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## The World Trade Organizations' Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement: The Compelling Challenges for Developing and Less Developed Member Countries-Implementation and Enforcement

Alphonso B. Kassor

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**THE WORLD TRADE ORGANIZATION'S TRADE  
RELATED ASPECTS OF INTELLECTUAL PROPERTY  
RIGHTS (TRIPS) AGREEMENT: THE COMPELLING  
CHALLENGES FOR DEVELOPING AND LESS  
DEVELOPED MEMBER COUNTRIES-IMPLEMENTATION  
AND ENFORCEMENT**

BY ALPHONSO B. KASSOR

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## INTRODUCTION

The general underlying objectives of the Trade Related Aspects of Intellectual Property (TRIPS) Agreement are to reduce the distortions and impediments to international trade and promote effective and adequate protection of intellectual property rights and facilitate the transfer and dissemination of technology. However, the endless negotiation or application for special status or request for modification, in accordance with relevant provisions of the Agreement (the wiggle room and grey area factors) continue to impede the true implementation and enforcement of TRIPS. These legal mechanisms used by mostly less developed member states have continued to speak to the relevancy of the agreement. Although these factors are legal, depending on interpretation, they have tremendously influenced the original intent and spirit of the agreement since coming into force on January 1, 1995.

A coalition of the major industrialized countries, prominently led by the United States, with over 90 percent ownership of intellectual property rights, aggressively campaigned for a universally substantive negotiated agreement to enforce the rights of owners. The motivation to carve out these specific owners' rights and elevate them to an international level, grew out of frustration with the inability of the rules under the General Agreement on Tariff and Trade (GATT) to protect intellectual property rights worldwide, which is critical to the international trading of goods and services. These industrialized nations widely recognized that, at the inception of the general agreement on trade and tariff in 1947, "less than 10 percent, for example, of United States exports, were tied to intellectual property when the GATT was negotiated."<sup>1</sup> According to them, the practice was contributing to the free-riding practices and creating distortion of fair trade perpetrated by developing and less developing countries. Moreover, the World Intellectual Property Organization (WIPO) conventions "did not attempt to establish the sole set of norms for the protection of intellectual property rights. These conventions limited state discretion to requiring a vague national treatment."<sup>2</sup>

Against this backdrop, GATT contracting parties' multilateral trade meeting, known as the Uruguay Round negotiations in Uruguay, TRIPS was put on the table. Finally, "the TRIPS agreement was adopted in Marrakesh, Morocco in April, 1994."<sup>3</sup> Articles 7 and 8 of the agreement were adopted with minimal modifications from proposals submitted by developing and less developed countries.

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<sup>1</sup> M.B. RAO & MANJULA GURU, UNDERSTANDING TRIPS: MANAGING KNOWLEDGE IN DEVELOPING COUNTRIES 21 (2003).

<sup>2</sup> UNCTAD-ICTSD, RESOURCE BOOK ON TRIPS AND DEVELOPMENT 19 (2005).

<sup>3</sup> RAO & GURU, *supra* note 1, at 29.

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## I. HISTORICAL PERSPECTIVES OF THE TRIPS AGREEMENT

The need for a retrospective account of the evolvement of TRIPS is paramount. TRIPS evolved out of the “Great Conventions that have governed intellectual property rights since 1890: that is, the Berne Convention for the Protection of Literary and Artistic Works (1971); the Paris Convention for the Protection of Industrial Property (1967); the Universal Copyright Convention (1952), and the Rome Convention for the Protection of Performers, Phonograms, and Broadcasting organizations.”<sup>4</sup>

The inception of TRIPS was borne out of the need by industrialized countries to strengthen the protection of intellectual property rights. The TRIPS Agreement, with minimal exceptions, is widely noted as the most comprehensive international instrument on intellectual property rights.

The United States feared it would be very difficult to successfully discuss issues relating to higher standards for intellectual property protection at forums like the WIPO (administers the Berne and Paris Conventions); the United Nations Educational, Scientific and Cultural Organization (UNESCO) (administers the Universal Copyright Convention); and the United Nations Conference on Trade and Development (UNCTAD), without strong resistance from developing countries. The latter constitute majority membership of these organizations but exert less effective power at GATT. Hence, the United States decided to flex its muscle as an influential player in GATT by bringing the issue of intellectual property protection as a trade-related agenda topic at GATT’s September 1986 meeting in Punta del Este, Uruguay, most popularly referred to as the Uruguay Round. Prior to the Uruguay conference, “intellectual property rights were considered as an obstacle to free trade.”<sup>5</sup>

To a great extent, the intellectual property regime was more of an inconsistent patchwork of standards. The great conventions, listed supra, lacked teeth, and had no mechanisms in place to impose sanction or address non-compliance. A 1988 WIPO study revealed that ninety-eight signatories to the Paris Convention only adopted or implemented intellectual property laws that were in their social, economic, or national welfare interest:

Forty-nine excluded pharmaceutical products from protection, forty-five excluded animal varieties; forty-four excluded methods of treatment, forty-four excluded plant varieties, forty-two excluded biological processes for producing animal or plant varieties, thirty-five excluded food products, thirty-two excluded computer programs and twenty-two excluded chemical products.<sup>6</sup>

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<sup>4</sup> *Id.* at 19.

<sup>5</sup> Emir Aly Crowne, *Fishing TRIPS: A Look at the History of the Agreement on Trade – Related Aspects of Intellectual Property*, 2 CREIGHTON INT’L & COMP. L.J. 77, 79 (2011-2012).

<sup>6</sup> *Id.* at 78.

