From the Paris Convention to the TRIPS Agreement

A One-Hundred-and-Twelve-Year Transitional Period for the Industrialized Countries

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I. INTRODUCTION

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) has not appeared out of a vacuum. It is the culmination of a long maturation of which the root goes a long way back, notably to the General Agreement on Tariffs and Trade (GATT) of 1947, the Berne Convention for the Protection of Literary and Artistic Works of 1886 and the Paris Convention for the Protection of Industrial Property of 1883. It took a very long time for its seed to grow and come to fruition in 1995. In the meantime, countries nowadays called “industrialized” had largely profited from the lack of robust and full protection at the international level in order to copy British technology from one another and disseminate it throughout their local industries. They had benefited broadly from that long period of time to structure, develop, strengthen and diversify their technological and industrial, as well as human, capacities. Nevertheless, other parts of the world, especially African countries, did not have identical advantages during that same period of time. Bearing the heavy burden of colonization further to the Trans-Atlantic slave trade,
Sub-Saharan countries were not independent politically, economically or technologically. Moreover, the colonial regimes impeded any development of local technology or innovation until independence was granted to most African countries around the year 1960.

The two above-mentioned categories of States are today Member countries of the World Trade Organization (WTO). Industrialized countries are experienced in the trade and intellectual property (IP) fields, while developing countries (DCs) and least-developed countries (LDCs) in general, and African countries in particular, are inexperienced in these areas. These inexperienced countries are given only five or ten years (already renewed once) for a transitional period in which to create a sound and viable technological base and a structural reform of their IP systems. These time-periods are very short, thus it is obvious that the WTO requires from those countries superhuman efforts which even Western countries did not and could not attain in the past. At the rate the need for the protection of intellectual property rights (IPRs) is increasing and since DCs and LDCs are overwhelmed with economic, financial and administrative constraints, it is high time for the WTO to re-examine the length of the transitional periods granted to its poor Member countries. What should be done to allow the DCs and LDCs, and the African countries among them, to build a sound and viable technological base and achieve structural reform? Upon what criteria should the WTO base the length of transitional periods? Could a transitional period of five or ten years enable African countries as well as all DCs and LDCs to integrate into the world trading system? How long did it take industrialized countries to build a sound and viable technological base and undertake as complete a structural reform of their IP systems as the one specified in the TRIPS Agreement?

Beyond the above-mentioned questions, this article seeks to demonstrate that, even if not accepted and encouraged, the lack of robust and full protection at the international level in the years from the Paris Convention to the TRIPS Agreement helped industrialized countries build and develop gradually a profound and viable technological base. Without rejecting the TRIPS Agreement—which is very helpful in the long run for DCs and LDCs—it would be just and equitable that the poorer countries also be granted a transitional period equal to that of the industrialized countries, i.e. from the Paris Convention in 1883 to the creation of the WTO TRIPS Agreement in 1995. It is only this kind of transitional period which could give DCs and LDCs, and especially African countries, not only appropriate means to build and develop a solid and viable technological base but also the opportunity to undertake a proper structural reform of their IP systems.

This article is divided into four Sections. Throughout the next Sections it will be shown how the lack of robust and full protection of IP worldwide benefited exclusively the industrialized countries. Section II will focus on the lack of robust protection, at the international level, of IPRs before the Paris Convention and Section III discusses this
within its framework. Section IV will deal with the same subject-matter, but under the former GATT, and Section V will focus on the TRIPS Agreement under the WTO. Notwithstanding the previous lack of robust and full protection of IP worldwide, Section VI will examine why IP protection is crucial for scientific development and transfer of technology as well as the economic and social welfare of a country or of a continent. Section VII concludes.

II. THE EARLY PROTECTION OF IPRS

Certainly the current level of technological, industrial and human capacities in industrialized countries did not happen in the blink of an eye—or in only five or ten years. Instead, it was a long process which started long before the Industrial Revolution in England in 1760, when it accelerated and subsequently spread all over Europe, America and Japan. Although inventor’s rights already existed—notably in the Republic of Venice through the Parte Veneziana in 1474; the patent in England in 1623 through the Statute of Monopolies promulgated by King James the First; in the young United States through the Act dated 10 August 1790; and in France through the Decree adopted by the King, Louis XVI, on 31 December 1790 and on 7 January 17913—industrialized countries, as mentioned earlier, largely profited from the lack of IPR protection to create a sound and viable technological or industrial base.

