

## 9. WTO TRIPS AGREEMENT: A HINDRANCE TO THE ECONOMIC DEVELOPMENT OF LEAST DEVELOPED COUNTRIES? THE CASE OF MALAWI AND RWANDA

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### ABSTRACT

The Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement) is a brainchild of the World Trade Organization (WTO), an organization established in 1995 as an outcome of the Uruguay Round of trade negotiations, which took place from 1986 to 1994, within the framework of the General Agreement on Tariffs and Trade (GATT). Many studies have been conducted on the socio-economic benefits of the TRIPS Agreement for developing countries such as those sanctioned by the Organization for Economic Co-operation and Development (OECD), the World Intellectual Property Organization (WIPO) and the European Union Intellectual Property Office (EUIPO). However, little attention has been paid to the plight of Least Developed Countries (LDCs) in relation to the extent to which they are able to make use of TRIPS flexibilities to foster their economic development. While a number of scholars have touched upon the subject, much focus has been on developing countries in general, with particular interest narrowing down to countries such as China, India and Brazil. What is evidently clear though

is that LDCs keep on making requests for extension of dates by which they are expected to be fully compliant to TRIPS.

This paper highlights two arguments regarding TRIPS flexibilities and LDCs. The first is based on the observation that certain flexibilities may provide no real contribution to development insofar as they are not concretely implemented. This has been done through a review of related literature and analysis of various expert views on the same. The second is the existence of a gap among LDCs in terms of their ability to make the best use of the TRIPS flexibilities in order to sustain economic development, using Malawi and Rwanda as case studies. By doing so, the paper intends to steer more focus, debate and empirical research in this not so adequately researched area.

**Keywords:** *TRIPS Agreement, TRIPS flexibilities, Least Developed Countries, transition period, developing countries*

### 1. INTRODUCTION

Intellectual property deals with the protection of works of the human intellect. IP laws have a huge bearing on critical and often competing policy areas such as industry, health, culture, agriculture and education. IP rights are generally recognised universally as an essential policy tool for market economies.<sup>1</sup> While intellectual property protection at the international level is not a new phenomenon, the Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>2</sup> (TRIPS

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<sup>1</sup> Marianne Levin, *The Pendulum Keeps Swinging – Present Discussions on and around the TRIPS Agreement* (Edward Edgar Publishing) 3

<sup>2</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994)

Agreement) represented a major revolution in international intellectual property protection.<sup>3</sup> To date, numerous studies have been done on how developing countries have used the TRIPS Agreement to advance their economic development goals. However, little effort has been made to extend such studies to Least Developed Countries (LDCs), probably due to the widespread assumption that LDCs generally lack necessary resources to implement a working IPR system comparable to those of the developing and developed world.<sup>4</sup> Worth noting however is the fact that the TRIPS Agreement has within it some flexibilities that specifically target the developing world and LDCs given their unique needs,<sup>5</sup> including room for LDCs to continue extending the transition period for compliance to the agreement. However though, such extensions do not affect LDCs right to fully utilize the flexibilities provided for in the TRIPS Agreement. The subsequent paragraphs unpack some of the TRIPS flexibilities available for LDCs, the economic perspective of strong IPR protection for LDCs, and further highlights the extent to which two LDCs, Malawi and Rwanda have taken advantage of TRIPS flexibilities in their quest to shape their respective IP landscapes.

## 2. TRIPS FLEXIBILITIES VERSUS ECONOMIC PERSPECTIVE OF STRONG IPR PROTECTION FOR LDCS

Observably, a number of flexibilities are provided for in the TRIPS Agreement that could be of significant economic importance for LDCs. One such flexibility is contained in article 66.1 which provides for extension of transition period specifically for LDCs.<sup>6</sup> This implies, for instance, that LDCs have the chance to use this transition period in relation to

pharmaceutical patents, whereby patent rights may not be an obstacle to the supply of medicines, thereby boosting the local pharmaceutical industries.

Another flexibility contained in TRIPS is that of compulsory licensing as contained in Article 31 of the TRIPS Agreement,<sup>7</sup> whereby countries are at liberty to cleverly craft grounds upon which such compulsory licences are granted under their national laws to ensure the widest use of the same to foster economic development. In the same line, the flexibility of public non-commercial use of patents gives the opportunity to use patents with an extra advantage of doing so without the requirement for prior negotiation with the patent holders, as is the case with compulsory licences.

Yet another example of flexibilities provided for in TRIPS Agreement is the possibility for parallel importation, as is implied by Article 6 of the Agreement on exhaustion of intellectual property rights.<sup>8</sup> Exceptions to patent rights are another flexibility provided for in the TRIPS Agreement, whereby Article 30 does not define the scope or nature of the permissible exceptions, thereby giving countries permissible freedom in this area. Thus, LDCs could take advantage of this in their national laws by crafting them in such a way that they give room for promotion of technology transfer and prevention of abuse of intellectual property rights by foreign patent holders.