Moreover, according to an excerpt from an expert commentator, intellectual property protection rights became a trade related issue based on the following reasons:

Piracy of intellectual property products had become one of the central concerns in negotiations on world trade. A concern where both the figures for projected losses and the rhetoric of condemnation were surprising to newcomers. The Business Software Alliance reported that the software industry sustained losses in excess of \$15 billion in 1994. The Recording Industry Association of America claimed that in Thailand alone trade losses in 1994 amounted to \$2.245 billion. The International Intellectual Property Alliance (IIPA) reported that copyright piracy in 36 countries had resulted in \$8 billion losses to US companies in 1993. The industries under the auspices of the IIPA lost an estimated \$15 to \$17 billion due to international piracy in 1993.<sup>7</sup>

At the Uruguay Conference, the United States led the industrial world in effectively bullying developing and less developed countries and others to the GATT-WTO negotiation table on trade-related issues. The United States “threatened to impose multilateral/unilateral sanctions under Section 301 of its 1974 Trade Act and the European prototype, Council Regulation 264/84, if these countries rejected discussion and agreement to protect intellectual property rights.”<sup>8</sup>

At the GATT-WTO Ministerial Conference in Uruguay, the developing and less developed countries were very concerned, to say the least, and reluctant to participate. They largely viewed the United States proposed agenda item as an attempt on the part of the developed countries to institute excessive protection of intellectual property rights. In developing and less developed countries’ views, “over protection of intellectual property rights could impede the transfer of technology and increase the cost of agricultural and pharmaceutical products.”<sup>9</sup> These commodities are heavily relied upon by developing countries for the day-to-day well-being of the populace. The developing and less developed countries proposed, among other things, the need to maintain flexibility in implementing economic and social objectives under the TRIPS agreement.

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<sup>7</sup> Kingsley K.K. Ampofo, *Enabling Implementation of Intellectual Property Protection in Developing Countries Under the TRIPS Agreement: The Role of the World Bank and the World Trade Organization*, 20 U. GHANA L.J. 26, 36-37 (1996-1999).

<sup>8</sup> Crowne, *supra* note 5, at 85.

<sup>9</sup> *Id.* at 87.

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With the inception of the TRIPS Agreement to protect intellectual property rights, a new phenomenon in international trade, a resolution regarding pharmaceutical products was adopted (the Doha Declaration) at the fourth session of the World Trade Organization's Ministerial Conference in Doha, Qatar in November of 2001. This resolution permitted mostly developing countries to invoke paragraph 6 of the agreement to support public health. The Public Health Declaration states "each member has the right to grant compulsory license(s) and the freedom to determine, for the purposes of issuing a compulsory license, what each member regard as constituting a national emergency or other circumstances of extreme urgency." The Declaration further states: "the TRIPS Agreement does not and should not prevent members from taking measures to allow national governments to apply various legal measures such as 'compulsory licenses' in situations of public health crises."<sup>10</sup> The compulsory licensing procedure allowed a third party to manufacture certain cheaper generic drugs on behalf of a developing country lacking manufacturing pharmaceutical capacity.

The less developed countries have not always looked kindly on TRIPS. However, under the terms of the WTO, GATT's successor organization, a commitment was made to lower trade barriers and eliminate regimes of unilateral trade sanctions for members who would ratify the TRIPS Agreement. The ratification of the TRIPS Agreement was a requirement for membership in the WTO. Hence, "TRIPS sounded very attractive to the ears of the less developed countries."<sup>11</sup>

Moreover, to address the multiple concerns of the developing and less developed countries toward the TRIPS Agreement, a transitional period provision was made part of the TRIPS Agreement to address the issues raised by developing and less developed countries relative to the implementation of the Agreement.

The most striking elements of the TRIPS Agreement are Articles 7 and 8. These key component areas give legitimacy to the Agreement, and impact all other areas of the Agreement. As a core provisional structure of the Agreement, these articles are systematically resorted to in the implementation and interpretation of the Agreement. The two all-important articles are categorized as 'Objectives and Principles' of the treaty respectively:

Article 7- Objectives

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of the rights and obligations.

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<sup>10</sup> Marla L. Mellino, *The TRIPS Agreement: Helping or Hurting Least Developed Countries' Access to Essential Pharmaceuticals?* 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1349, 1359 (2009-2010).

<sup>11</sup> Crowne, *supra* note 5, at 80.

### Article 8 – Principles

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their social-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
2. Appropriate measures, provided that they are consistent with the provisions of this Agreement may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.<sup>12</sup>

The text of Articles 7 and 8 was essentially adopted from the draft language of developing countries led by India and Brazil. It was directly incorporated (with limited modifications) into the final Draft Agreement as an appeasement to disabuse developing and less developed countries of their perception, i.e., that the TRIPS Agreement was essentially a manipulative instrument of the developed countries to impede trade and the transfer of technology. Articles 7 and 8, most importantly, provide interpretative guidance to all members and institutions of the WTO.

According to Peter K. Yu, Articles 7 and 8 under the TRIPS Agreement can be interpreted in number of ways. They can be seen as:

- a. a legal instrument- used in the interpretation and implementation of the TRIPS Agreement
- b. an economic instrument- used to facilitate innovation, technology transfer, knowledge production and promotion of social and economic welfare and development
- c. a political instrument that provides much needed balance to make the Agreement a legitimate bargain between developed and less-developed member countries
- d. a structure that bridges the gap between the TRIPS regime and other international regimes, and
- e. a global instrument that has sowed the seeds for the development of new international norms both within and without the TRIPS regime.<sup>13</sup>

The Uruguay Rounds were finally concluded in Marrakesh, Morocco in April, 1994. The conclusion of the TRIPS Agreement did not address the skepticisms the developing countries held about implementing the “often ambiguously worded substantive rules of the Agreement.”<sup>14</sup>

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<sup>12</sup> Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 Hous. L. Rev. 979, 1000-10 (2009-2010).