According to scholars, it took only decades and not centuries for European countries to copy British technology and disseminate it throughout their local industries. Paul Bairoch, one such scholar, explains how this copying process was undertaken:4

“In the mid-XVIIIth century, the attention of the whole of Europe was attracted by a phenomenon which was taking place in England. Something very important was happening there ... To these questions, French encyclopaedists first, followed by other European countries, had to provide not only informative but also formative answers. Thus, throughout Europe, huge campaigns on information and training emerged, often organized by the central authorities. All over Europe, in increasing numbers and large-scale printing, appeared not only treatises on 'modern' agriculture, but also reviews and journals devoted to these questions. All over Europe, whether on the initiative of the central authorities or not, emerged diverse types of associations, which focused on the diffusion, encouragement and use of 'new' agricultural techniques, improved seeds, new races of more productive domestic animals, more refined or improved tools, etc. Therefore, all over Europe innovation centres were disseminated through which new techniques were imposed on a major part of the population.” (translated by the author).

Bairoch affirms that the dissemination of British technology all over Europe was accelerated by the concentrated communications networks at that time which facilitated

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information exchanges between European countries. The first countries to follow the British example were France, Belgium and Switzerland. Then came Germany, Austria and Sweden, and later Spain, Italy, Russia and Japan. As to North America and Oceania, the fact that British farmers settled there contributed greatly to the dissemination of British technology in those parts of the world.

Further, when the first railway was started in England in 1825 following the invention of the steam engine by James Watt in 1783, it took only five years for the United States to reproduce locally the technique in 1830, seven years for France (1832), ten years for Belgium (1835), eleven years for Germany and Canada (1836), and twelve years for Russia (1837). Between 1838 and 1848, thirteen countries were added to that list, among which were Austria and Italy. In the agricultural and industrial fields, British technology was reproduced in the above-mentioned countries either through reverse engineering and a mere copying process, or through the transfer of technology from one to another. In general, France as well as the other countries which started their Industrial Revolutions in the xixth century, copied British machines—legally or illegally—in the first phase. Around the year 1870, serious controversies occurred regarding different national systems of IP protection; this situation led to the first congress in Vienna in 1873, then another in Paris in 1878, both of which aimed at the unification of divergent ideas.

The necessity to protect IPRs at the international level came later on, in 1883, with the Paris Convention, which is the first international agreement on the protection of industrial property. Then followed the Berne Convention for the Protection of Literary and Artistic Works in 1886. And, lastly, the GATT of 1947, even though exclusively focused on tariffs and trade, also referred to IP in its provisions. The Paris Convention

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5 Id.
7 Bairoch, supra, footnote 4, p. 83.
8 W.O. Henderson, Britain and Industrial Europe 1750-1870: Studies in British Influence on the Industrial Revolution in Western Europe, Liverpool, at the University Press, 1954, pp. 44-45. In France, for example, the two locomotives imported from England by Marc Seguin in 1828 were not brought into service, but served solely as models for the first twelve locomotives manufactured by Seguin. See also Ch. Ballot, L'introduction du machinisme dans l'industrie française, Paris, 1923, reprinted Slatkine-Megariotis, Geneva, 1978, p. 242: “When, in 1771, Trudane sent Holker to England to discover the latest secrets, Holker happened to buy a Jenny which he brought to France and succeeded to assemble in the factory of Sens ... The success was quick. A construction workshop was built in Sens, another in Rouen.” Ballot tells us in the same book that it was in France that the mechanical linen textile mills were further developed using machines manufactured from a model which an industrialist from the North brought out in a fraudulent manner from England around 1832-1835, and especially from designs copied in English factories in 1833 and 1838 by Decoster. Decoster employed more than 450 workers to manufacture those machines.
9 Bairoch, supra, footnote 4, p. 35. When Colbert, at the end of the xvith century, decided to call upon foreigners to instruct the French people, he called upon the Dutch for the weaving, the Germans and the Swedish for iron and lead metallurgy, and the Italians for glass and silk-making. In Europe, in general, the Dutch were solicited for the building of canals, and the Italians, the French and the Swiss for construction techniques.
has been revised six times and amended once. As for the Berne Convention, it has been completed twice, revised five times and amended once. The GATT of 1947 has been amended twice.

