the face of the growth of economies like China’s, India’s, Brazil’s and others’. And it seems all too likely that the consequent new balance of power will act as a driving factor of decline of ‘unilateralism’ in international relations – even as concerns present intellectual property (IP) international regulation, largely framed by a traditionally dominant (even diplomatically boosted) ‘Washington consensus’. As Graham Dutfield has asked, ‘Will the United States government be so pro-patent when the proportion of domestic patents granted to Indian and Chinese inventors increases dramatically?’¹

However, the hypothesis that the progress of international economic integration might *per se* ensure a general ‘rebalancing’ of the traditionally dominant IP law patterns is far from granted. Even the present global financial and economic crisis might play ambiguously on the emerging countries’ assessment of their own geopolitical interests and consequent IP policies. Will they act as drivers of the progress of the less developed, or will they ‘forget their past’ and coalesce with the developed world in maintaining, and indeed expanding, the scope of the deep ‘asymmetries’ of terms of trade, as also enhanced by existing international (TRIPs, in particular) regulation of IP, versus many countries (African, first and foremost, but not only) still struggling to achieve a reasonable economic and technological standard in vital societal sectors?

In proceeding to my analysis, I will try to avoid the trap of generic politically inspired discourse on TRIPs by calling the readers’ attention to two specific normative profiles of the Agreement which draw less attention than deserved, and that can work to aggravate the LDCs’ weak position, especially as concerns the sharing of

1. G Dutfield, ‘Knowledge Diplomacy and the New Intellectual Property Fundamentalism’, in J Malbon and C Lawson (eds), *Interpreting and Implementing the TRIPS Agreement – Is it Fair?* (Edward Elgar, Cheltenham UK 2008) 31, at 32.

advanced technologies. After examining such profiles, I will briefly attempt to outline a couple of ‘redeeming’ reforms of the present TRIPs text: reforms that I deem compatible with the overall system of the Agreement’s basic principles and objectives.

1 ONE DEADLINE FITS ALL? IT DIDN’T FOR ‘US’

As is well known, the TRIPs Agreement (Article 65) has obliged developing countries to apply its provisions within a *short period* (very short from a historical perspective: five years from the signing of the WTO Agreement) that is furthermore *fixed and equal* for all – save for a limited (from a historical perspective) delay of a further five years (Article 66) in favour of the least developed countries – this term being further extended in 2001 in Doha to 2016 as concerns the rules on pharmaceutical product patents. (However, the Council for TRIPs may, upon duly justified request by a least-developed country member, accord further extensions.)

Let us dwell for a while on the geopolitical significance of this unification of models and time limits for compliance – particularly as regards the latter. In my view,² it reflects a double standard in the framing of the rule: since, by putting a short *and fixed* term to developing countries to toe the line with Western IP law standards, today’s industrialized countries ‘have done unto others’ what they themselves refused be ‘done unto them’ in the initial stages of their own industrial development.

It is an undeniable fact, indeed, that contemporary established powers *themselves* determined, based on *their own* stage of development, how and when to apply strong models for the protection of intellectual property. For example, at the beginning of the nineteenth century the German states were considered by France as havens for plagiarists. And Germany introduced legislation against unfair competition between the end of the nineteenth and the beginning of the twentieth centuries, when it recognized that it could afford the ‘luxury of fairness’.³ May I also recall that before its rapid industrial reconstruction after World War II, Japan was famous for its eagerness to copy almost anything new produced in Western countries.

As for the US, current aggressive champion of the need for world-wide stringent protection of intellectual property, Professor Jane Ginsburg⁴ reminds us that, as concerns copyright, they grew and flourished, till the end of the nineteenth century, as a ‘pirate nation’, i.e. free riding on the works of English and Irish authors (Dickens’ exasperated protests have remained famous). This continued till the end of the nineteenth century, when the American publishing industry produced ‘enough’ successful *own* authors to ‘sell’ even on the international market (just think of Beecher Stowe, Twain, Hawthorne, Melville, James, Thoreau, Emerson, Whitman, Alcott, Fuller,

2. G Ghidini, *Innovation, Competition and Consumer Welfare in Intellectual Property Law* (Edward Elgar, Cheltenham 2010) Appendix.