<sup>13</sup> Yu, *supra* note 12, at 1046.

<sup>14</sup> Slade, *supra* note 13, at 986.

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The 2001 Doha, Qatar Declaration of the WTO relative to TRIPS and public health was a clear manifestation of the need to clarify the many ambiguities the TRIPS Agreement contains. The Declaration further underscores the need that “intellectual property protection can never prevail where doing so undermines other development objectives.”<sup>15</sup>

Article 8, as an interpretative tool, reinforces the common practice indicated above that “members have the right to favor other policies should a national situation dictate. In the realm of public health, social, domestic and national security need, members have the obligation to refrain from questioning acts of other members as provided for by the provisions under these articles.”<sup>16</sup>

## II. THE HURDLES OF COMPLIANCE

As previously discussed in other areas, during the Uruguay round of negotiations of the TRIPS Agreement, there was a serious disagreement between the developed and developing countries regarding the inclusion of intellectual property rights in the then GATT framework of trade negotiation. The developed countries successfully bargained to embody intellectual property within the WTO system. This was a smart move to obtain legal international backing. On the other hand, developing countries were cognizant of the enormous burden placed on them for decades to come. Worst of all, the less developed countries (LDCs) were not well represented during the Uruguay round of negotiation. “Out of about 31 LDCs, only one took an active part in the negotiation of the TRIPS Agreement –Tanzania in East Africa.”<sup>17</sup> Moreover, the LDCs were put in a very difficult dilemma as discussed early in other parts of this work. Except for certain differential and special treatment provided for under Articles 66 and 67, there is only one way of participating in WTO. The WTO imposes compliance with TRIPS to become a member of the global trading system under the aegis of WTO. There is no choice in subscribing to TRIPS separate from the freedom to participate in WTO. The LDCs are characterized as the poorest and weakest segment of the international community. The social and economic quality of life of the population in these countries is generally hindered by extreme poverty, economic vulnerability and socio- political instability. These countries are categorized based on three criteria: “low income, human capital status, and economic vulnerability.”<sup>18</sup>

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<sup>15</sup> *Id.* at 985.

<sup>16</sup> *Id.* at 987.

<sup>17</sup> Omolo Joseph Agutu, *Least Developed Countries and the TRIPS Agreement: Arguments for a Shift to Voluntary Compliance*, 20 AFR. J. INT’L & COMP. L. 423, 429 (2012).

<sup>18</sup> *Id.* at 426.



Many commentators have argued that LDCs face enormous tasks in implementing the TRIPS agreement. They believed that LDCs are walking the exact route that present day industrialized countries walked. The currently industrialized countries at the time had no TRIPs regime hanging over them. They went through the phases of imitation, reverse engineering and learning without regard to using other inventions and innovations. During the early stages of industrialization, there were weaker protections and outright disregard for infringement.

There are high costs attached to the implementation and enforcement of the TRIPS Agreement. There are costs imposed on governments in general, especially those of the LDCs. The costs may be both direct and indirect in nature. Direct costs may involve administrative fees along with the cost of training, reviewing, and drafting of laws to implement the Agreement. While indirect costs may vary from country to country irrespective of economic and social status, they may include welfare costs such as increased prices, loss of jobs, and inhibition of competition and innovation due to heavy reliance on imported commodities, especially in LDCs. Business and finance laws in these countries were not designed to accommodate the TRIPS regime. As a result of these disparities, members are mandated to amend legislation to bring them into compliance with TRIPS. Furthermore, countries are required to establish regulatory departments and other administrative bodies to regulate and enforce the laws. Due to multiplicity of needs and scarcity of resources, LDCs are faced with an impossible choice or a catch 22 in deciding whether to fund protection of intellectual property rights at the expense of more immediate needs like healthcare, education, agriculture, and development of other social sectors. Omolo Agutu quoted the World Bank reflection on LDCs dilemma:

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.<sup>19</sup>

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<sup>19</sup> *Id.* at 432.

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There is no doubt that the cost of instituting an adequate system to protect an intellectual property regime is substantial. There are fixed and recurrent costs. Most of the fixed costs, which are significant, come by way of developing local institutions in line with TRIPS standards. These may include, but are not limited to developing examination and registration offices and equipment; drafting and adopting acceptable administrative procedures; and training examiners, judges, and custom authorities. The recurrent costs will continue to rise as more and more intellectual property comes into use.

The United Nations Conference on Trade and Development (UNCTAD) provided some rough estimates highlighting the enormous cost of compliance with TRIPS from selected developing countries. It cited costs averaging well over millions of dollars in fixed and recurrent costs as estimated by experts from Chile, Egypt, and Bangladesh in its 1996 report. Indeed, this is an indication that significant costs have to be borne by these poor countries in implementing an effective system, which would ultimately divert scarce competing resources away from areas of great necessities—health, education, and social welfare programs. In light of the economic toil that it takes to administer an effective intellectual property rights system as demanded by the TRIPS Agreement, small and poor countries “are unlikely to develop much commitment to institutional reform for some time. Unless they are able to recover these costs through fees, technical and financial assistance from abroad, and take advantage of cooperative international agreements to help cut costs, it remains to be seen any presentment of effective participation.”<sup>20</sup>

The area allocated to enforcement in the Agreement forecasts major successes to be achieved with respect to its impact on developing and least developing countries in the areas of technology transfer and innovation. Article 41 contains general obligations expected of each member, irrespective of economic status. It provides in part that members

shall ensure that enforcement procedures . . . are available under their national laws so as to permit effective action against any act of infringement of intellectual property rights . . ., including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements . . . these procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safe guards against their abuse . . . enforcement shall be fair and equitable...not unnecessarily complicated or costly or entail unreasonable time limits or unwarranted delays . . . and that nothing under this article creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.<sup>21</sup>

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<sup>20</sup> Keith E. Maskus, *Intellectual Property Challenges for Developing Countries: An Economic Perspective*, 2001 U. ILL. L. REV. 457, 467 (2001).