Despite these two Conventions and the former GATT, as well as their revisions and amendments, no full and robust protection was imposed worldwide, although international trade was also much developed during that period. There was no dispute settlement system at the international level, yet the possibility for industrial countries to provide it certainly did exist. Instead, the Paris and the Berne Conventions as well as the GATT empowered Member countries to adopt measures to protect intellectual property within the national boundaries. As mentioned earlier, the lack of robust protection at the international level at that time largely benefited the industrialized countries. The provisions of the Paris and Berne Conventions as well as of the GATT 1947 (notably most-favoured-nation treatment) having been reproduced literally in the TRIPS Agreement, have only recently produced a strong system of protection (one hundred and twelve years later for the Paris Convention; one hundred and nine years later for the Berne Convention; and forty-seven years later for the GATT).

III. THE PROTECTION OF IPRs UNDER THE PARIS CONVENTION

According to the Paris Convention, the countries of the Union are bound to ensure that their nationals have effective protection against unfair competition. They are also bound to ensure that nationals of other countries of the Union have appropriate legal remedies to effectively repress all acts of unfair competition and infringement.

The countries of the Union shall also undertake to provide measures to permit federations and associations representing interested industrialists, producers, or merchants—provided that the existence of such federations and associations is not contrary to the laws of their countries—to take action in the courts or before the administrative authorities, with a view to the repression of the acts of unfair competition and infringement “in so far as the law of the country in which protection is claimed allows such action” by federations and associations of that country. Further, the Paris

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12 The Paris Convention was revised at Brussels on 14 December 1900, at Washington on 2 June 1911, at the Hague on 6 November 1925, at London on 2 June 1934, at Lisbon on 31 October 1958, and at Stockholm on 14 July 1967; and was amended on 28 September 1979.
14 The first modification of GATT took place in 1955 when a review session modified numerous provisions. A move towards a transformation of GATT into a formal international organization named the Organization for Trade Co-operation failed. The second revision took place in 1965 when the Part IV, relating to Trade and Development, established new guidelines for trade policies in favour of developing countries.
15 Article 10bis (1).
16 Article 10ter (1).
17 Article 10ter (2).
Convention states that the countries of the Union shall "in conformity with their domestic legislation" grant temporary protection to patentable inventions, utility models, industrial designs and trademarks, in respect of goods exhibited at official or officially recognized international exhibitions held in the territory of any of them.\(^\text{18}\)

It should be noted that nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws grant, or may later grant, to nationals. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.\(^\text{19}\) However, no requirement as to domicile or establishment in the country where protection is claimed may be imposed upon nationals of countries of the Union for the enjoyment of any industrial property rights.\(^\text{20}\) The same treatment shall benefit also nationals of countries outside the Union who are domiciled or who have real and effective industrial or commercial establishments in the territory of one of the countries of the Union.\(^\text{21}\)

Notwithstanding the above, most Member countries of the Union excluded some technological fields from patentability in accordance with their public policy objectives of national systems for the protection of IP, including their development and technological objectives. Carlos M. Correa affirms that this possibility had been extensively used by developing and some developed countries, particularly with respect to pharmaceutical products. By 1980, sixty-five countries did not recognize such protection, and countries such as France and Canada had provisions on compulsory licences that specifically affected the enjoyment of patent rights related to medicines.\(^\text{22}\) If national tribunals applied rules of private international law as regards the international competence of jurisdictions and the recognition of foreign judgments when a question related, in particular, to violations of contract was raised, things changed automatically when the dispute had to deal directly with the technique of a patent, cancellation of a title, counterfeiting, etc.\(^\text{23}\) The principle applied here was that national tribunals are exclusively competent on such questions.\(^\text{24}\) As it is clear that a patent was identical to a privilege granted by the King or the highest authority in the country, in theory, no tribunal should be able to remove or contradict it.

The outstanding revision of the Paris Convention with regard to dispute settlement took place in 1967. According to the revised Convention, any dispute

\(^{18}\) Article 11(1).

\(^{19}\) Article 2(1).

\(^{20}\) Article 2(2).

\(^{21}\) Article 3.

\(^{22}\) Carlos M. Correa, Implementing the TRIPS Agreement in the Patents Field—Options for Developing Countries, 1 J.W.I.P. 1, January 1998, p. 76.

\(^{23}\) For example, a Tribunal in Amsterdam on 25 January 1926 refused a German patentee the right to sue in the Netherlands a Dutch national who pirated his patent: see Foyer and Vivant, supra, footnote 3, p. 59.

