THE CONTRIBUTION OF INTELLECTUAL PROPERTY RIGHTS TO THE ECONOMIC GROWTH IN DEVELOPING COUNTRIES: THE CASE OF TANZANIA

MUTAKYAHWA CHARLES

A THESIS SUBMITTED IN FULFILLMENT OF THE REQUIREMENTS FOR DEGREE OF MASTER OF LAWS OF THE OPEN UNIVERSITY OF TANZANIA

2013

CERTIFICATION

Having read this thesis entitled "***The Contribution of Intellectual Property Rights to the Economic Growth in Developing Countries: The Case of Tanzania,"*** I am satisfied with the work done and it deserves examination for a possible award of the degree of Master of Laws Degree (LL.M.) of The Open University of Tanzania.

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Dr. Paul Kihwelo

(Supervisor)

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Date

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DECLARATION

I, **Mutakyahwa Charles,** do hereby declare that, this research work is my own original work, and that it has not been presented to any university for a similar or any other degree award.

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Mutakyahwa Charles

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Date

DEDICATION

To my wife, Erika Bernard Rumuhereile and my daughter Catherine Komutonzi Nkonya

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ABSTRACT

This thesis deals with the contribution of the intellectual property rights to the economic growth of developing countries, taking Tanzania as the case study. In the main, it discusses whether the international legal framework providing for intellectual property rights aims at having strengthened economies in the developing countries or otherwise protects economic interests of developed countries at the detriment of the former, by simply reducing them mere markets of industrial products from developed countries.

Further, the thesis discusses the efforts laid down by developing countries against the developed ones, to have intellectual property rights' intended good on a balanced equation, for the benefit of all. Furthermore, on a specific accent, the thesis explores the Tanzanian situation, with regard to the legal framework providing for intellectual property rights. This aims at establishing whether non beneficial or otherwise, extracted from intellectual property rights, depends on the Tanzania legal regime or imbedded within the hidden intents of the international intellectual property rights systems.

In this regard, the thesis chapters are as follows: Chapter One: the general introduction; Chapter Two: genesis of intellectual property rights; Chapter Three: the intellectual property organizations and their mandate for economic growth; Chapter Four: the Uruguay Round Negotiations and reactions from the developing countries; Chapter Five: the contribution of intellectual property rights to the economic growth; and Chapter Six: the general observations, conclusions and recommendations.

TABLE OF CONTENTS

LIST OF FIGURES xii

LIST OF TABLES xiii

LIST OF ABBREVIATIONS AND ACRONYMS xiv

LIST OF CASES xvi

LIST OF STATUTES xviii

LIST OF SUBSIDIARY LEGISLATION xix

LIST OF REGIONAL AND INTERNATIONAL INSTRUMENTS xx

CHAPTER ONE 1

1.0 THE THEORETICAL BACKGROUND 1

1.1 The Background Information 1
1.2 Statement of the Problem 7
1.3 Objective of the Research 8
1.3.1 General Objective 8
1.3.2 Specific Objectives 9
1.4 Hypothesis 9
1.5 Significance of the Study 9
1.6 Scope of the Study 10
1.7 Literature Review 10
1.8 Research Methodology 16
1.8.1 Research Design 16
1.8.2 Area of Study 17
1.8.3 Population Sample/ Unit of Inquiry 17
1.8.4 Sampling Techniques 18
1.8.5 Types of Data 19
1.8.6 Data Collection Methods 19
1.8.6.1 Questionnaire 20
1.8.6.2 Interview Method 21
1.8.6.3 Observation 21
1.8.7 Data Analysis Techniques 22
1.8.8 Limitations of the Study 23

CHAPTER TWO 24

2.0 GENESIS OF INTELLECTUAL PROPERTY RIGHTS 24

2.1 Understanding Intellectual Property Rights ... 24
2.2 The Patents ... 25
2.2.1 Historical Background of Patent ... 27
2.2.2 Patents in England: From Discretional Royal Grants to Legal Rights ... 29
2.2.3 The Spread of Patent System in the World ... 32
2.2.4 Criteria for Recognized Patents ... 32
2.3 The Trade and Service Marks ... 34
2.3.1 Historical Development of Trade and Service Marks ... 35
2.3.2 Towards a New Trademark Regime ... 37
2.3.4 The Key Changes under the Singapore Treaty on the Law of Trademark 38
2.4 The Copyright and Related Rights ... 38
2.4.1 Historical Development of Copyright and Related Rights ... 38
2.5 Intellectual Property Rights in Tanzania ... 44
2.5.1 The Law Relating to Patents in Tanzania ... 44
2.5.2 The Law Relating to Copyright and Related Rights in Tanzania. ... 46
2.5.3 The Law Relating to Trade and Service Marks in Tanzania ... 47
2.6 Conclusion ... 49
CHAPTER THREE ... 50