<sup>21</sup> DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 285 (2d ed. 2003).

However, the issues of enforcement, especially for small and poor countries, come with a series of complex problems. First, TRIPS enforcement agreement is based on broad standards. This point implies that the interpretation of standards is left to the norms and caprices of each member as it sees fit or in accordance with its legal system. With respect to localized enforcement, the capacity of each nation-state to enforce policies at local levels is rife with entrenched localized corruption and cronyism that are well-institutionalized ways of life in most developing and least developing countries. Moreover, the agents of enforcement—the courts, customs and police—are poorly trained and often corrupt. They have performed in a way that continues to hamper effective enforcement as envisaged by the TRIPS Agreement. It is an understatement, to say the least, that many legal systems, especially in the developing and least developed countries, are not well adapted to the legal standards used as a basis for TRIPS. Failure to adapt to these standards could result in weak protection for foreign intellectual property right holders.

### III. THE ILLUSIVE PROMISE OF TECHNOLOGY TRANSFER AND INNOVATION TO DEVELOPING AND LESS DEVELOPED MEMBER COUNTRIES

During the negotiation of the TRIPS Agreement, developing and least developed countries were concerned, as discussed in other parts of this work, that accepting the multilateral TRIPS Agreement would incur significant costs of compliance. Moreover, a fair amount of coercion was in place. The United States and the European Union made the TRIPS Agreement a “‘single undertaking,’ with all of the individual agreements as ‘integral parts’ binding on all members.”<sup>22</sup> And the path to membership in the WTO, successor of GATT, was via TRIPS. An assumption of membership in the WTO system was an automatic withdrawal from GATT. The consequence of not accepting TRIPS and its collateral agreements was the loss of access these countries had to US and EU markets under the former GATT. Indeed, developing and least developed countries were aware of the high costs of not accepting membership into the WTO. Despite the furious objections, the developing and least developing countries eventually accepted the TRIPS Agreement.

In order to mitigate some of the impacts of compliance and by way of concession-inducement, the developed countries undertook certain commitments to provide financial and technical support to developing and least developed countries in the implementation of the TRIPS Agreement. This loose commitment was incorporated under Articles 66 and 67 of the TRIPS Agreement. Article 66 is captioned ‘Least-Developed Country Members’ and states in part:

1. In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a

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<sup>22</sup> Poppy S. Winanti & Alasdair R. Young, *Complying with Unwelcome Rules? Developing Countries and the TRIPS Agreement*, 2 INDIAN J. INT’L ECON. L. 52, 58 (2009).

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viable technological base, such Members shall not be required to apply the provisions of this Agreement, other than Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], and 5 [Multilateral Agreements on Acquisition or Maintenance of Protection], for a period of 10 years from the date of application . . . [and t]he Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.

2. Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members . . .to create a sound and viable technological base.<sup>23</sup>

In order to facilitate the implementation of Article 66, a provision was also incorporated in the TRIPS Agreement under Article 67 specifically relating to the increase in the transfer and access to technology and innovation to the developing and less-developed member countries. The preamble of the TRIPS Agreement drew particular attention to “the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations . . . to enable them create a sound and viable technological base.”<sup>24</sup> Moreover, from a proposal tabled by developing countries, Article 7 states, “[t]he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology . . . in a manner conducive to social and economic welfare . . . .”<sup>25</sup>

Article 67 serves as a reinforcement or a complimentary tool to Article 66 under the TRIPS Agreement. Article 67 provides in part that:

In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favor of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights . . . on the prevention of their abuse, and shall include support regarding the establishment . . . of domestic offices and agencies relevant to . . . the training of personnel.<sup>26</sup>

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<sup>23</sup> RAO & GURU, *supra* note 1, at 308.

<sup>24</sup> GERVAIS, *supra* note 21, at 76.

<sup>25</sup> Amanda Watson, *Does TRIPS Increase Technology Transfer to the Developing World: The Empirical Evidence*, 20 INFO. & COMM. TECH. L. 253, 254 (2011).

<sup>26</sup> Gervais, *supra* note 21, at 353.

Researchers over the years have tried to gauge the best method by which the transfer of technology to the developing and less-developed world can be measured. Amanda Watson, Department of Economics, University of Florida, in an information and communications technology law review article, first inquired whether “the TRIPS Agreement allows poorer nations greater access to technology and innovation or the Agreement is simply meant to benefit only the developed world.”<sup>27</sup>

There is a general perception among developed countries, also buttressed by the principles and objectives of the TRIPS Agreement, that intellectual property protection should contribute to technical innovation and the transfer of technology. However, developing and less developed countries dispute this assertion, and contend that “strong [intellectual property rights] laws keep poorer nations from taking advantage of the imitation and reverse-engineering techniques others have used to build their technological bases and catch up with competitors.”<sup>28</sup>

The above argument is countered by some advocates of robust intellectual property rights protection. These advocates contend that flouting international laws and resorting to practices such as reverse-engineering, imitation and piracy to suit ones’ advantage hinders access to investment and technology in the developing and less developed world. These advocates also surmise that companies would fear losing their technologies to leakages in nations with weak intellectual property rights laws, thereby avoiding investment in such countries altogether. Overall, there are indications that point to the fact that stronger intellectual property rights protection tends to lead to higher levels of technological transfer and innovation mostly in the form of direct foreign investment. The increase in the granting of patents and licenses may be a new way of providing technical assistance to developing and less developed countries. Data on patents and licenses may be a way of gauging the extent of technological transfer and innovation in the developing and less developed world, an indication of fulfillment under WTO’s TRIPS Articles 7 and 8. The spread of technological innovation has a direct link to some form of licensing and granting of patents, and overall intellectual property protection. Watson cites researchers’ findings that increasing the strength of patent laws raises foreign direct investment, and that the positive intellectual property rights protection tends to also boost the research and development level in high-income developing countries. The India drug industry is a microcosm of the rest of the developing world. According to Watson, researchers “using data from three hundred and fifteen Indian pharmaceutical companies, found that India’s adoption of TRIPS patent protection in 1995 increased research and development in investment and in patents

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<sup>27</sup> Watson, *supra* note 25, at 253.

