

The TRIPS COVID-19 Waiver, Challenges for Africa and Decolonizing Intellectual Property

By Yousuf Vawda*

Challenges

Africa's challenges are both historical and contemporary. Firstly, they are historical in that the origins of their intellectual property (IP) laws, and indeed all laws, were a colonial imposition. This did not change substantially in individual countries with their independence from colonial rule, although

there were some revisions to their laws.³ This is true of both English- and French-speaking African countries. It has been observed, in respect of the latter, that the dependence on France and foreign donors is such that local officials are perceived to have been socialized to "concur with, or defer to, French policy advice and expertise".⁴ Such dependence relates not only to the laws themselves,

Abstract

The intellectual property (IP) regimes of African countries are a function of their colonial past, which imposed strong protections, and which have been entrenched through the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement).¹ This has had a devastating effect on their ability to access necessary health products both before and during the current COVID-19 pandemic. It is important to reflect on the challenges that African countries face, before considering the implications of the WTO TRIPS waiver on COVID-19 (henceforth, waiver).² In assessing the challenges faced by these countries, as well as the possibilities of improving access, this paper argues that while the waiver offers the best available solution to overcome the current supply shortages of a range of COVID-19 health products, in the longer term a break from this past – the decolonization of IP regimes – is necessary.

Los regímenes de propiedad intelectual (PI) de los países africanos son una función de su pasado colonial, que impuso fuertes protecciones, y que se han afianzado a través del Acuerdo sobre los Aspectos de los Derechos de Propiedad Intelectual relacionados con el Comercio (Acuerdo ADPIC). Esto ha tenido un efecto devastador en su capacidad para acceder a los productos sanitarios necesarios, tanto antes como durante la actual pandemia de COVID-19. Es importante reflexionar sobre los retos a los que se enfrentan los países africanos, antes de considerar las implicaciones de la exención de los ADPIC de la OMC sobre la COVID-19 (en adelante, exención). Al evaluar los retos a los que se enfrentan estos países, así como las posibilidades de mejorar el acceso, este documento sostiene que, si bien la Exención ofrece la mejor solución disponible para superar la actual escasez de suministro de una serie de productos sanitarios para el COVID-19, a más largo plazo es necesaria una ruptura con el pasado: la descolonización de los regímenes de PI.

Les régimes de propriété intellectuelle (PI) des pays africains sont une conséquence de leur passé colonial, qui a imposé de fortes protections, ancrées dans l'Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce (ADPIC). Cela a eu un effet dévastateur sur leur capacité à accéder aux produits de santé nécessaires, avant et pendant la pandémie actuelle de COVID-19. Il est important de réfléchir aux défis auxquels les pays africains sont confrontés, avant d'examiner les implications de la dérogation à certaines obligations des ADPIC de l'OMC pour faire face à la COVID-19 (ci-après, la dérogation). En évaluant les défis auxquels ces pays sont confrontés, ainsi que les possibilités d'améliorer l'accès, ce document soutient que si la dérogation offre la meilleure solution possible pour surmonter les pénuries actuelles d'une série de produits de santé pour la COVID-19, il sera nécessaire, à plus long terme, de rompre avec ce passé – la décolonisation des régimes de PI.

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but also the institutions left behind, and the practices, education and training of bureaucrats. It has also been argued that it extends to the mindset of judges who adjudicate IP-related cases, who were predominantly schooled in the colonial mold, and who appear to show deference to the rights of intellectual property right (IPR) holders over the public interest.⁵ Thus, regardless of the level of their economic development, many of the developing and least developed countries in Africa continued to adopt and implement the norms, standards and levels of protection for IP of developed countries.⁶ At the advent of the TRIPS Agreement, the legislation of the former colonies was still rooted in the colonial mold, which resulted in a near-seamless transition to TRIPS-compliant regimes. This was significantly different from some developing countries, notably India and Brazil, both of which had colonial histories but had adopted significant reforms pre-TRIPS.⁷ Therefore, when the shift of moving IPRs onto the trade agenda in the Uruguay Round of negotiations, and with the intense pressure applied by the GATT Secretariat took place, including tactics to divide southern countries, African countries in particular were ill-prepared to resist this further encroachment on the commons.⁸

The colonial design was hardwired into the DNA of the colonies, has remained, become entrenched, and difficult to dislodge.