3. ‘Die deutsche Industrie steht heute auf einer solcher Höhe, sie ist so reich und so kräftig, dass sie sich den Luxus der Ehrlichkeit gestatten kann’, said the distinguished German jurist Wassermann, in a speech made in Berlin, in 1912, at the constitution of a commission for the study of indications of origin (source: L Coquet, *Les indications d’origine et la concurrence déloyale* (Paris 1913) 317; emphasis added).

4. JC Ginsburg and JM Kernochan, ‘One Hundred and Two Years Later: The U.S. Joins the Berne Convention’, in RP Merges and JC Ginsburg (eds), *Foundations of Intellectual Property* (West Academic, New York 2004) 298 *et seq.*

etc.),⁵ thereby eventually accepting the principle of reciprocal international copyright protection. But please note: even under those circumstances, the Chace Act 1891, which acknowledged foreign authors' and publishers' copyright, and which remained in force for decades, granted such protection on condition that foreign texts were printed in the US, banning the import of editions published abroad.⁶

(The less said about Italy the better. Suffice it to say that while the industries of my country's northern regions clamour for protection against counterfeit goods, a huge amount of such goods is produced and/or distributed by 'entrepreneurs' rooted in southern regions).

In the final analysis, those 'one-sized' deadlines, willy-nilly accepted by developing countries for applying Western models of IP protection, objectively risk 'sticking' the same countries to the disadvantaged economic situation mentioned above: precisely because the value of high-tech products that, in international exchanges, flows from the protection of IPRs mostly relates to the production of 'the others'.

'No, the contrary is true!', outright supporters of the present system proclaim. Quick legal unification tends to speed up recourse to R&D by developing countries, they say. These optimists argue that a healthy lash of the whip does help 'backward' countries to escape their long dependence on the primary sector, as well as the clutches of technological stagnation. It is a serious objection, certainly convincing when it refers to the 'innovation divide' that still characterizes the relations between countries which have, however, attained a reasonable level of development – take, e.g., the technological gap existing in several sectors between Northern European and Mediterranean European industrial systems. But as regards relations between developed and developing countries in the strict sense, that objection draws little comfort from experience; and in any case the historical reality contradicts its underlying assumption.

Indeed, not only has the prophecy of the healthy whiplash come true for a limited number of developing countries whose levels of industrial investment have enabled them to marshal sufficient resources to give birth to technically complex productions, but, even more significantly, as hinted, is a distinct factual observation: the countries in question have reached or are on the verge of reaching that capacity also thanks to a previous *refusal* – and not a previous *acceptance*! – of strong IPR models.

In short, these emerging technologically proficient developing countries⁷ have extensively done what today's many industrialized countries did in the 1800s and part of the 1900s when they effectively ignored or got around an effective enforcement of IPRs *until* their own industries were no longer in their infancy. By contrast, these same countries started effectively to respect and enforce IPRs *as* they, in turn, became producers of advanced technologies (often acquired through imitation) and it became in their own interests to adopt a policy of safeguarding intangible assets in domestic and above all international trade.

Così fan tutte in the initial stages of industrial development.

5. See also PK Yu, 'The Global Intellectual Property Order and Its Undetermined Future' (2009) 1(1) *The WIPO Journal* 13.

6. See B Bugbee, *Genesis of American Patent and Copyright Law* (Public Affairs Press, Washington DC 1967) 43–4. This is substantially what the Venetian authorities did in the late fifteenth century, i.e. granting privileges to printers aimed at fostering the growth of the local publishing industry after the emergence of the Gutenberg revolution.

7. S Basheer and T Prashant Reddy, *The 'Efficacy' of Indian Patent Law: Ironing Out the Creases in Section 3(d)*, scripted, Vol. 5, Issue 2, August 2008, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1086254.