<sup>28</sup> *Id.* at 254.

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filed by Indian pharmaceutical firms.”<sup>29</sup> In 2002, India was the world’s largest producer of generic drugs.

Also quoting from case-study research conducted by Michael Ryan of World Development, Watson informed that “heightened intellectual property laws increased biomedical innovation in Brazil via public-private partnerships, i.e. companies are more willing to invest money if they know they will reap profits from their research (patents) and if they do not have to shoulder all the risk themselves.”<sup>30</sup> Irrespective of this positive development, there is no significant data to indicate whether more intellectual property rights protection laws will increase or decrease access to drugs, or will increase or decrease prices.

Examining the short-and long-term effects of TRIPS implementation, Watson cited research by McCalman that appeared in the *Journal of International Economics* (2005), which estimated that, “the net receipt from transaction from IPRs to the United States from the TRIPS Agreement is estimated to be up to 40% of the gains associated with trade liberalization; while developing countries made net payment of up to 64% of the gains they receive from trade liberalization. He further posits that, while everyone benefits, developed countries gain more than developing ones.”<sup>31</sup>

The uneven gains envisioned by developing and less developed countries led drafters of the TRIPS Agreement to include the Article 66.2 provision, which requires developed nations to provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to less developed country members in order to enable them to create a sound and viable technological base.

Quoting another researcher, Intan Hamdan-Livrameto, Watson noted that most developing and less developed countries, especially in the pharmaceutical industry, are delaying implementation of the TRIPS Agreement as provided for by continuous deadline extensions (next transitional period has been extended to July 1, 2021 or while a particular country ceases to be in the least developed category if that happens before 2021). Intellectual property right reform regulations may serve as a valuable short-term signal to investors, but proof of effective enforcement may be more important in the long-term. Intan Hamdan-Livrameto, according to Watson, noted that “one unit rise in enforcement causes foreign direct investment to rise by 6.7% and licensing to rise by 1.9% in countries with little imitative capabilities-meaning TRIPS enforcement has a positive impact on foreign direct investment flows.”<sup>32</sup>

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<sup>29</sup> *Id.* at 269.

<sup>30</sup> *Id.* at 270.

<sup>31</sup> *Id.* at 271-72.

<sup>32</sup> *Id.* at 273.

Overall, it can be discerned from the above review that there is significant empirical evidence to indicate that a positive relationship exists between robust TRIPS-inspired intellectual property right laws and increased access to technology. Despite the positive outlook, there is a caveat to the extent that most developing and less developed countries tend not to benefit or, in other words, are harmed or limited by a “shortage of resources, a weak intellectual property infrastructure, lack of skilled personnel and inadequate awareness of and information on the various treaties and conventions in the field of intellectual property.”<sup>33</sup>

Most middle income-developing and less developed countries are increasingly becoming reservoirs of transferred technologies from developed countries. Developing, and especially less developed countries’ abilities to implement and enforce TRIPS and related provisions in accordance with the agreement timetable of implementation is a daunting task, particularly in the high technology area. General compliance began as far back January 1, 1996, one year after entering into force, January 1, 1995.

At the Uruguay Round of negotiation, developed countries were more focused on strong protection of intellectual property rights, while the less developed members were strongly opposed to the idea of outright application in scope. Due to large scale discrepancies of human capital and intellectual property structural inadequacies, as discussed in other areas, a “mechanism was adopted under Articles 7, 8 and other related provisions to allow less developed countries to obtain further extensions to fully implement TRIPS as needs dictate.”<sup>34</sup>

A WTO member state that is less developed may delay implementation of TRIPS-compliant laws for up to 10 years. It may request and obtain extensions of this ten-year period from the council for TRIPS.

The core principle areas of noteworthiness of the TRIPS Agreement focusing on the developing world are the non-discrimination principles: national treatment and most-favored nation provisions under Articles 3 and 4 which essentially state in part:

Article 3- National Treatment-

Each member shall accord to the nationals of other members treatment no less favorable than that it accords to its own nationals with regard to protection of intellectual property . . . <sup>35</sup>

Article 4- Most –favored Nation Treatment-

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<sup>33</sup> Third U.N. Conference on the Least Developed Countries, *Interactive Thematic Session, Intellectual Property and Development*, ¶ 6, U.N. Doc. A/CONF.191/L.6 (May 17, 2001).

<sup>34</sup> John E. Giust, *Noncompliance with TRIPS by Developed and Developing Countries: Is TRIPS Working*, 8 *IND. INT’L & COMP. L. REV.* 69, 96 (1997-1998).

<sup>35</sup> GERVAIS, *supra* note 21, at 96.