\(^{24}\) Ibid., p. 54.
between two or more countries of the Union concerning the interpretation or application of the Convention, and not settled by negotiation, may, by any one of the countries concerned, be brought before the International Court of Justice (ICJ) by application in conformity with the Statute of the Court, unless the countries concerned agree on some other method of settlement. But the jurisdiction of the ICJ is not mandatory for UN countries. Thus, infringing countries could not be brought before the ICJ without their consent. This is one of the reasons why the World Intellectual Property Organization (WIPO) was denied designation as the appropriate forum for the revision of IPRs at the launching of the Uruguay Round. It must be emphasized that industrialized countries have, for a long time, been in the position to grant robust and full protection to IPRs worldwide. They have long had all the necessary infrastructure as well as trained personnel to implement and enforce IP provisions. But if industrialized countries did not impose such protection at the time of the establishment of the Paris and Berne Conventions, including the former GATT, and the subsequent revisions and amendments thereof, it is only because they were not ready at that time. They had to slow down to create and develop a sound and viable technological base as well as the legal and administrative structures. Thus, based upon having this long transitional period, it would also be just and equitable to grant a similar transitional period to African countries of which the industrial or technological levels are very low. The lack of robust and full protection did not end with the Paris Convention; it continued also under the GATT 1947, and this will be examined below.

IV. THE PROTECTION OF IPRS UNDER THE GATT 1947

In parallel with the Paris and the Berne Conventions, the earlier GATT referred to IP in its provisions, notably in Articles III(10), IV, IX, XII(3), XVIII(10) and chiefly in Article XX(d). Although GATT provisions such as most-favoured-nation treatment (Article I), national treatment (Article III) and transparency (Article X), as well as nullification and impairment (Article XXIII), applied to actions taken in connection with the national enforcement of IPRs, the general relevance of the previous GATT for IPR regulations was limited, and no substantive disciplines applied in this area.

It is quite surprising that no special attention was paid to the IP provisions until the first attempt to reach an agreement on the matter when, at the end of the Tokyo Round

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25 Article 28(1).
27 Among the fifty-six African countries, only ten countries appear among the “most industrialized” of the continent. The industrial level of these African countries are: Swaziland (33.8%), Mauritius (24.47%), Egypt (19.36%), South Africa (18.75%), Ivory Coast (18.75%), Tunisia (18.22%), Senegal (17.77%), Morocco (17.57%), Lesotho (16.02%) and Zimbabwe (15%); see, Le Nouvel Observateur, Atlas économique et politique mondial, Atlasco, les 227 pays étudiés, 2003, p. 192.
(1978-1979), a code against trade in counterfeit goods was proposed. But the proposal failed. The question appeared again in 1982 when the Ministerial Conference launched the question of IPRs protection, and it was later brought to Punta del Este during the Uruguay Round which resulted in the creation of the WTO and the TRIPS Agreement in 1995.

V. THE WTO TRIPS AGREEMENT

Contrary to the opinion of many scholars, it must be emphasized that the link between IPRs and trade did not start at the time of the Uruguay Round. As TRIPS is a compilation of previous multilateral conventions on the matter, the link between the two fields goes back as far as the Paris Convention of 1883 for the protection of industrial property. If the said link and the protection of trade-related aspects of IPRs were not previously emphasized, it was above all because of the lack of political will, and this came only during the Ministerial Conference which took place in Uruguay within the framework of the GATT 1947.

At the Ministerial Conference which launched the Uruguay Round of multilateral trade negotiations at Punta del Este in September 1986, TRIPS was included into the negotiation Agenda as one of the so-called “new topics”. Intellectual property featured almost as a footnote on a crowded Agenda, and it was uncertain whether that contentious item would survive the end of the Round. Nevertheless, the comprehensive Agreement on TRIPS was later considered as one of the major breakthroughs in the GATT negotiations, along with the Agreements on agriculture and services. But if the presentation of the topic was so-called “new”, there was in fact nothing new with the trade-related aspects of IPRs, as a reference of the linkage between the two fields was contained, as mentioned earlier, in the provisions of the Paris Convention as well as of the GATT 1947.

Apart from the TRIPS norms regarding, in particular, most-favoured-nation treatment, the transitional periods, the scope of patentability, the duration of patent and the burden of proof, the major breakthrough of the TRIPS Agreement is only but the strong political will of granting a robust and full protection to IPRs at the
international level.\(^{37}\) And the only reason why this had not been achieved before was the fact that industrialized countries were not ready to impose such protection worldwide through a strong mechanism such as the WTO dispute settlement system. However, it is not by chance that this has occurred only now.