Similarly, exemptions from patentability are an implicit flexibility provided for in TRIPS Agreement, as it does not require patenting of new uses of already known products. Thus, LDCs have the chance to exclude new uses of known

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[hereinafter TRIPS Agreement]

<[https://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](https://www.wto.org/english/docs_e/legal_e/27-trips.pdf)> accessed 12 October 2019.

<sup>3</sup> Jerome Reichman, 'The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries' (2000) 32 (3) CWRJIL <<https://scholarlycommons.law.case.edu>> accessed 15 August 2019.

<sup>4</sup> Jean Homere, 'Intellectual Property can Help Stimulate Economic Development of Least Developed Countries' (Hereinonline 2004) <<https://hereinonline.org>> accessed 12 August 2019.

<sup>5</sup> Jayashree Watal and Leticia Caminero, 'Least Developed Countries, Transfer of Technology and the TRIPS Agreement' (2017) WTO Staff Working Paper 1/2018, 5 <<https://econstor.eu>> accessed 12 October 2019.

<sup>6</sup> TRIPS Agreement (n 2).

<sup>7</sup> TRIPS Agreement (n 2), art 31.

<sup>8</sup> *ibid*, art 6

products or processes from patentability, thereby controlling the anti-competitive behaviour of patent ever greening by foreign firms. Thus, when all is said and done, LDCs ought to strike a balance between relaxing in the comfort zone provided by the extendable transition periods and taking advantage of the other flexibilities provided for in TRIPS by making their laws fully TRIPS compliant.

From the perspective of development economists, strong IP protection is hyped to be a useful key for the economic development of all countries. The TRIPS Agreement itself is touted for registering some positive impact on developing countries, especially the Newly Industrialised Countries (NICs) like Chinese Taipei, by enabling them to realize the benefits of a more robust intellectual property system. However, a number of economists also argue that the same cannot be said about LDCs who have neither the infrastructural capacity nor human capacity to adopt the existing technologies into their systems. While the expectation with the TRIPS coming into force has been that higher returns to knowledge would result into more innovation, which would in turn benefit even the developing world and LDCs, there is no credible evidence that such is indeed the case.<sup>9</sup>

Nevertheless, the expectation from a macroeconomic perspective is that a well-functioning IP system may be of benefit to developing countries and LDCs in that it would fast track FDI, create new jobs, promote indigenous industries and generate considerable tax revenues. In 2008, the Chief Economics commentator for the Financial Times described constraints upon developing countries (and more so LDCs) in the area of IP as 'unconscionable.'<sup>10</sup> Notably, developing countries have shown discomfort with the strict trade policies

of non-discrimination in favour for the affirmative action that 'equal treatment of un-equals is unjust.'<sup>11</sup> Thus without flexibilities being fully utilised, there is chance that strong IPR protection could limit the economic development options of developing countries. Nevertheless, what is equally clear is that strong IP protection would lead to a boom in Foreign Direct Investment (FDI) for the poor countries, the major argument being that lack of IPRs means that investors may not be willing to conduct trade in such countries that provide no protection against counterfeiting and/or piracy.<sup>12</sup>

In terms of costs for implementing the TRIPS Agreement, the implementation cost for LDCs is unfathomable. The very idea of building and properly staffing intellectual property offices in poor countries constitute a palpable drain on the already scarce resources of poor countries.<sup>13</sup> It is a proven fact that had it not been for full or partial funding from WIPO or other organisations, LDCs would not even have been able to send their delegations to the numerous meetings at the World Intellectual Property Organisation.<sup>14</sup> In 2002, the World Bank estimated net losses of US\$530 million for Brazil, US\$5.1 billion for China, US\$903 million for India and US\$15.3 billion for the Republic of Korea just to administer and enforce IP reforms to undertaken to implement the TRIPS Agreement.<sup>15</sup>

Furthermore, a decade into TRIPS implementation, a research revealed that despite the increase in R&D capacity of the developing world, the developed world still controlled over ninety per cent of the technology output and received over ninety per cent of global cross border royalties and licensing fees.<sup>16</sup> In the same year, the developing countries paid US\$17 billion in royalties and licensing fees mostly to IP rights holders in developed countries.<sup>17</sup>

<sup>9</sup> R Wade, 'What Strategies are Available for Developing Countries Today? The World Trade Organisation and the Shrinking of 'Development Space' (2003) 3 <eprints.lse.ac.uk> accessed 14 August 2018.