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With regard to the protection of intellectual property, any advantage, favor, privilege or immunity granted by a member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other members . . . .<sup>36</sup>

According to Professor Carlos Correa, “the primary effect of combining minimum standards with national treatment is to ensure that all members of the Agreement can expect the application of the same minimum standards in other member countries, irrespective of status. And without national treatment, members could be free to apply one law to its domestic nationals and another to foreign nationals.”<sup>37</sup>

Prior to TRIPS, under GATT, now WTO, members were not permitted to apply different taxes, levies, laws, or regulations to ‘like products.’ This practice gives rise to countries attaching different meanings or classifications to products, which led to multiplicity of disputes. The TRIPS non-discrimination principles require only like treatment of nationals. There is absence of any ‘like product’ test in the broad non-discrimination principles of TRIPS.

Professor Correa also cites TRIPS Article 27 as a clear example of non-discriminatory principle incorporated into the Agreement relative to patents. It states in part: “patents shall be available and patents rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.”<sup>38</sup>

#### IV. LIMITATIONS OF TRIPS

Professor Correa, irrespective of numerous exceptions and non-discriminatory principles incorporated into the Agreement, strongly believes that these flexibilities in the TRIPS Agreement have not produced results that really assist in the development of local innovation and technology transfer. He surmises that the “various exceptions to exclusive intellectual property rights are not strong enough to achieve the intended goals.”<sup>39</sup>

There are multitudes of commentaries, studies and analyses critical of the ineffectiveness of the transfer of technology and innovation; and the extension of financial and technical assistance as mandated by Articles 66 and 67 of the TRIPS Agreement to developing and least developed countries. In his article, Least Developed Countries and the TRIPS Agreement..., Omolo Joseph Agutu, enumerated several problems associated with TRIPS provisions aforementioned. He

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<sup>36</sup> *Id.* at 102.

<sup>37</sup> *Research Handbook on the Interpretation and Enforcement of Intellectual Property under the WTO Rules*, in 2 INTELLECTUAL PROPERTY IN THE WTO 12 (Carlos M. Correa ed., 2010).

<sup>38</sup> *Id.* at 13.

<sup>39</sup> *Id.* at 41.



began by noting “that TRIPS is relatively clear on [developed] country obligations regarding IP protection, but remarkably vague on what would comprise satisfactory compliance.”<sup>40</sup>

Quoting a 2002 report of the Intellectual Property Commission, Agutu noted further: “[t]he TRIPS has strengthened the global protection offered to suppliers of technology, but there is no international framework to ensure that the transfer of technology takes place within a competitive framework which minimizes the restrictive technology licensing practices with which the Code was concerned.”<sup>41</sup>

The developed countries are required to incentivize their institutions to transfer technology to developing and least developing countries. He sees this as a mockery of the IPR protection mechanism system. He further noted that “no country would motivate its business enterprises to transfer protected technology into the wilderness; there must be some form of protection in the importing country to receive, protect and nurture the technology; it would be unrealistic to expect developed countries to effectively motivate transfer of restricted technologies by their business enterprises into the public domain in least developed countries.”<sup>42</sup>

Another point of criticism leveled against the TRIPS Agreement has to do with failure of the Agreement to clearly define a developed, developing and less developed country. The text of the TRIPS Agreement under Article 66 lacks the definition of which countries fall under either category. This inconclusiveness casts doubt on effective enforcement mechanisms.

Although mandated by the ministerial conference of 2001 and the TRIPS Council to set-up a reporting system for developed countries as subscribed under Article 66, “there is no standard or uniform format for filing reports detailing amount and kind of technology transfer occurring over a specific period of time.”<sup>43</sup> The reports are said to be broad, non-specific and irregular, some countries failing to comply at all. The present non-compliance and non-interventionist approach reflects some of the weaknesses and imbalances the Agreement contains.

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<sup>40</sup> Agutu, *supra* note 17.

<sup>41</sup> *Id.* at 437.

<sup>42</sup> *Id.* at 438.

<sup>43</sup> *Id.* at 438.

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Another shortcoming of Article 66 under the Agreement is requiring government to exert indirect pressure on private enterprises to transfer technology to developing and least developed countries. In most industrialized countries, governments do not wield the power to mandate how private entities use their technologies. The language of the Code in effect defeats the commitment made by developed countries at the negotiation table. Most developed country members are resorting to legal technicalities in attempting to renege on their treaty obligations. Most posit that companies and institutions can only be expected “to invest and transfer their technology to a specific country, if a number of framework conditions in the beneficiary country actually exist.”<sup>44</sup> Developed countries further defend that Article 66 only mandated them to provide incentives (carrots) to private institutions, without any obligation whatsoever to coerce private entities to share their technologies with developing and less developing countries.

In accordance with the language of Article 67 of the Agreement, developed countries are supposed to offer technical and financial assistance to developing countries and least developed member countries upon request and on mutually agreed terms and conditions. The assistance is supposed to cover preparation of laws and regulations and the establishment of local offices, including staff training. However, many researchers and commentators, tend to dismiss the effectiveness of Article 67. Agutu, citing UNCTAD in its critique, stated:

Overall, the support programs do not work in such a way that is developmentally effective, either because of their inappropriate design or the manner in which they are implemented. The nature of these programs reflects the weak bargaining power of the least developed member countries. They are forced to accept what they are offered. The commercial interests of rich countries and differences in interpretation between the least developed countries and their development partners also is a hindering factor in the effective implementation of programs.<sup>45</sup>

The act of betrayal by developed countries coupled with the deficiencies of Article 67 is reflected in the manner in which the developed countries vehemently opposed the establishment of an independent evaluative mechanism of their report on technical and financial assistance. They opted for a bilateral assessment mechanism. One knows only the efficacy of such bilateral trade relations, in lieu of the inequality of economic status subsisting between the parties to the TRIPS Agreement.

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<sup>44</sup> *Id.* at 441.

<sup>45</sup> *Id.* at 442.