Before the creation of the WTO, multilateral rule-making in the IPR area was dominated by the WIPO, which administers or co-administers practically all the important conventions in this field. At the outset of the Uruguay Round fundamental divergences existed between industrialized countries, which wished to achieve a comprehensive coverage of all IPRs, and DCs and LDCs, which wanted to limit the scope to a code against trade in counterfeit goods. The consequence was that practically all existing IPRs were included in TRIPS. Most of the WIPO Conventions, notably the Paris Convention covering industrial property rights and the Berne Convention covering copyright, as well as the Washington Treaty for the protection of semi-conductor topographies, were included by reference, which meant that these Conventions were also subject to an efficient dispute settlement system. Over and above the level provided for under the provisions of these Conventions, the substantive levels of protection were set at the level prevailing in 1985 in the industrialized countries.\(^{38}\) It was only in 1985, after they had reached the level of robust protection of the TRIPS Agreement, that the Uruguay Round launched the crucial question of the worldwide protection of trade-related aspects of IPRs. And by the time the TRIPS Agreement entered into force, industrialized countries were already well equipped. They already had established infrastructures capable of granting such protection, including trained personnel. They had already—and gradually—developed and diversified their technological or industrial capacities.

It should be pointed out that TRIPS standards concerning the availability, scope and use of IPRs reproduce literally Articles 1 to 12 and 19 of the Paris Convention, Articles 1 to 21 of the Berne Convention, Articles 2 through 7, and 12 and 16 of the Washington

\(^{37}\) See the Preamble of the TRIPS Agreement: "Members, Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights ... Recognizing, to this end, the need for new rules and disciplines concerning (a) the applicability of the basic principles of GATT 1994 and of relevant international intellectual property agreements or conventions; (b) the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights; (c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems; (d) the provision of effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments ... Recognizing the need for a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods; Recognizing that intellectual property rights are private rights ... Emphasizing the importance of reducing tensions by making strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures ..." (emphasis added). See also Article 1(1) according to which Members shall give effect to the provisions of the Agreement and shall, but shall not be obliged to, implement in their law more extensive protection than is required provided that such protection does not contravene the provisions of the TRIPS Agreement, Article 41(1), according to which Members shall ensure that enforcement procedures as specified in the TRIPS Agreement: "... are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement;" (Articles 41 to 61; emphasis added); and Article 72 according to which: "Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of other Members."

Convention. Further, TRIPS standards refer to the above-mentioned Conventions with regard to the enforcement of IPRs as well as to the acquisition and maintenance of such rights. So why wait one hundred and twelve years to impose robust and full protection at the international level? And why grant only five or ten years to DCs and LDCs while industrialized countries had the benefit of a very long period of transition? The WTO should review its policy on this issue.

The importance of the TRIPS Agreement for the development of the DCs and LDCs, among which are a number of African countries, cannot be denied. Ensuring enforcement procedures as specified in Part III of the Agreement will largely benefit not only foreign investors but also, and most importantly, in the long run African nationals. Nevertheless, a long transitional period for DCs and LDCs to establish and finalize the structures imposed by the TRIPS Agreement is required. African countries are not as industrialized as Western countries, from where the TRIPS Agreement originates.

The principal objective of the TRIPS Agreement is to strengthen and harmonize Western IP standards around the world; African countries need enough time to assimilate the Agreement and translate its language and obligations into African laws, regulations and procedures. Rules pertaining to IP protection reflect cultural values, which are connected to national, and hence cultural, identities. Therefore, the transitional period of five or ten years, even with the possibility of renewal, is not sufficient at all. Extending this period would be a very good opportunity for DCs and LDCs in general, and African countries in particular, to build a sound and viable technological base, to undertake and achieve a proper structural reform of their IP systems, to develop their human capacities and to integrate into the world trading system. In order to reach this goal, the key which will open the “gates” of a sound and viable technological or industrial base to African countries is their awareness of the importance of full and robust IP protection.

VI. THE IMPORTANCE OF A FULL AND ROBUST PROTECTION OF IPRS

If the lack of robust and full protection at the international level led the scientific world to anarchy and facilitated piracy and acts of unfair competition and infringement

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39 See Part II TRIPS. This concerns Articles 9 to 40 TRIPS with regard to Copyright and Related Rights, Trademarks, Geographical Indications, Industrial Designs, Patents, Layout-Designs (Topographies) of Integrated Circuits, Protection of Undisclosed Information and Control of Anti-Competitiveness Practices in Contractual Licences.

40 See Part III TRIPS. This concerns General Obligations (Article 41), Civil and Administrative Procedures and Remedies (Articles 42 to 49), Provisional Measures (Article 50), Special Requirements Related to Border Measures (Articles 51 to 60) and Criminal Procedures (Article 61); and Article 62.