3.0 INTELLECTUAL PROPERTY ORGANIZATIONS AND THEIR MANDATE FOR ECONOMIC DEVELOPMENT ... 50

3.1 Introduction ... 50
3.2 IP Organisations and their Mandate for Country's Economic Growth ... 50
3.3 The African Regional Developments of Intellectual Property Rights ... 57
3.3.1 Was there a Need for ARIPO? ... 59
3.4 Conclusion ... 61
CHAPTER FOUR ... 63

4.0 THE URUGUAY ROUND NEGOTIATIONS AND REACTION FROM THE DEVELOPING COUNTRIES ... 63

4.1 What is the Uruguay Round ... 63
4.2 Genesis of the Uruguay Round ... 63
4.3 Intellectual Property Rights Protection and the Pre – TRIPS Competing State Interests ... 65
4.3.1 The Unilateral IP Protectionism: The Case of the United States of America 66
4.3.2 Conflicting Interests within the European Community on IP Protection . 67
4.3.3 Reaction by Nicaragua and Jordan (Developing Countries) ... 68
4.3.4 Reaction from China ... 71
4.4 The Incoming of TRIPS and its Mandate for Economic Growth ... 73
4.5 The TRIPS Application and its Economic Implications to Developing Countries ... 80

4.6 TRIPs and Technology Transfer from Developed to Developing Countries ... 87
4.7 Problems Related to Technology Transfer from Developed to Developing Countries ... 88
4.8 Conclusion ... 91
CHAPTER FIVE ... 93

5.0 THE CONTRIBUTION OF IP TO THE ECONOMIC GROWTH IN TANZANIA. ... 93

5.1 Introduction ... 93
5.2 Lack of or Very Minimal Technological Transfer from Developed to Developing Countries ... 94
5.3 Lack of Innovations and Prevalence of Illegal Imitations ... 98
5.4 Unrecorded Revenues from the Proceeds of IP Products ... 107
5.5 Limited Revenues Derived from IP in Tanzania ... 110
5.5.1 The Economic Contribution Derived from the Copyright and Neighbouring Rights 110
5.5.2 The Economic Contribution Derived from the Patents ... 113
5.5.3 The economic Contribution Derived from Trade and Service Marks ... 116
5.6 Improved Legal Framework and its Impact on Intellectual Property ... 122
Table 5.4: Summary of Types of FDI and Country of Origin into Tanzania .. 126

5.7 Conclusion ... 128
CHAPTER SIX ... 130

6.0 GENERAL OBSERVATIONS, CONCLUSIONS AND RECOMMENDATIONS ... 130

6.1 General Observations ... 130
6.1.1 That the Aim for Economic Growth in Developing Countries under the TRIPS Agreement is Far – Fetched. ... 130
6.1.2 That Imitation Takes Preference over Innovation and / or Inventions ... 133
6.1.3 That the Tanzania IPR Legal Framework Needs Reform ... 133
6.2 Conclusion ... 134
6.3 Recommendations ... 136
6.3.1 That the TRIPS Agreement must be Amended to Reflect Practicability on Technology Transfer ... 136
6.3.2 That Imitation is a Better Option for Developing Countries than Innovation ... 137
6.3.3 What Measures Should be Taken to Improve current IP Legal Framework in Tanzania. ... 142
6.3.3.1 Harmonisation of Laws Relating to Patents in Tanzania ... 142
6.3.3.2 Amending the Trade and Service Marks Act to Incorporate the Singapore Treaty ... 144

6.3.3.3 Amendments to the Copyright and Neighbouring Act and Related Regulations.. 145
REFERENCES.. 148

LIST OF FIGURES

Figure 1: Development Country Report Submission (1999 - 2007)