<sup>10</sup> C Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform for Developing Countries* (Oxford University Press New York, 2009) 2.

<sup>11</sup> Jacob Kol and Loet Mennes *European Trade Policies and the Developing World* (Routledge 2005) 50.

<sup>12</sup> D Richards, *A Skeptic's View of Intellectual Property Rights* (Edward Elgar Publishing Limited UK 2008) 272.

<sup>13</sup> Reichman (n 3) 450.

<sup>14</sup> *ibid.*

<sup>15</sup> Deere (n 10) 10.

<sup>16</sup> *ibid.*

<sup>17</sup> *ibid.*

Such unforeseen imbalances being observed overtime should ordinarily be reason enough to necessitate full utilization of TRIPS flexibilities by LDCs. Observably also, there has been some growing concerns that the benefits of higher IP protection through the TRIPS has been unevenly distributed with the developed world getting the most out of the cake, despite all countries bearing the transaction costs.<sup>18</sup> These observations rubberstamp the need for LDCs to ensure full utilisation of the TRIPS flexibilities, including continued extensions of transition period to allow for technological catch-up period.<sup>19</sup>

### **3. COMPLIANCE WITH INTERNATIONAL AGREEMENTS: DO LDCS REALLY UNDERSTAND TRIPS AND ITS FLEXIBILITIES?**

International relations literature on accession to and compliance with international agreements outlines three approaches that seem to inform poor countries when it comes to compliance to international agreements. One approach contends that national characteristics of developing countries are the core source of variation, suggesting that this may have played a role as regards TRIPS implementation. This view looks at such issues as overall economic worth; relative weight of IP related imports and exports, technological factors and the structure of the domestic industry and the potential for cultural and creative industry as being the potential driving forces for signing an agreement.<sup>20</sup> The expectation therefore is that the wealthier developing countries should be able to offer higher IP standards, especially where they are able to export IP related goods.

A second approach focuses on the role of international power dynamics. This implies that where the force to have a treaty or an agreement signed comes from the developed nations, the capacity of the developing nation and/or LDCs to resist is in fact, compromised, due to their economic, political and intellectual dependence on the developed countries.<sup>21</sup>

Cambodia provides a very good example to this effect. It hastily agreed to more burdensome conditions just to join the WTO. To the contrary, Nepal, thanks to the technical assistance it received prior to going to the accession desk, was able to negotiate some relatively favourable terms.<sup>22</sup>

The third approach looks into the possibility of nations signing agreements with little intention or capacity to enforce them, but rather as an empty promise in the hope of getting reputational rewards or economic favours from the developed world.<sup>23</sup> Therefore, the three scenarios should not be ruled out as possible explanation(s) as to why most of the LDCs ended up just signing the TRIPS and implementing the provisions contained therein, without fully understanding how the agreement would be of benefit to them. Notably, most LDCs have not fully utilised most flexibilities provided for in the TRIPS other than the Doha Declaration.

### **4. THE QUESTION OF ENFORCEABILITY OF THE SPECIAL TREATMENT FOR LDCS**

Noting that implementation of the TRIPS would bring challenges for LDCs, TRIPS includes within its provisions three concessions for the developing countries and LDCs as way of taking their concerns on board. These are provision of transition periods for implementation, a legal obligation on developed countries to enhance technology transfer to LDCs and a commitment on the part of developed countries to provide technical assistance and capacity building.<sup>24</sup> This was thus as much as the LDCs and the developing countries could take. However, while the Agreement seems to balance the rights and obligations of the patent holders (mostly from the developed world) and patent users (mostly from developing countries and LDCs), in reality the agreement works in favour of the developed countries because of the difference in enforceability.

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<sup>18</sup> Reichman (n 3) 451.

<sup>19</sup> Reichman (n 3) 451.

<sup>20</sup> Deere (n 10) 15.

<sup>21</sup> *ibid* 16.

<sup>22</sup> H Tura, 'Ethiopia's Accession to the World Trade Organisation: Lessons from Acceded Least Developed Countries' 2016 *Oromia Law Journal* 125-152, 150.

<sup>23</sup> Deere (n 10) 16.

<sup>24</sup> TRIPS Agreement (n 2), art 66.