## V. THE WAY FORWARD

Perhaps developed member countries enthusiastic about strengthened global compliance with TRIPS have to take into account the following concerns in the interest of the socially, economically, and politically vulnerable member countries to make TRIPS more relevant in attaining the goals claimed in its preamble and under Article 7 of the Agreement.

The developed member countries, who realistically believed in robust trade under the TRIPS Agreement, are aware that TRIPS implementation and enforcement is not progressing as envisaged. Some commentators have come to the conclusion that in order to significantly minimize the current status of stagnation in the LDCs, there is an urgent need to:

1. Review the WTO system with the view of amending it to allow LDCs not to comply with TRIPS either until they cease to be classified as LDCs or until they decide on their own volition to implement the Agreement—they can remain part of the WTO system, but not be coerced to apply TRIPS to the letter, and
2. To make TRIPS membership optional and compliance voluntary which would minimize the costly need in establishing IPR regimes. This is a way of providing room for self-identification of needs and gradual or systematic allocation and utilization of resources in meeting the competing domestic needs and TRIPS obligations at the same time without enduring economic hardship.

Although the aforementioned points continue to haunt TRIPS implementation and enforcement, it seems that some influential members remain oblivious to reality. They continue to push back and unrealistically opine that the train has left the station and there is no turning back. These proponents of the status quo have argued, among other things, that:

1. An amendment to allow for delayed compliance would lead to fragmentation of the WTO system;
  2. To make membership optional at this point in time would mean the reversal of the gains made by the WTO;
  3. These proposals might undermine the popular acceptance of TRIPS in the long-run; and
  4. Mandatory compliance would guard against the isolation of LDCs holding to certain generally acceptable international standards.
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More fully, it is important to note that success of TRIPS is tied to the well-being of the WTO system and vice versa. The prospect of implementation and enforcement by developing and less developed countries has become the Achilles heel. As main architects of the TRIPS Agreement, developed member countries have major responsibility to see that developing and less developed members succeed. The success of these member countries would ultimately contribute to robust and unhindered global trade. Thus far, the successes and failures of TRIPS are mixed. But, the failures are attributable to the lack of commitment by developed member countries to address the issues of concern of developing and less developed countries that have continued to stall the effective implementation and enforcement of the objectives and principles for which it was created. The failure by a majority of developing and less developed member countries to meet or support full compliance after twenty-two years of entry into force calls for a renegotiation if TRIPS is to continue to be relevant, globally.

There is a way going forward in achieving better impact of the TRIPS Agreement on, especially, the LDCs. There is general recognition on the part of the international community of countries in the LDCs category, which is based on the fact that these labelled countries face serious disadvantages in their development efforts as a result of weaknesses in their human capital and economic structures. Under the burden of these disadvantages, they (LDCs) are faced with the risk of the inability to measure up to the rest of global economy and greater difficulty in escaping the unending poverty trap. There is unanimity within the international community for the rationale in granting LDCs special treatment and international support. However, the reason for being in this category, weak socio-economic structures, and promise of transformation have remained largely unfulfilled. The size of the category of LDCs keeps growing. The fact that most of the LDC members of TRIPS continue to fall behind in meeting their obligations calls for a critical review of the effectiveness of some of key elements of the Agreement. Minimally, some LDCs have made some progress. There is need to formulate country-specific packages in the allocation of resources and extension of assistance in furtherance with compliance of the TRIPS Agreement. Unless the key players in the WTO can provide a path and present some willingness to ensure that TRIPS is relevant to the transformation of the global economy, the economically handicapped and vulnerable countries will indefinitely continue to kick the can down the road in the implementation and enforcement of the TRIPS Agreement.

CONCLUSION

One did not need a fortuneteller to predict the daunting task ahead of the implementation and enforcement of the WTO's TRIPS agreement by all sides, especially the vulnerable least developed member states. The inception of TRIPS at the GATT-WTO Uruguay Round of negotiation, under the heavy-handed economic influence of the U.S. and its Western European allies, was acrimonious and antagonistic, to say the least. After twenty-two years of TRIPS entry into force, one would expect that member countries would be at least in compliance or on board at some appreciable level. However, the economic, technological, and governance inequality subsisting among member countries is so wide that it will take decades, or perhaps more than half a century to begin to feel the wind of full implementation and enforcement. In some quarters, there are calls to revisit the Agreement, complete renegotiation of TRIPS, suspension of the obligations of LDC member countries, voluntary compliance, and a desire to retool under a new world order, etc.

In the wake of enormous structural constraints, such as shortages of resources, a weak intellectual infrastructure, a lack of skilled personnel (IP judges, administrators, etc.), and inadequate awareness of information on collateral treaties and conventions in the field of intellectual property by responsible institutions—businesses, governmental agencies, higher institutions of learning, and local population, the WIPO, identified some key areas of institutional building to further the IP capacity of developing and least developed member countries in compliance with the TRIPS Agreement:

1. Transfer of IP knowledge to LDCs in specific areas needed to build up knowledge capital in the public and private sectors;
2. WIPO worldwide Academy could offer IP training designed to meet individual needs of LDCs—distance learning programs, customized training courses for managers, IP technical staff, government agencies and other collateral sectors; policy training programs for policy advisers, decision makers and diplomats; diploma courses and degree programs;
3. Installment of WIPO services, equipment, and deployment of personnel on a long-term basis to help build and modernize IP offices in the LDCs;
4. Assist in the development of comprehensive and user-friendly promotional information materials and training programs for LDCs (web-based form and through seminars and workshops).

The World Intellectual Property Organization has made, over the years, tremendous efforts in the implementation of these programs to resolve some of the structural problems in least developing member countries.