The contemporary challenges are manifold. African countries have been slow to incorporate the available public-health flexibilities into their national laws, and even slower in making effective use of them. A number of reasons may account for this. One is the lack of legal and technical expertise or infrastructure and resources to implement complex systems like substantive examination of patents or the processing of compulsory license applications.⁹ Another relates to trade and other pressures by high income countries on developing countries to not use the flexibilities, as seen in Free Trade Agreements, where countries were often bullied into not using the flexibilities but also into adopting higher levels of protections. There have also been threats of legal action and/or economic sanctions, and frequently being cited by the United States (US) on its section 301 Watch List.¹⁰

Specifically in relation to Africa, it is critical to examine the role of regional IP organizations, namely the African Regional Intellectual Property Organization (ARIPO) for English-speaking countries and the Organisation Africaine de la

Propriété Intellectuelle (OAPI) for French-speaking countries. Regrettably, their role has been weighted in favor of the protection of holders' rights rather than a supportive one to enable member countries to facilitate greater access to health products through use of pro-public health measures. For example, they have downplayed the role and use of flexibilities but instead promoted stronger enforcement measures. ARIPO and OAPI are cited in several studies as not being fit for purpose.¹¹ The very design of these institutions and their practices bear this out. ARIPO patents automatically apply if no objection within 6 months, with the result that these patents are effective in many countries by default. In the case of OAPI, members are governed by a single regional statute, and the regional body approves a single patent that is automatically applicable in all 17 member countries, and this despite fact that 13 of them are least developed countries (LDCs) and should not be obliged to respect those patents. Clearly, these institutions are in urgent need of major reform to their protocols, their practices, and their relationship with member states.

TRIPS public health flexibilities have had very limited use in Africa, having been used for only a brief period in early 2000s. One study reported that these uses occurred during height of the HIV/AIDS pandemic. At this time, 28 of the 33 LDCs in Africa used the LDC transition flexibility to import anti-retroviral medicines (ARVs), while a few others applied some form of government use provisions.¹² Most ARVs were supplied by Indian manufacturers, which was then possible because of the limited window of opportunity available until 2005, after which India was required to grant product patents on medicines.

Finally, the lack of political will has been another barrier to the adoption and use of flexibilities. Many governments are unable or unwilling to challenge the powerful political and economic powers for fear of attracting their wrath.¹³

The second set of challenges relate to the difficulties of using existing measures, which are ineffectual, for various reasons.

IPR holders refuse to grant voluntary licenses except on a very limited basis, and then with stringent conditions regarding supply of markets and other constraints, which invariably exclude a number of large middle-income countries.¹⁴ A major problem is that the licensing contracts are secret. Were they to be subjected to scrutiny, they may likely be found to

be anti-competitive and in violation of Article 40 of TRIPS.¹⁵

Even where countries have provisions for compulsory licensing, they are difficult to implement for a number of reasons: they may be issued on a limited set of grounds which do not make provision for public health grounds; they are required to be issued in each country on a case-by-case, and product-by-product basis; it is usually difficult to track the multiple patents on a single product that may not be publicly known, increasing the risk of infringement claims; and they invariably involve a protracted and expensive judicial process.¹⁶ Under such circumstances, smaller competitors are deterred from applying for compulsory licenses as the financial risks are too great.

For countries that have no or low manufacturing capacity, the Art 31*bis* amendment attempts to overcome “predominantly for the domestic market” barrier, but the complex and cumbersome requirements regarding notifications, quantities, labelling and other conditions has made it practically unworkable,¹⁷ with the result that this flexibility has been used only once since it was first mooted over 15 years ago.

These constraints exist side by side with the challenge that currently Africa has extremely limited vaccine manufacturing capacity. Prior to COVID-19, Africa was consuming in the region of 1.3 billion vaccines annually, which comprised 25 per cent of the global demand for vaccines. Of this, a mere 12 million vaccines doses have actually been manufactured in Africa, accounting for 1 per cent of its requirements. The staggering reality is that Africa depends on imports for 99 per cent of its vaccine needs.¹⁸

The relevance of the waiver to Africa

In the current context, the existing measures will not do much to urgently scale-up manufacturing for the reasons outlined. Account must also be taken of the complex nature of vaccines, biologics, diagnostic tests, medical devices, respirators, which are not only covered by multiple patents¹⁹ but also covered by additional IP protections in the form of copyrights, industrial designs, trade secrets, clinical trial data, manufacturing know-how and other information.