Article 66.2 of the TRIPS Agreement specifically highlights what would be looked at as a moral obligation of the developed world to the LDCs: '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 in order to enable them create a sound and viable technology base.'<sup>25</sup> The article puts as an obligation for members of developed countries to provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least developed country members to enable them to create a sound and viable technology base.<sup>26</sup> The goal of technology transfer in the sense of the TRIPS Agreement was to lessen the technology gap between LDCs and the developed world with the aim of levelling the playing field in world trade.<sup>27</sup> However, important to note is that this article does not subject the signatory members to an obligation of result. Thus, the agreement never gives any recourse for the poor countries in case the provision of this article is not met.<sup>28</sup> Even as recent as 2018, the business climate in most LDCs is such that the much needed access to new technologies remains a major challenge despite such provisions existing in the TRIPS Agreement.<sup>29</sup> Thus, the language of Article 66.2, despite sounding positive, does not necessarily oblige the actual transfer of technology to LDCs, but rather just incentives for the transfer of technology,<sup>30</sup> and without WTO jurisprudence, several questions remain arguably open, thereby giving room for non-compliance to the developed world.<sup>31</sup>

On the other hand, the developing countries have a wide range of obligations regarding patentable subject matter and

enforceability of the same, and surprisingly in their case, they may be taken to the Dispute Settlement Mechanism (DSM) in the event of non-compliance.<sup>32</sup> This kind of imbalance has forced a perception on some quarters that the DSM is there to serve the interests of the developed world, and it is no wonder that since its establishment no LDC in Africa has ever initiated a dispute as to be brought to the attention of DSM despite their inherent outcries.<sup>33</sup>

At the moment, what is evidently being obtained by LDCs are usually incentives as tax advantages and research cooperation, training programmes and subsidies,<sup>34</sup> which, strictly speaking are but a raw deal in the absence of infrastructural capacity on the part of the LDCs. It is worth recalling that in 2001 a delegation from Zambia asked developed countries to provide empirical evidence on how they had implemented Article 66.2, and how such had led to a viable technology base for LDCs. What followed thereafter were a series of reports between 2003 and 2016 from developed country members with no such monitoring mechanism as to check whether the claimed incentives benefitting LDCs were indeed aligned with Article 66.2, or whether they were within the development interests of the said LDCs.<sup>35</sup>

It is not surprising therefore that each time the set deadlines for compliance has been reached, most LDCs make requests for further extension of transition period, with the most recent being up to mid-2021 in general and January 2033 for pharmaceuticals.<sup>36</sup> The extensions of the transition period for such LDCs are not a cause for celebration but rather evidence that without taking advantage of the flexibilities the multilateral trade system is still failing for such LDCs.<sup>37</sup>

<sup>25</sup> TRIPS Agreement (n 6), art 66.2.

<sup>26</sup> Watal and Caminero (n 5) 3-17.

<sup>27</sup> Tobias Stoll, *Max Planck Commentaries on World Trade Law* (Martinus Nijhoff Publishers 2009) 822.

<sup>28</sup> Wade (n 9) 622-38 17.

<sup>29</sup> *The Least Developed Countries Report 2018: Entrepreneurship for Structural Transformation* (UNCTAD, United Nations 2018).

<sup>30</sup> Stoll (n 27) 824.

<sup>31</sup> Jayashree (n 5) 6.

<sup>32</sup> TRIPS Agreement (n 6), art 64.

<sup>33</sup> Linimose Anyiwe and Eghosa Ekhator, 'Developing Countries and the WTO Dispute Resolution System' (2013) JSDLP 138.

<sup>34</sup> Stoll (n 27) 824.

<sup>35</sup> Watal and Caminero (n 5) 3-17.

<sup>36</sup> *ibid.*

<sup>37</sup> K Kennedy, 'The 2005 TRIPS Extension for the Least Developed Countries: A Failure of the Single Undertaking Approach?' 2006 *The International Lawyer* 683-700, 685.

## 5. UTILIZING COMPULSORY LICENSING: TRIPS AND PUBLIC HEALTH IN LDCS

In the eyes of the general public in LDCs, including those who take no interest in IP matters, TRIPS has very much been identified with pharmaceutical patents.<sup>38</sup> It was a worrying factor for LDCs that TRIPS implementation would put an end to acquiring essential medicines at affordable prices.<sup>39</sup> It was only in 2001 that the Doha Declaration acknowledged the gravity of the health problem in LDCs<sup>40</sup>. The Doha Declaration is widely understood as an assurance of continued access to essential drugs on the part of the poorest countries, and almost all LDCs have benefitted from it. The Doha Declaration was therefore a huge humanitarian relief for poor countries and indeed it has been explored by the LDCs, since the challenges being faced by LDCs put them in a class of their own. For instance, diseases such as HIV/AIDS continue to be a major factor hindering their development, destroying lives, economies and governments.<sup>41</sup> As an example, in 2011, an estimated 9.7 Million people in LDCs were living with HIV, while cancer incidence is expected to rise by 82% from 2008 to 2030.<sup>42</sup> There are reported cases in Sub-Saharan Africa where AIDS has wiped out entire communities and families.<sup>43</sup> Thus the opportunity for compulsory licences in indeed such public health emergencies is a huge flexibility and a major consideration that the TRIPS Agreement provides for LDCs