2 THE FALL OF THE (INDUSTRIAL) 'LOCAL WORKING REQUIREMENT': WHO GAINS, WHO LOSES

The second normative profile of TRIPs I refer to highlights a relevant development introduced by the Agreement in the domain of patents. It concerns the repudiation, expressly sanctioned by Article 27.1 of the TRIPs Agreement, of the historical principle (enshrined in the Paris Convention 1883, Article 5A.2, and adopted by the vast majority of the emerging industrial States of the nineteenth century) that allowed Member States granting a patent to request that said patent be (industrially) worked, i.e. manufactured, *in situ*.⁸ The obvious objective, and rationale, of the principle was the fostering of technology sharing and thus the acceleration of domestic industrial growth.

I said, historical principle. Long before the 1883 Universal Convention, it had characterized the very early stages of Western economic development. Already in late medieval and Renaissance Europe, privileges and franchises, the ancestors of modern patents, were issued primarily to induce the transfer, even by mere import, of foreign technologies. Thus, under Elizabeth I, a monopoly right was granted to introduce the manufacture of hard white Spanish soap, and another for the manufacture of saltpetre, a component of explosive powders previously imported from Antwerp.⁹ This policy was shared *inter alia* by early American legislators. Addressing Congress on 8 January 1790, George Washington called for legislative attention to IP, 'giving effectual encouragement, as well to the introduction of new and useful inventions from abroad, as to the exertions of skill and genius in producing them at home'.¹⁰

Let us now return to today's economic and legal scenario. I agree that within the contemporary framework of trade relations *between developed countries* – i.e. countries that have already achieved industrial maturity and are endowed with sufficient

8. Article 5A of the Paris Convention, incorporated in the TRIPs Agreement via article 2.1 TRIPs, requires a patentee to produce the patented goods in the country where protection is sought if the country issuing a patent so desires and treats a failure to work the patent locally as an *abuse* of the patentee's exclusive rights. On the other hand, article 27.1 TRIPs makes 'patent rights enjoyable without discrimination as to the place of invention [...] and whether products are imported or locally produced'. The need to reconcile these two provisions has led scholars like J Straus ('Implications of the TRIPs Agreement in the Field of Patent Law', in F-K Beier and G Schricker (eds), *From GATT to TRIPs*, in (1996) 18 ICC 204) to assume that WTO Members can no longer consider patentees' failure to work a patent locally as a *per se* abuse. They would commit such abuse (and thus become subject to a compulsory licence under the same article of the Paris Convention) *only* if they should undersupply the country that granted the patent, that is, they would not provide, even by mere exports, enough products to the country itself. Albeit not universally shared (see, for example, JH Reichman and C Hasenzahl, *Nonvoluntary Licensing of Patented Inventions: Historical Perspective, Legal Framework under the TRIPs Agreement, and an Overview of the Practice in Canada and the United States*, Draft, UNCTAD/ICTDS, 2002, II, C.2), even such an interpretation – upholding the repeal of the local working requirement – can be reconciled with our argument and thesis. The former indeed provides for a general rule, while the latter refers to a limited exception in the meaning of article 30 TRIPs.

9. J Federico, 'Origin and Early History of Patents', in (1929) 11 J of the Pa. Off. Soc. 293–7.

10. PA David, 'The Evolution of Intellectual Property Institutions' in A Aganbegyan, O Bogomolov and M Kaser, *System Transformations: Eastern and Western Assessments (Proceedings of the Tenth Congress of the International Economic Association)*, vol. I (Palgrave Macmillan, London 1994).

financial means to invest in technology-driven competition – the repudiation, at the very end of the twentieth century, of the local working requirement, after over a century of honoured service, represents a convincing anti-protectionist stance. At *that* stage of development, indeed, the requirement implied greater costs in terms of freedom of industrial establishment than benefits in terms of local acquisition of technology.¹¹