How will the waiver help? Instead of hundreds of actions in many different countries, the same effect can be achieved by a single action in WTO. It can effectively provide a blanket suspension of all relevant IP protections on the wide range of

health products required to contain, prevent and treat COVID-19. It will provide legal cover and remove threat of action in the WTO Dispute Settlement Body.²⁰ It can also help to minimize threats of trade retaliation against individual countries.

While a waiver will take the pressure off developing countries and LDCs to initiate action, such as negotiations for voluntary licenses or making applications for compulsory licenses, or initiating government use measures, countries will still need to domesticate the provisions of the waiver into national law through legislative, administrative or executive actions, depending on their unique legal systems.

The waiver, as currently revised, seeks to clarify the scope to cover the prevention, containment and treatment of COVID-19, for all “health products and technologies” including materials, components, their methods and means of manufacture. It also proposes a duration of a minimum of three years, which is to be reviewed annually and again at the end of the three-year period to ascertain if the need for the waiver continues to exist.²¹

Can the waiver proposal be improved? The key difficulty is that even if the waiver is passed in its revised form, there is little compulsion on IPR holders to cooperate. Additional measures may be necessary to mandate, particularly high income countries (HICs) which house the majority of relevant IPR holders, to require such rights holders to disclose fully and commit to the transfer of trade secrets, manufacturing know-how, and effect the necessary technology transfer. The TRIPS Agreement enables such disclosure for the protection of the public.²² Such countries may compel industry to commit their IP and know-how to the C-TAP facility to enable rapid scale-up of vaccine and other health technologies, especially where governments have invested substantial public funds in the development of vaccines and other products.²³ The full ambit of the exception in TRIPS Article 39, which permits disclosure of undisclosed information in the public interest, needs to be explored.

The waiver is an important, but limited, intervention. The past ten months have exposed the multilateral system introduced by WTO as one that reinforces the colonial character of IP. In the final analysis, HICs can effectively block consensus in WTO and act as an effective veto in the deliberations. The waiver, if passed, may be sufficient to negotiate the crisis posed by this pandemic. In the longer term, more lasting and systemic changes will be necessary, solutions that directly address the inequality

between the developed and developing world. What is required is an effective decolonization of this model.

Decolonizing intellectual property

What does decolonization entail? Does it mean reverting to the status quo applied in pre-colonial times? That would be a gross oversimplification. Africa intellectuals such as Frantz Fanon, Leopold Sedar Senghor, Cheikh Anta Diop, Ngugi wa Thiong'o and others have all contributed to this discourse. Contemporary interpretations of this concept range from the moderate to the radical feminist. An example of the former is Kwasi Wiredu's notion of "conceptual decolonization":

It consists in an African's divesting of his thought of all modes of conceptualization emanating from the colonial past that cannot stand the test of due reflection. This divestiture does not mean automatically repudiating every mode of thought having a colonial providence. That would be absurd beyond description.²⁴

The idea here is not adopting a stance of rejecting everything linked to the colonial era, but rather closely inspecting the concepts of Western modes of living and asking the question: "does it work for Africa?" It has been described as a form of bi-culturalism, namely, attaining a conceptual synthesis involving "analyses of the canon of Western philosophy and also the manifestation of tribal cultures."²⁵

Radical interpretations seek to rethink Africa from an indigenous feminist perspective that critically engages Eurocentric interpretations of the pre-colonial period which are deeply rooted in fixed terminologies and classifications, "to produce knowledge of our precolonial past that is fuller, more complex, diverse, of immense value and, therefore, not dismissible."²⁶ It seeks to reclaim the experiences of the most marginalized groups, such as indigenous women, made invisible by patriarchy and colonialism. This view argues that the impetus for decoloniality is increasing in a COVID-19 world of further marginalization of the structurally oppressed and their voices.²⁷