## 6. THE RWANDA CASE

As a general observation, economic performance in post-colonial Africa has not been impressive, in spite of immense

mineral resources and foreign aid. However, Rwanda provides a very good example to the contrary. Rwanda as a country is widely touted as being one of the five fastest growing economies in Africa, the others being Botswana, Ethiopia, Uganda and Mauritius.<sup>44</sup> The country boasts an economic growth averaging 8% since 2001, having registered a massive reduction in poverty levels and being among the very few African countries to have achieved the United Nations' Millennium Development Goals (MDGs).<sup>45</sup> In terms of the global income rankings, Rwanda improved from being the seventh poorest country in 2000 to the twentieth poorest country in 2015.<sup>46</sup> The November 2018 letter of intent by the Rwandan Government to the IMF highlights a rosy picture of the macro-economic performance of Rwanda for the year 2018 and projects the same to be case in the year 2019.<sup>47</sup>

Rwanda is arguably one African country that has taken bold and positive strides to use IP to foster its economic development. Rwanda had its first national IP Policy in 2009, which was revised in 2018. The 2009 version of the policy focused more on being defensive than offensive in terms of IP protection. For instance, as regards patents, the 2009 Intellectual Property policy noted that the since Rwanda had a low record of patent filings, special focus was put on exceptions to patent law, including the exclusion of pharmaceuticals from patenting, as provided for in the TRIPS.<sup>48</sup> Thus, Rwanda, noticing her low innovative output put much focus on the flexibilities provided for in the TRIPS. However, having signed the Harare protocol on patents and designs, and having attracted FDI in the manufacturing

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<sup>38</sup> Levin (n 1) 20.

<sup>39</sup> Reichman (n 3) 450.

<sup>40</sup> C Correa, 'The TRIPS Agreement and Developing Countries' <<https://www.researchgate.net/publication/227107105>> accessed 22 September 2018, 5.

<sup>41</sup> Wade (n 9) 622-38.

<sup>42</sup> UNAIDS The Challenge of Access (UNDP 2013) 2.

<sup>43</sup> OS Sibanda, 'Comparative Analysis of Access to Patented HIV/AIDS Pharmaceutical Medicines through the Canadian and EU TRIPS Flexibilities Measures: Are they Efficacious or overly Burdensome

and Ineffective Measures?' 2012 PER / PER/Potchefstroom Electronic Law Journal PELJ 521-569, 521.

<sup>44</sup> George Ayittey, 'The Non-sustainability of Rwanda's Economic Miracle' (JMS 2017) 90.

<sup>45</sup> *ibid* 88.

<sup>46</sup> 'Rwanda Economic Update: Sustaining Growth by Building on Emerging Export Opportunities' (World Bank, 2017) 3.

<sup>47</sup> Ndagijimana Uzziel and John Rwangombwa, 'Rwanda Letter of Intent, Memorandum of Economic Policies, and Technical Memorandum of Understanding' (IMF 2018) 2.

<sup>48</sup> Rwanda IP Policy 2009.

industry, there emerged the need to have the Intellectual Property legislation reviewed.

In terms of making use of TRIPS flexibilities, Rwanda was the actually the first African country to make use of Article 31bis of the TRIPS Agreement. The article was a permanent amendment to the TRIPS, following the Doha Declaration and a subsequent General Council decision. Article 31bis partly waives article 31(f) for LDCs, allowing them to use compulsory licensing for public health reasons through importation of the drugs from other countries.<sup>49</sup> This amendment came into effect in January 2017. However, the story of Rwanda wanting to make use of this provision is unique in the sense that as early as 2007, that was even before the amendment had been officially incorporated into the TRIPS, Rwanda pushed through to make use of it regarding an AIDS drug.

After negotiations between Rwanda and the patent holder to obtain a contractual license had failed, a pharmaceutical company, Apotex, was authorized by the Canadian government to produce a generic version of the drug to treat AIDS.<sup>50</sup> This speaks volumes for the steadfastness of Rwanda in making use of any such opportunities that the TRIPS Agreement avail for LDCs. As regards pharmaceutical patents, and pursuant to the Doha Declaration on TRIPS and Public Health in 2001, the position of Rwanda had always been that of excluding pharmaceutical products from patent protection. This position was actually explicitly reflected in the Rwandan patent law of 2009.