I doubt, however, that this equally applies to relations between such countries and developing countries. In this context, the abandonment of the requirement to work the patent locally curtails the *spill-over* of advanced technological skills, and hence the sharing by least developed countries of both the patented technologies and the know-how that typically accompanies them. Thus, at the stroke of a pen, the international protection of IPRs has dropped a decisive instrument for supporting developing countries, and especially LDCs, in their efforts to bridge the gap with advanced countries: an instrument, repeat, that industrially advanced countries largely employed in the past, precisely to enhance, to their own benefit, the sharing of technological knowledge. See, for example, Article 53 of the Italian Patent Act in force *till 1996*, stating that 'the import into or sale in the State of objects produced abroad does not constitute working of the invention'.

Again, a double standard: even in the light of two further remarks.

First, at the time the TRIPS Agreement began to be negotiated, both the normative features we have just discussed were no longer of interest for the already developed countries. On the contrary, establishing a standard short term for enacting the TRIPS 'Western-style' standards and abolishing the local working requirement altogether provided a dual benefit for some countries: (1) as concerned their mutual (developed to developed) relations, the establishment of a level playing field for innovation-oriented competition between countries that had already reached the economic (and financial) stage that enables competition through innovation; (2) as concerned their relations with DCs, the enactment of legal solutions, such as the two we have just discussed, which, in their synergy, would work for 'sticking' said countries – LDCs in particular – to their historical (substantially colonial) basic status of importers of advanced (patented) technology and exporters of raw or semi-processed materials and low-tech local products.

Second (or in fact first?): until WWII, the stages of industrial development were determined by national governments that exercised effective power over economic policies. This no longer holds in a contemporary scenario (in which the TRIPS Agreement is also rooted), where economic sovereignty – and sometimes more than that – lies to a significant extent in the hands of multinational enterprises which are typically insensitive, in the absence of specific political or/and economic motivations, to supporting the efforts of single developing nations to fill their technological gap.

3 TWO SIMPLE 'REDEEMING' REFORMS

The adverse impact on LDCs of the two normative profiles we have discussed can realistically be overcome only by solutions *de lege ferenda*, i.e. explicit reforms of the present legal framework. Indeed, the norms' text (Articles 65 and 66, as integrated by

11. As a matter of fact, the repudiation of the principle had for a long time been advocated by a few countries, first and foremost the US, as a means of enhancing 'industrial freedom' (freedom of choice of industrial setting) at an international level.

the Doha resolution) and Article 27.1) seems so clear and univocal that I do not see any reliable ‘wiggle rooms’ or ‘flexibilities’ allowing redeeming interpretations. Thus my effort will focus on outlining reforms to the TRIPs text which might efficiently prevent the distorting effects of present regulation while complying with the Agreement’s system of principles and objectives: in particular those set forth in Part I, General, Articles 7 and 8.¹²

As ‘basic principles’ – also highlighted by WIPO’s in-progress ‘Development Agenda’¹³ – these norms should also guide the definition of type and scope of those ‘measures’ that the system of TRIPs allows Members to adopt when the need arises to conciliate IPRs holders’ ‘legitimate interests’ with third parties’ [*equally!*] ‘legitimate interests’ (Article 30).

Thus, as concerns the ‘time schedule’ for complying with TRIPs’ substantive rules, an incisive and efficient reform might envisage that LDCs (whose official list is of course ‘fluid’) are bound to adopt said rules not at a standard, one-size-fits-all date, but on an individual basis, so to speak, i.e. as each different country effectively reaches a certain level of economic development, expressed by a *bundle of objectively measurable indexes*, such as per capita income, basic infrastructural assets, export/import balance, gross national product (GNP) and other significant ones.

As to the faculty of reintroduction of the local working requirement (in an industrial sense), Articles 30 and 31 of the Agreement come into play as concerns, respectively, the possibility to ‘provide limited exceptions to the exclusive rights conferred by a patent’ (‘provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner’), and the possibility of allowing ‘other uses’ (‘other’, i.e. different from the measures envisaged in Article 30: see official note to Article 31) ‘of the subject matter of a patent, without the authorization of the right holder, including use by the government or third parties authorized by the government’ – thus: ‘Government use’ and ‘compulsory licenses’ (Article 31).