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Despite the expenditure of capital and human resources in developing and expanding the IP capacities of LDCs to implement and enforce the TRIPS Agreement, the least developed world continues to lag behind. The continuous malaise draws several intriguing questions for reflection. Is there an urgent need to revisit the Agreement to revamp it in its entirety in relation to implementation and enforcement? Is the failure of the developed member countries to honor their promises as laid out under Articles 66.2 and 67 a contributing factor? These and many issues and concerns that are more critical to the survival of the core intended principles and objectives of the current Agreement can be only legitimately addressed at a Uruguay-like conference. The developed member countries would have to be willing and honest in committing to the retooling of TRIPS for a global relevancy. One can objectively assume that most developed member countries are sensitive to the needs of LDCs (perhaps this may not be the case). It is fair enough to support certain waivers and amendments to the WTO's TRIPS Agreement in order to make it more relevant in achieving its general goal of protecting IPRs and its specific goal of implementation of TRIPS.

In the meantime, developing and less developed member countries have to exhibit to the developed members that they 'mean business.' Over the years and before the TRIPS Agreement, the World Intellectual Property (WIPO) and related institutions have extended and continue to provide financial and technical assistance to developing and less developing countries in the implementation and enforcement of the TRIPS Agreement. However, most of these less privileged member states cannot produce any evidence of serious improvement in intellectual property system organization in light of the numerous assistance.

Take the case of Liberia in West Africa. It has been a long-standing recipient of technical assistance from WIPO and related U.N. institutions. There is evidence in historical records that the "Liberia IP office has one of oldest records of IP rights dating back to 1897."<sup>46</sup> But, there is little or nothing meaningful it can show for the continuous engagement. It appears that the single greatest "achievement" was the enactment of the two pieces of legislation in 1997 and 2003. Liberia's IP system remains in a dismal state. A WIPO commissioned assessment report in 2009, based on a request by the government of Liberia, concluded with high degree of accuracy the following:

- The country has no intellectual property policy framework to implement the intellectual property legislation;
- The Intellectual Property Act of 2003 is poorly drafted and suffers from lack of clarity, inconsistency, gaps and is virtually incapable of being implemented (the law looks more like a draft than a law);

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<sup>46</sup> Getachew Mengistie & Marisella Ouma, *Intellectual Property Development Plan for the Republic of Liberia*, at 73 (2009), <http://www.moci.gov.lr/doc/LiberiaFinalConsolidatedIPDP.pdf>.

- The law has gaps, for example, it does not provide for the duration of a patent; it does not incorporate utility model to protect minor inventions;
  - The non-implementation of some provisions of the law is affecting the operation of the Industrial Property Office;
  - The Industrial Property Office suffers from lack of capacity and inadequate financial resources;
    - The Office is understaffed and poorly composed. Of the 11 staff members, there are no lawyers, engineers, or professionals with science backgrounds to deal with tasks which may involve legal and technical issues; there are literally no patent examiners;
    - The Office is poorly equipped. There are no electronic resources such as: computers, printers, scanners, faxes, telephone apparatus, and photocopiers; and no basic facility resources such as: air conditioning, electricity, water, vehicle, etc.;
    - The Office has poor systems of operation that may affect its functions and users of its services. There are no statistics regarding the number of applications filed by and titles granted to residents and foreigners due to poor record keeping and management;
    - The records are not kept appropriately. The law requires the Office to maintain separate registers for patents, industrial designs, and marks. To the contrary, patents and marks are put in the same register. There are no statistics on patents, trademarks, design applications and titles due to the non-availability of records coupled with the lack of a recording system. There is no way of determining whether a mark is registered. This may be contributing to the high rate of piracy and counterfeiting, with no way of deterring potential infringers;
  - The Industrial Property Office does not have a system of notification of rights holders. This affects rights holders who do not have intellectual property agents;
  - The Intellectual Property Office has no financial autonomy. It lacks an adequate budget and does not have the authority to make use of the funds it generates;
  - The Director General's vested power of handling complaints of infringement cases and at the same time trying to resolve disputes through arbitration may affect the core functions of the Office. Tracing infringement and instituting action is the responsibility of the right holders;
  - The Industrial Property Office lacks the capacity to discharge its functions effectively. It does not have qualified engineers and scientists to make a decision whether or not an application fulfills substantive requirements of patentability before granting a patent;
  - The Office does not have an organizational structure or a system of checks and balances. The division of labor between staff is made on an ad hoc basis;
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- The level of awareness about intellectual property and its benefits among politicians, researchers, higher learning institutions and research and development organizations is extremely low. This core group has very limited knowledge about intellectual property;
- There are limited activities made to raise intellectual property awareness amongst the general population. The Intellectual Property Office has no outreach programs or strategies;
- The lack of capacity to implement the laws has even made it difficult to protect the market from large volumes of counterfeiting and piracy rampant in the country. It is worth noting that counterfeit and pirated products transshipped from neighboring countries are much higher than those protected and produced in the country;
- There is little or no enforcement system. The power of enforcement is the responsibility of the judiciary, police force, customs department, and IPO. They have done very little to stop the entry of infringing products, primarily due to lack of awareness and capacity;
- There is fragmentation of entities involved in the administration of intellectual property system.<sup>47</sup>

The problems highlighted above outlining Liberia's dismal IP system are just the tip of the iceberg. Liberia's dismal IP system is a mirror image of less developed member countries similarly situated. The fundamental basics for an IP protection mechanism simply do not exist. It would require enormous resources, time, effort in every direction, shape and form to elevate the system to an internationally acceptable standard. Does the government of the day have the political guts and spine to make decisions that would change the status quo? Are the major stakeholders of intellectual property rights willing and prepared to decisively move the system in the direction as enshrined under the preamble of the TRIPS Agreement? The ball remains in the courts of both developed and developing/less developed member countries, but more in the former.

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<sup>47</sup> *Id.* at 73-74.



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