The 2018 revised IP policy therefore sought to adjust the 2009 policy to all such new developments. For instance, realizing that Rwanda as a country has shown huge potential to attract foreign investors over the past decade or so, the 2018 version of the IP policy points out the need to review the patent legislation to make it such that it has the capability to woo foreign investors, who would only be attracted if there is a right balance between their needs as right holders and the consumers. Furthermore, in a deliberate move to promote

the local innovative base, the policy reforms with respect to utility models in the 2018 version of the policy has included the need to empower IP offices so that they are able to process utility model applications.<sup>51</sup>

However, in as much as there has been increasing attraction of FDI especially in the manufacturing industry since 2009, the 2018 version of the IP policy, noting that Rwanda as an LDC still stands to benefit from the flexibilities offered by the TRIPS Agreement in the patent regime, continues to propose that pharmaceutical patents and new medical uses of known substances remain to be part of the exceptions to patentability. This is another visible way in which Rwanda continues to use the TRIPS flexibilities to her advantage.

In addition, Rwanda's IP regime recognizes international exhaustion of IP rights, in a clear move to allow for parallel importation of generic medicines that might have been produced under compulsory license in other countries. Furthermore, utilizing the provision under Article 31 of the TRIPS Agreement, the 2019 version of the Rwanda IP policy recommends that Rwanda put in place a system that allows for the granting of compulsory licenses in specific circumstances. The IP reforms put forward in the revised national IP Policy of 2018 are summarized in Table 1 below.

<sup>49</sup> Vitor Fildago, 'Article 31bis of TRIPS: How can African Countries Benefit from this Arrangement?' <<https://lexology.com>> accessed 19 April 2020.

<sup>50</sup> *ibid* 2.

<sup>51</sup> Rwanda IP Policy 2018.

**Table 1. Summary of reforms in the 2018 Rwanda Intellectual Property Policy**

Area	Policy Reforms
Legislative framework	<ul style="list-style-type: none"> <li>Domesticating provisions of international treaties including TRIPS</li> <li>Cover all categories of IP</li> <li>Establishment of penal provisions against offences to IPR.</li> <li>Takes advantage of TRIPS flexibilities to the Rwandan context.</li> </ul> <p>Clarifies institutional responsibilities</p>
Patents	<ul style="list-style-type: none"> <li>Revision of patent legislation with the view to attract FDI</li> <li>Empowerment of the new IP office with infrastructure, resources and know-how</li> </ul> <p>Establishment of an administrative opposition.</p>
Utility models	<ul style="list-style-type: none"> <li>Empowerment of the new IP office with infrastructure, resources and know-how</li> <li>Establishment of an administrative opposition procedure.</li> <li>Engage the IP office to create advisory service</li> </ul> <p>Create opportunities for learning from others on innovation culture.</p>
Industrial designs	<ul style="list-style-type: none"> <li>Accede to Locarno Agreement on international classification for industrial designs</li> <li>Provide for substantive examination of applications for industrial design</li> <li>Establish an administrative opposition procedure for the registration of IDs</li> <li>Empowerment of the new IP</li> </ul>

Area	Policy Reforms
	<p>office with infrastructure, resources and know-how.</p> <ul style="list-style-type: none"> <li>Establish an administrative opposition procedure.</li> </ul> <p>Empower IP office to provide advisory services.</p>
Trademarks	<ul style="list-style-type: none"> <li>Accede to the Nice Agreement International Classification as well as Banjul Protocol.</li> <li>Align to international standards</li> <li>Provide for mechanism of appeal and dispute resolution.</li> <li>Empowering the IP office</li> <li>Establish an administrative opposition procedure</li> </ul> <p>Empower IP office</p>
Geographical Indications	<ul style="list-style-type: none"> <li>Create appropriate legislative framework for GI</li> <li>Accede to the Lisbon Agreement on Appellations of origin</li> <li>Create awareness as regards the potential of GIs</li> </ul> <p>Empower IP office to deal with GIs.</p>
Copyright and Related rights	<ul style="list-style-type: none"> <li>Create appropriate legislative framework</li> <li>Empower IP office to deal with copyright registration</li> <li>Engage in efforts to create awareness.</li> </ul> <p>Rationalize the roles of different institutions Liaise with CMOs to take advantage of systems such as WIPOCCOS</p>