41 This Part deals with mechanisms dealing with IPR enforcement (see Articles 41 to 61).

previously, there is no convincing reason that this situation should be continued and encouraged at the present time. The patentee or the rightholder is granted a monopoly of a right only for a given time, not endlessly, and the ultimate beneficiaries of the scientific and technological progress are, in the long run, the world community as a whole. No one can deny the fact that scientific discoveries and technological progress, in diverse fields, have opened vast prospects for the improvement of the living conditions of humanity. Thus, not protecting IPRs will threaten research and development and make scientific progress fall backwards. When around the year 1870 strong criticism arose against the institution of patents, Great Britain and the Netherlands abolished patent-law protection, and this resulted in a grave recession as regards technological development. The two countries, aware of the importance of IP protection for economic and technological progress, later re-established patent protection, believing in an interconnection between IP protection and the promotion of innovation and, ultimately, of social and economic welfare.

Many scholars from Third-World countries affirm that IP must serve the economic and social development of the whole society, and not the egoistic interests of private individuals and multinationals. Without entering into a fierce debate on this issue, it is important to affirm objectively that IP serves both the economic and social development of the whole society. All depends on the moment when the conflict between the two interests appears. Obviously, the conflict between the protection of IPRs and the access of the whole society to the scientific progress and its applications generally appears only at the starting point, at the innovation stage of the property. By the time an IPR emerges, especially a patent, it is obvious that its monopolistic protection during a given time-period is opposed to the right of competitors and the whole community to freely access the new invention and its applications. During that time, all non-rightholders have to pay for permission to reproduce or to use the object of the patent. But when the patent protection expires, competitors and the whole community greatly benefit, at a low price, from such scientific progress and its diverse applications.

At the time a patent emerges, limitations of the patent by governments are considered only as tiny advantages, while the exclusive rights conferred to the patentee or the rightholder constitute a broad and individual benefit. Nevertheless, when the protection finishes, the limitations and exceptions will turn into a broad advantage for the whole society, while the exclusivity of the rights granted to a single patentee will, in its turn, be reduced to a tiny profit. In other words, limitations to the exclusive rights by governments will be first considered as a mere exception while the rights of the patentee will be general and “absolute”. At the end, limited exceptions will become a “general rule” while the exclusivity of rights conferred to a patentee (general rule) will

43 See Bronckers, supra, footnote 26, p. 1247, at footnote 6: from 1869 until 1910, the Netherlands abolished patent law protection.

turn into a mere exception. Ultimately, the inventor, the competitors and the whole society will be treated at the same level. That is why, in exchange for patent protection, patentees must disclose their inventions in a manner sufficiently clear and complete for the inventions to be carried out by the public. Thus, the patent system is a means of granting, for a limited period of time, adequate compensation for the investment made by those who, with their money and physical efforts, strive for the improvement of the living conditions of humanity. They have to be paid back first for the fruit of their private efforts. Then, their invention, at the termination of the protection, will be at the disposal of the whole society for ever. A system which does not recognize, protect and reward private initiatives is condemned to collapse.

It must be emphasized that the rapid increase in technology has made the protection of innovation a key determinant of economic success. How governments approach that protection, however, requires a compromise between the two above-mentioned conflicting goals. The owners of IP have a natural interest in enjoying exclusive rights to their innovation for as long as possible. A reasonably long period of exclusive rights, therefore, can act as a powerful incentive to innovation. Consumers and competitors, on the other hand, would prefer that the fruits of innovation be made generally available as quickly as possible, so that competition will both reduce prices and lead to further innovation. It is just and equitable to first grant effective and full protection to the IP rightowners which have to recoup their financial expenses made during their long research programmes. A country which does not take steps to achieve the full realization of the right of the inventor to benefit from a full and robust protection of the moral and the material interests resulting from any scientific, literary or artistic production of which he is the author, will not experience the diffusion and the transfer of technology in its territory. In a study regarding the influence of IP on private investment, joint-ventures and technology licensing in sixteen countries—among which were Japan, Spain and fourteen leading developing countries—Edwin Mansfield noted that the strength or weakness of a country’s system of IP protection seems to have a substantial effect, particularly in high-technology industries, on the kinds of technology transferred by many U.S. firms. This factor seems to influence the composition and extent of U.S. direct investment, although the amount seems to differ greatly from industry to industry. In relatively high-technology industries such as chemicals, pharmaceuticals, machinery and electrical equipment, the IP protection system also often has a significant effect on the amount and kind of technology transfer and direct investment by Japanese and German, as well as U.S., firms.