In South African jurisprudence, for example, the Constitutional Court has deliberated on the issue of decolonization in a landmark decision declaring capital punishment unconstitutional on grounds that included the application of African values such as *Ubuntu*²⁸ to contemporary legal

disputes. This has prompted the court to depart from certain colonial era legal canons, such as the legality of capital punishment, as it cannot be reconciled with African values.²⁹ There has not been much jurisprudence on the colonial foundations of intellectual property law, and its relevance to contemporary society. A recent case relating to a trademark dispute concerned a complaint that the purported use of certain marks associated with a large fast-food chain by a small competitor were likely to deceive or cause confusion in the public.³⁰ In rejecting the claim of infringement, the court took an unconventional approach to an IP dispute and paid attention, in particular, to the context in which these entities were trading. The complainant was a large chicken food franchise whereas the competitor a small vegan eatery; and significantly, it again invoked the principle of *Ubuntu* (in this context encouraging rather than restraining small business development in a developing economy) as being in the greater public interest and consistent with African values. In response to the complainant's claim to uniqueness of its brand as "pride and success in adversity" as hallmarks of its Afrocentricity, the judgment, states: "success against adversity also means allowing small businesses to survive onslaughts by large, economically powerful corporates like the applicant."³¹

But the project to decolonize IP jurisprudence in South Africa has some way to go. Only one patent-related case has come before the Constitutional Court to date.³² At issue was the question of whether a court's finding of patent validity on one ground in a revocation hearing ought to have a bearing on a subsequent infringement hearing on the same patent, to the extent that the alleged infringer is barred from raising a different ground to attack the validity of a patent. The High Court ruled that to do so would offend the principle of *res judicata*, and the Supreme Court of Appeal refused leave to appeal. The Constitutional Court was split evenly on the issue, with the result that lower court's position prevailed. The judgment has been criticized as being bad in law.³³ The authors conclude that "the stalemate in the Constitutional Court has the potential to endorse decisions made invariably in favor the rights of the patent holder (as has happened in this case) while not giving sufficient consideration to the broader public interest served by thoroughly examining all the patentability requirements to establish validity, and removing undeserving patents from the register."³⁴

Conclusion

It is evident that the IP system is itself based on particular value judgements about how best to benefit society and incentivize innovation. Thus, the necessity to interrogate its philosophical and political underpinnings. In that regard, African (and South) scholars and activists are invited to interrogate the existing IP framework through the lenses of decoloniality, and explore alternative, more contextually-appropriate means to not only incentivize innovation, but to also ensure equitable access to the fruits of such innovation.

Endnotes:

¹ WTO, Agreement on Trade Related Aspects of Intellectual Property Rights (1995) https://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

² WTO, Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of Covid-19. Communication from India and South Africa (2 Oct 2020) IP/C/W/669 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True>.

³ T Kongolo, Historical Developments of Industrial Property Laws in Africa (2013) W.I.P.O.J Issue 1 2013 Thomson Reuters (Professional) UK Limited and Contributors, 116-117 (Kongolo 2013).

⁴ See, for example: C Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*, (Oxford, Oxford University Press, 2009) 240–286 (Deere 2009).

⁵ See, for example, YA Vawda, Compulsory Licensing Jurisprudence in South Africa: Do We Have Our Priorities Right? Research Paper No. 90 (Geneva, South Centre, December 2018). (Vawda 2018) https://www.southcentre.int/wp-content/uploads/2018/12/RP90_Compulsory-Licensing-Jurisprudence-in-South-Africa-Do-We-Have-Our-Priorities-Right_EN-1.pdf.

⁶ YA Vawda and B Shozi, *Eighteen Years After Doha: An Analysis of the Use of Public Health TRIPS Flexibilities in Africa*. Research Paper No. 103 (Geneva, South Centre, February 2020). (Vawda & Shozi 2020). <https://www.southcentre.int/research-paper-103-february-2020/>.

⁷ Some South American countries did so by limiting the scope of patentability in the pharmaceutical and chemical sectors, while India's 1970 Patents Act allowed the patenting of methods or processes on pharmaceuticals, but not product patents. See P Drahos and J Braithwaite, Who Owns the Knowledge Economy? Political Organising Behind TRIPS, The Corner House (2004) (Drahos and Braithwaite) <http://www.thecornerhouse.org.uk/resource/who-owns-knowledge-economy>.

⁸ See, for example, Drahos and Braithwaite (2004).

⁹ Vawda and Shozi (2020).

¹⁰ See T Avafia J Berger and T Hartzenberg, The ability of select sub-Saharan African countries to utilise TRIPS Flexibilities and Competition Law to ensure a sustainable supply of essential medicines: A study of producing and importing countries, trade law centre for southern Africa (2006) https://unctad.org/system/files/official-document/ictsd-tralec2006d3_en.pdf.