## 7. THE MALAWI CASE

Malawi is a small land-locked country in Sub-Saharan Africa with a per capita GNI of just US\$320 in 2016, one of the lowest



in the world.<sup>52</sup> The country has up to 90% of the population living in rural areas without access to portable water and electricity, engaging in small scale farming activities, subsistence and relying on rain-fed agriculture. Malawi has one of the largest population densities in sub-Saharan Africa.<sup>53</sup> Just as Rwanda, Malawi is also a member of the Africa Regional Intellectual Property Organization (ARIPO) as well as the World Intellectual Property Organization (WIPO). The country is also among the LDCs that signed the TRIPS Agreement and are currently working on harmonizing its legislation to make it TRIPS compliant, though the process has been very slow for patents, as the country is still using the 1958 Act. However, the trademarks and copyright laws are as recent as 2017 and 2016 respectively. With the Patent Act being as old as 1958, where the term of patent protection remains 16 years, there is not much that Malawi has so far done in terms of making the patent laws TRIPS compliant, or indeed making attempts to make use of TRIPS flexibilities for LDCs such as Article 31bis. This is despite the country being among the worst hit with HIV and AIDS in Sub-Saharan Africa, whereby 1 million people were recorded as living with the virus in 2018, out of a population of 18 million people.<sup>54</sup>

Malawi ranks as one of the poorest countries on earth by some quarters. It is a unique case in that while it is not strictly speaking a fragile state, the country continues to display characteristics of a conflict affected country in as far as functionality of governance institutions is concerned.<sup>55</sup> A third of the country's GDP is dependent on the rain-fed agricultural sector, and as would be expected, climate-related shocks have been among the factors that have affected the country's development progress over the past decades, in addition to domestic political and governance shocks. Collectively, these shocks have contributed to economic stagnation and a low pace of poverty reduction.<sup>56</sup> To date, the country faces various economic challenges such as low productivity, narrow and raw export base with high reliance

on few commodities; persistent energy shortfalls and poor ICT facilities.<sup>57</sup>

Malawi has had IP legislation since its independence through the statutes and administrative apparatus that were inherited from the former colonial power. With the exception of Copyright Act which was repealed in 2016 and the Trademarks Act which was repealed in 2017, the colonial Patents and Registered Designs Act is still in force to date. This speaks volumes as regards the out-datedness of the Patents Act. In addition, the Breeders' Rights Act of 2018 provides protection of breeders of new varieties of plants.

Malawi has a national IP policy which is as recent as 2019. The policy is linked to a number of international IP treaties to which Malawi is party including the TRIPS Agreement.<sup>58</sup> The policy identifies five priority areas whose implementation are said to be key to the realization of IP as a tool to transform the country's economy. These priority areas are summarized in Table 2 below:

**Table 2. Policy priority areas in Malawi National IP Policy**

Priority Area	Problems Identified	Strategies
Effective Institutional Framework for Modernizing Administration of IPRS	Lack of operational and financial autonomy  Lack of coordination between COSOMA and DRG	<ul style="list-style-type: none"> <li>• Develop and implement the modernization plan</li> <li>• Develop legal framework for establishment of autonomous office</li> <li>• Develop and adopt an operational business model</li> </ul>
Generation and Protection of IP Assets	Low output of locally generated IP	<ul style="list-style-type: none"> <li>• Provide incentives for development of IPR</li> <li>• Mainstream</li> </ul>

<sup>52</sup> IMF Country Report for Malawi (IMF 2017).

<sup>53</sup> World Bank, 'Malawi Poverty and Vulnerability Assessment' (World Bank, December 2007).

<sup>54</sup> UNAIDS Statistics – Malawi <<http://unaids.org>> accessed 19 April 2020.

<sup>55</sup> *ibid.*

<sup>56</sup> IMF (n 52) 129

<sup>57</sup> *ibid.*

<sup>58</sup> National Intellectual Property Policy for Malawi 2019, 5

Priority Area	Problems Identified	Strategies	Priority Area	Problems Identified	Strategies
	High filing fees	<p>generation of IP as a performance indicator</p> <ul style="list-style-type: none"> <li>Promote development of institutional IP policies</li> <li>Establish an innovation fund</li> <li>Develop guidelines for supporting international protection of locally generated IP assets</li> <li>Promote reverse engineering</li> <li>Promote Traditional Knowledge (TK) &amp; Traditional Cultural Expression (TCE) based innovations</li> </ul>			<ul style="list-style-type: none"> <li>Create or strengthen rights holder associations</li> </ul>
			Effective and Balanced Legal Regime for IPRs	<p>Outdated Patent and Registered Designs legislation</p> <p>Patent laws not in line with TRIPS</p> <p>No protection for TK, EoF and TCE</p>	<ul style="list-style-type: none"> <li>Review patent and design legislation</li> <li>Implement protection of utility models</li> <li>Provide for adequate and balanced enforcement procedures</li> <li>Implement TRIPS, Marrakesh and other regional IP obligations</li> <li>Prepare legislation and strategies for the protection and exploitation of TK, genetic resources and expressions of folklore</li> <li>Enhance the capacity of IP office</li> <li>Establish an inter-ministerial steering committee on IP</li> </ul>
Effective Exploitation and Commercialization of IP Assets	R&D activities not leading into commercialization	<ul style="list-style-type: none"> <li>Develop and implement guidelines for supporting commercialization of IP</li> <li>Promote establishment of innovation centres</li> <li>Develop contractual and licensing guidelines</li> <li>Develop and implement a strategy for IP and branding</li> <li>Identify avenues for showcasing Malawi's IPR-based products</li> <li>Develop a database of IPRs originating from Malawi</li> </ul>	IP Awareness Creation and Capacity Building	Limited awareness of the value of IP	<ul style="list-style-type: none"> <li>Develop and promote a national slogan</li> <li>Develop and implement awareness and outreach strategy</li> <li>Mainstream IP issues in school curricula</li> <li>Enhance training of IP attorneys</li> <li>Introduce and strengthen teaching of IP in tertiary institutions</li> </ul>