45 See Article 29 TRIPS.
46 See notably, Articles 7, 8, 30 and 31 TRIPS.
When protection and enforcement of IPRS are guaranteed, the promotion of technological innovation might follow; then, the transfer and dissemination of technology will occur. At last, there will be mutual advantages for both producers and users of technological knowledge. The rightowners will be paid for their contribution to the advancement of the standard of living and to the enjoyment of economic and social rights; and the whole society, experiencing the social and economic welfare, will be the ultimate beneficiary of the scientific and technological progress. Thus, the low or non-existent levels of IP protection in DCs and LDCs, especially in African countries, can be seen as a barrier to sound and viable social welfare.

The responsibility to take steps with a view to progressively achieving the full realization of IPRS, as well as the economic and social welfare of Africans, lies with the African governments. They must take steps to the maximum of their available resources to guarantee to their nationals the protection of their IPRS and the enjoyment of economic and social rights. Corruption must be eradicated, and the exercise of human rights and freedom must be promoted and respected across the continent. If a country does not take the above-mentioned responsibility, its nationals will become citizens only of the Red Cross, Caritas, *Médecins sans Frontières*, Doctors of the World and of numerous non-governmental organizations. An illustrative case in Africa is the current difficulty encountered with regard to the proliferation of HIV/AIDS. It is obvious that African countries did not rank public health as a number one priority when HIV/AIDS became known at the beginning of 1981. It is not right and not understandable that African countries—startled by the phenomenon—more than twenty years later seem ready to place the responsibility for their public health on foreign pharmaceutical companies and Western countries.

It should be noted that the TRIPS Agreement was imposed worldwide only on 1 January 1995, fourteen years after the spreading of HIV/AIDS, and there are also other epidemic diseases of horrific dimensions in Africa, such as Ebola, measles, malaria, tuberculosis, tetanus, cholera, etc. What concrete steps have African countries taken since the emergence of HIV/AIDS around 1981 to the establishment of the TRIPS Agreement in 1995? Why did they not profit like other countries to create technological means to produce generic drugs for the benefit of their nationals? It is surprising that a 1993 study of thirty-six African countries, conducted by the World Health Organization (WHO), found that only three countries had a "limited drug regulatory capacity". Not one African nation had what the WHO called a "comprehensive drug regulatory capacity". African governments have to be placed before their national responsibilities and become accountable for this crime of omission. It is unfortunate that some corrupt African governments invest national capital abroad for their own profit, close their hands and sit down quietly, and expect financial aid from foreign countries, the

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World Bank and the International Monetary Fund, in order to start development in their own countries. Much has been said and written about the responsibility of colonial powers for the misery of Africa. Nevertheless, it is high time to start focusing on the amount of responsibility of the Africans in their own misfortune. African countries must not continue to confiscate the human rights and freedom of their nationals. They must be accountable for their acts. They must provide material or economic means to their respective populations in order to benefit from scientific progress and its diverse applications. And the latter will come into Africa only if the private rights—of which IPRs are a part—are respected, promoted and fully protected. Thus, African countries need to request a reasonable and sufficient transitional period in order to build a sound and viable technological base, to achieve a proper legal and structural reform, to train their people and to integrate into the international scene at this, the beginning of the twenty-first century. Apart from stressing the importance of IP, the request of a sufficient and reasonable transitional period to be granted to African countries to close the technological and economic gaps between the latter and the industrialized countries, is the aim of the current article.

VII. CONCLUSION

It has been demonstrated in this article that since the Paris Convention in 1883 to the creation of the WTO TRIPS Agreement in 1995, industrialized countries had a one-hundred-and-twelve-year transitional period for imposing robust and full IP protection at the international level. The article has also shown that the link between IPRs and trade did not start at Punta del Este in September 1986 as many scholars affirm. Intellectual property rights have been recognized as private rights long before even the GATT 1947, and the Paris and the Berne Conventions of, respectively, 1883 and 1886. The Parte Veneziana in Venice in 1474 recognizing the right of the inventor, and the British Statute of Monopolies in 1623 creating the patent are two examples of this recognition. And where a patentee or a rightholder is protected against acts of unfair competition and infringement, there is automatically a link between IP and trade.