In this framework, I submit the following argument: that the imposition of a local working requirement inflicts a *much more limited restriction* on the patentee’s rights and freedom of action than that stemming from a compulsory licence (or government use). The former only weighs upon the choice between exporting and producing *in situ*, leaving *all* other faculties of the patentee fully intact – including the choice between producing directly or through a local licensee of her own trust and appointment. In fact, quite unlike the local working requirement, the imposition of a compulsory licence (or government use) ‘reduces’ the patentee’s position to little more than that of a simple rentier.

12. Art 7: ‘*protection and enforcement of IPRs*’ is not an end in itself, but rather a means to ‘*contribute to the promotion of technological innovation and to the transfer and dissemination of technology*’ (emphasis added); and then see, in connection, art 8 ‘Members may, in formulating or amending their laws and regulations, adopt measures necessary ... to promote the public interest in sectors of vital importance to the socio-economic and *technological development*’ (emphasis added).

13. See in particular proposals and recommendations Nos 19, 25, 28 by WIPO’s Provisional Committee on Proposals Related to a WIPO Development Agenda (Fourth Session, 11–15 June 2007, at <http://www.wipo.int/ip-development/en/agenda/pcda07_session4.html>. Further references in A Kur and H Grosse Ruse-Kahn, ‘Enough Is Enough – The Notion of Binding Ceilings in International Intellectual Property Protection’, in *Max Planck Papers on Intellectual Property, Competition and Tax Research*, No 09-01, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1326429>.

In short: in more exists less. If the system of TRIPs explicitly allows the compulsory transfer to a third party of the exercise of practically all basic patentee's rights, affecting patterns of production, distribution, pricing – and this, albeit in exceptional cases, even without requiring a previous attempt to negotiate a contractual licence with the patentee (Article 31(b)) – why shouldn't the same system equally allow LDCs to request a local working requirement, as 'a limited exception to the exclusive rights' of the patentee (Article 30)? So limited, I insist, that it would leave in the patentees' hands, unlike compulsory licences, the exercise of all patent holder's fundamental faculties basic – just limiting the option to 'work' the patent by means of mere export. (And limiting it not indefinitely: just until the objective indexes recalled above will certify that the country is no longer 'least developed'.)

May I further, and conclusively, hint at some further reasons in favour of the proposed reform.

First, allowing LDCs to reintroduce the local working (in the industrial sense, i.e. of manufacturing) requirement might be highly supportive, as suggested, of those countries' *industrial policies* aimed at 'catching up' with innovation even beyond those socio-economic and humanitarian emergencies that usually justify the granting of compulsory licences and government use. Thus LDCs would profit from the chances offered by the reintroduction of the local working requirement in other sectors of high relevance for overall economic development – e.g., production and saving of energies, cost-saving construction techniques, transportation and logistics, etc.

Second, as concerns the effective technological 'spill-over' effect, I am convinced that patentees might more eagerly, hence more 'abundantly' in quality as well as in quantity, 'keep feeding' *their own* local plant, or *their own* local licensee with the know-how associated with (but not included in) the patent, and quite often useful for the best implementation thereof. Indeed, it seems all too reasonable to assume that this would much more likely occur in a cooperative context than in cases where, by contrast, patentees would be obliged to surrender their patent to an unrelated, much less controllable (even *vis-à-vis* re-export to affluent markets) licensee, imposed by a foreign government.

Third, the basic costs of working the patent would accrue to patentees and their licensees rather than on the local governments or government-subsidised local firms.

Thus, I finally submit that the overall benefits associated with the reintroduction of the (industrial) local working requirement – fulfilled directly by patent holders or by licensees appointed by them – might often significantly surpass those expected by LCDs' straight recourse to compulsory licences or 'Government use'.