Priority Area	Problems Identified	Strategies
		<ul style="list-style-type: none"> <li>Develop capacity for enforcement and dispute resolution</li> </ul>

## 8. RWANDA-MALAWI COMPARISON

As can be appreciated from Tables 1 and 2, Malawi and Rwanda's IP legislations are by far not comparable. Rwanda already had a fairly modern IP legislation as early as 2009 and has over time begun considering creating a conducive environment for the increasing prospects of FDI. Malawi is battling with having to make their patent law modern and, especially to make it compliant with the TRIPS Agreement. Malawi at the moment is missing out on opportunities that arise from strong intellectual property protection such as FDI, whereas it is clear from the Rwanda case that since 2009 there has been a desire by foreign companies to establish manufacturing industries in the country. The 2009 IP policy for Rwanda was clear as to how as a country they intended to use the flexibilities provided for in the TRIPS Agreement, and it is not surprising that Rwanda was the actually the first African country to make use of article 31bis of the TRIPS Agreement, efforts of which started way earlier before the article came into force in 2017.

In the case of Rwanda, it is clear that the IP regime has taken on board the flexibilities in the TRIPS Agreement available for LDCs while at the same time mindful of the emerging IP needs that are coming as a result of the strides being made in terms of economic development, such as the need to create a conducive environment for FDI. Rwanda has made a systematic balance between benefiting from the provisions provided for by the TRIPS and the desire to have their laws TRIPS-compliant and conducive for international trade. There is a strong indication of systematically subscribing to the international standards of protection as are outlined in the TRIPS and other IP treaties that the country is party to. There is, however, evidence of slowness when it comes to implementation of the proposed reforms as it is noticeable in the case of Rwanda, that some of the provisions in the 2009 Intellectual Property Policy were actually not implemented until the policy was revised in 2018.

In the case of Malawi, there has clearly been a lack of steadiness to update the legislation and take advantage of the flexibilities provided for in the TRIPS Agreement. The innovation base is as stagnant as the patent laws, with local patent applications being at less than 1%. It is perhaps not surprising that even the focus of the national intellectual property policy for Malawi remains at the level of capacity building and awareness about IP. Yet it is clear for instance, given the HIV and AIDS statistics given about Malawi, it is clear that quite a big fraction of the country's annual national budget is directed towards the purchase of the AIDS drug. It was therefore necessary that Malawi, poor as it is, be aggressive in taking advantage of the such TRIPS flexibilities relating to access to medicines as compulsory licensing or parallel importations. With neglected patent laws dating as far back as 1958 however, the IP regime is far from exploring such available flexibilities. There is, however, a ray of hope as the process to revise the patent laws is underway, and it is hoped that the laws will be crafted in such a way as to take full advantage of the flexibilities provided for in the TRIPS. A recommendation for Malawi would therefore be that it should move steadfast with the revision process so as to create a legal environment that allows for maximum utilization of TRIPS flexibilities, borrowing a leaf from the strides registered by Rwanda.

## 9. CONCLUDING REMARKS

The present paper has shown how the TRIPS Agreement primarily advantages countries with a viable IP base, which is mostly the developed world as compared to developing countries and LDCs. However, the flexibilities that the TRIPS Agreement provides for the developing and LDCs can still be used by the concerned countries in a manner that could enable such countries to still benefit from being a WTO Member. Key, however, is for such countries to make a proper assessment of their development needs and potential for growth. Rwanda and Malawi provide two interesting cases where LDCs approach the TRIPS Agreement and its flexibilities differently, in setting their agenda for IP development in the respective countries, with the former making the most use of TRIPS Agreement and its flexibilities as compared to the latter. The paper also observes a gap in

terms of the obligations of developed country members to LDCs, where there is also room for improvement as regards helping out the LDCs, notably putting into practical action the provision under Article 66.2 of the TRIPS Agreement.

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