¹¹ See, for example, S Shashikant, *The African Regional Intellectual Property Organization (ARIPO) Protocol on Patents: Implications for Access to Medicines* Research Paper No 56, (Geneva, South Centre, November 2014) https://www.southcentre.int/wp-content/uploads/2014/11/RP56_The-ARIPO-Protocol-on-Patents_EN1.pdf; and N Syam and V Munoz Tellez. *Innovation and Global Intellectual Property Regulatory Regimes: The Tension Between Protection and Access*, Research Paper No. 67 (Geneva, South Centre, June 2016) https://www.southcentre.int/wp-content/uploads/2016/06/RP67_Innovation-and-Global-IP-Regulatory-Regimes_EN.pdf.

¹² See Vawda and Shozi (2020).

¹³ Ibid.

¹⁴ J Lexchin, As U.S. buys up remdesivir, 'vaccine nationalism' threatens access to COVID-19 treatments, *The Conversation* (5 July 2020) <https://theconversation.com/as-u-s-buys-up-remdesivir-vaccine-nationalism-threatens-access-to-covid-19-treatments-141952>.

¹⁵ Article 40 addresses, among others, "licensing practices or conditions which restrain competition (and) may have adverse effects on trade and may impede the transfer and dissemination of technology."

¹⁶ See Vawda (2018).

¹⁷ See CM Correa, *Guide for the Granting of Compulsory Licences and Government Use of Pharmaceutical Patents*, Research Paper No. 107 (Geneva, South Centre, April 2020) <https://www.southcentre.int/wp-content/uploads/2020/04/RP-107.pdf>.

¹⁸ J Nkengasong, A Case for Vaccine Manufacturing in Africa & Objectives of the Conference, Presentation to the AU Virtual Conference on Expanding Africa's Vaccine Manufacturing (12 April 2021); see also P Adepoju, Africa Plots Ambitious Vaccine Targets at Manufacturing Conference (12 April 2021) <https://healthpolicy-watch.news/africa-plots-ambitious-vaccine-targets-at-manufacturing-conference/>.

¹⁹ See, for example, medicines patent pool, VaxPaL – COVID-19 vaccines (2021) <https://medicinespatentpool.org/what-we-do/disease-areas/vaxpal/>.

²⁰ WTO, TRIPS Agreement, Part V: Dispute Prevention and Settlement.

²¹ WTO, Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19 Revised Decision Text, 25 May 2021 IP/C/W/669/Rev.1. <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669R1.pdf&Open=True>.

²² Article 39 (3) of the TRIPS Agreement contains such a provision.

²³ See for example, regarding the public funding of the Oxford-AstraZeneca vaccine, S Cross et al. "Who funded the research behind the Oxford-AstraZeneca COVID-19 vaccine? Approximating the funding to the University of Oxford for the research and development of the ChAdOx vaccine technology" medRxiv (2021) preprint DOI: <https://doi.org/10.1101/2021.04.08.21255103>.

²⁴ K Wiredu (ed.), *A Companion to African Philosophy* (2004) John Wiley & Sons, 15.

²⁵ Internet Encyclopedia of Philosophy, Kwasi Wiredu (1931 -) <https://iep.utm.edu/wiredu/>.

²⁶ B Muthien & J Bam, (eds). *Rethinking Africa: Indigenous Women Re-Interpret Southern Africa's Pasts* (Fanele, 2021) pp. 5-6.

²⁷ *Ibid.*, pp. 10-11.

²⁸ The concept appears in South Africa's Interim Constitution, Act 200 of 1993, namely: "The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation". *The concept is premised on a fundamental belief in African societies*



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that "a person can only be a person through others". See JY Mokgoro, *Ubuntu and the Law in South Africa*, *Potchefstroom Electronic Law Journal*, vol. 1 No. 1 (1998).

²⁹ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3.

³⁰ *Golden Fried Chicken v Oh My Soul Café* (D1739/2019) ZAKZDHC 30 (25 March 2019) (*Golden Fried Chicken*).

³¹ *Ibid.*, p. 7.

³² *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation* 2020 1 SA 327 (CC).

³³ See B Shozi & YA Vawda, *Quo Vadis Patent Litigation: Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation* 2020 1 SA 327 (CC) – In Search of the Bigger Picture on Patent Validity, *Potchefstroom Electronic Law Journal*, 24 (2021). (Shozi & Vawda 2021).

³⁴ Shozi & Vawda (2021) 12.

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