As to the TRIPS Agreement, it has not appeared out of a vacuum; it is the result of a long period of consolidation. If its maturity occurred only in 1995, its root, however, goes all the way back to the GATT of 1947, the Berne Convention of 1886 and the Paris Convention of 1883. The Paris and the Berne Conventions and their numerous subsequent revisions, completions and amendments, achieved nothing on the settlement of disputes on IP; nor did the GATT of 1947. In the meantime, countries nowadays called “industrialized” copied British technology and disseminated it from one to another throughout their local industries. They have structured, developed, strengthened and diversified their technological as well as their human capacities. So, these “industrialized” countries have profited from this long period of transition, while other countries, notably the African countries, were under the regimes of colonization.
which weakened their domestic economic capacity\textsuperscript{50} and were very hostile to any development of local technology and innovation. African countries did not have the direction of their national policies of development due to the fact that the objectives of colonial regimes were not favourable to the enhancement of local resources, but to using these resources for their own exclusive benefit. It is only since the 1960s that most of the African countries became independent, but their independence occurred at the time of the Cold War. This was a bad period, during which African countries survived according to their political ideology, with the crucial financial aid of each of the then two superpowers, the United States and the USSR. There were (and are still) no democratic institutions within African boundaries, and there were massive violations of human rights and of private initiatives until the fall of the Berlin Wall in November 1989 and the end of the Cold War in November 1990. It is only since then that the so-called “democratization wind” blows all over Africa— with meagre results at the moment. The democratization of Africa needs to be encouraged, and undertaken first by the African countries themselves. As to the technological field, African countries already began building it themselves not long ago.

Thus, to help these countries build and develop a sound and viable technological base and undertake a complete structural reform of institutions, of which the IP system is a part, would require a long period of transition and commitment. It is quite surprising to see that they have been granted only five or ten years during which they are urged to create a sound technological base and achieve structural reform of their IP systems. But how long did it take the industrialized countries to build a sound and viable technological base and set up institutions at the international level of the TRIPS Agreement? How long did it take industrialized countries, since the start of the Industrial Revolution in their own lands, to build a profound and viable technological or industrial base?

As the level of protection of IPRS similar to that of the TRIPS Agreement was reached in industrialized countries only in the mid-1980s, it can be calculated that from the Paris Convention to 1985, it took one hundred and two years, and from 1985 to 1995, it took ten more years. If industrialized countries have benefited from one hundred and twelve years (plus one year of transition according to Article 65(1) TRIPS), why grant only five or ten years to other countries such as DCs and LDCs, among which number the African countries? It would not be fair to ask DCs and LDCs in general, and African countries in particular, to achieve in five or in ten years what industrialized countries took over one hundred years to achieve.

Based upon the arguments developed in this article, it would be better and more equitable to grant a minimum transitional period of fifty years to DCs and seventy-five years to LDCs, especially African countries. And every five or ten years, these countries should be obliged to send reports to the TRIPS Council on the advancement of the

building process of their administrative and legal structures, as well as of their national
technologies. In this regard, the technical and financial assistance based upon Article 67
TRIPS as well as the international co-operation based upon Article 69 TRIPS, will have
to play a significant role. The more the technical and financial assistance is substantial
and controlled, the quicker the result will appear on the ground. All that is needed is a
strong political will from both African countries and industrialized countries. In this
building process, African scholars who find themselves abroad should return home to
participate in the reconstruction of their continent in their field of study or work. This
would be the best technical assistance and transfer of competence to Africa, which is in
serious need of the competence gained by Africans during their sojourn abroad,
especially in industrialized and democratic countries. African scholars living or studying
abroad can work for some years to prepare their return, but should not wait until they
are sixty-five years old in order to return to Africa.

According to TRIPS, to help African countries integrate into the world trading
system, developed country Members of the WTO should provide incentives to
enterprises and institutions in their territories to promote and encourage technology
transfer to African countries to enable them to create a sound and viable technological
base.\textsuperscript{51} The WTO must also review the duration of patent protection, especially for this
category of countries, so that they may quickly adapt foreign technologies to their local
industries. If there are three different categories of transitional periods granted to
different Member countries of the WTO according to their respective technological and
economic levels, why not do the same thing with regard to the duration of patent
protection? It is obvious that African countries must offer full and robust protection to
IPRs in order to gain the advantages of such protection. Nevertheless, it would be better
for the WTO to examine the situation peculiar to those countries, notably with regard
to the duration of patents.

Although the TRIPS Agreement is a perfect instrument for development, it will
reach its goal in Africa only if it were Africanized. This means that the African situation
should be reconsidered, and the special and differential treatment should be applied on
the ground. The integration of African countries into the world trading system will not
be quickly achieved with such short and insufficient transitional periods and with the
duration of patent protection being a full twenty years.

\footnote{See Article 66(2).}