Figure 2: Countries Targeted by Incentives

Figure 3: Distribution of DFI stock (%) by sector for 1998 - 2001

Figure 4:   New investment projects in Tanzania by sector for 1990 - 2003

LIST OF TABLES

Table One: COSOTA's literary members' works January to December 2001

Table Two: COSOTA's music members' works January to December 2001

Table Three: COSOTA's artistic members' works January to December 2001

Table Four : Summary of types of FDI and country of origin into Tanzania

LIST OF ABBREVIATIONS AND ACRONYMS

ARIPO	-	African Regional Intellectual Property Organization
BIPS	-	Bilateral Intellectual Property Treaties
BITS	-	Bilateral Investments Treaties
BRELA	-	Business Registration and Licensing Agency
Cap	-	Chapter
CJ	-	Chief Justice
COSOTA	-	Copyright Society of Tanzania
Dr.	-	Doctor
DSU	-	Dispute Settlement Understanding
e.g.	-	Exemplum Gratia
EKLR	-	Electronic Kenya Law Reports
FDI	-	Foreign Direct Investment
G.N	-	Government Notice
GATT	-	General Agreement on Tariffs and Trade
Ibid	-	Ibidem (meaning: found in the same place)
ICTs	-	Information and Communication Technologies
ILO	-	International Labour Organisation
IPC	-	International Patent Classification
IPR	-	Intellectual Property Rights
ITO	-	International Trade Organization
LDC	-	Least Developed Country
LL.B	-	Legum Baccalaureus – (Bachelor of Laws Degree)
LL.M	-	Legum Magister – (Master of Laws Degree)

Ltd	-	Limited
MTN	-	Multilateral Trade Negotiations
OECD	-	Organization for Economic Cooperation and Development
PCT	-	Patents Cooperation Treaty
Pg.	-	Page
PSRC	-	(Presidential) Parastatal Sector Reform Commission
R&D	-	Research and Development
SIDO	-	Small Industries Development Organization
TANESCO	-	Tanzania Electricity Supply Corporation
TBC	-	Tanzania Broadcasting Cooperation
TCCIA	-	Tanzania Chamber of Commerce Industry and Agriculture
TLT	-	Trademark Law Treaty
TRIPS	-	Trade Related Aspects of Intellectual Property Rights
UK	-	United Kingdom
UNCTAD	-	United Nations Conference on Trade and Development
USA	-	United States of America
USTR	-	United States Trade Representative
Vs	-	versus
WHO	-	World Health Organization
WIPO	-	World Intellectual Property Organization
WTO	-	World Trade Organization

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Lowell v Lewis, 15 F. Cas. 1018 [1817]

Millar v Taylor 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769)

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Pharmaceutical Manufacturing Co v Novelty Manufacturing Limited High Court of Kenya Civil Case No. 746 of 1998

Rodi & Wienenberger Aktiengesellschaft v Metalliflex Ltd, [1966] S.C.R. 593,

SANITAM Services (EA) Limited, (in the *Matter of Patent Grant No. AP 773* entitled *"Foot Operated Sanitary/Litter Bin", (ARIPO)*

Sumant Prasad Jain vs Shajahan Prasad and State of Bihar AIR 1972 SC 2488

Sunbird Helicopters Ltd v Michael Odongo, High Court of Kenya Civil Case No. 2622 of 1998,

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Valensi v British Radio Corporation [1973] RPC 337, 377

Vickery v. Welch, 36 Mass. 523, 19 Pick. 23,1837 WL 2540 (1837).

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*Wheaton v Peters (*33 U.S. 591, 684 [1834]),

Yovatt v Winyard 1820 WL 2039 (U.K. Ct. Ch. 1820);

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The Centre for Agricultural Mechanization and Rural Technology Act No. 19 of 1981, Cap 181 RE 2002,

The Fair Competition Act No. 4 of 1994 Cap 285, R.E 2002

The Merchandise Marks Act No 20 of 1963, Cap 85R.E 2002

The Patents (Registration) Act No. 1 of 1987, Cap.217. R.E 2002

The Public Corporations Act, No. 2 1992, Cap 257. R.E. 2002

The Small Industries Development Organization Act No. 28 of 1973, Cap 112 R.E 2002

The Tanzania Commission for Science and Technology Act No. 7 of 1986, Cap 226, R.E 2002

The Tanzania Engineering and Manufacturing Designs Organization Act No. 23 of 1980, Cap 176 R.E 2002

The Tanzania Industrial Research and Development Organization Act No. 5 of 1979, Cap 159 R.E 2002

The Tanzania Investment Act No. 26 of 1997, Cap 38, R.E 2002

The Trade and Service Marks Act No. 12 of 1986 Cap 326 R.E 2002

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The Copyright and Neighboring Rights (Production and Distribution of Audio and Audio Visual Recordings) Regulations, 2006 G.N. No.18 of 10th February, 2006.

The Trade and Service Marks Regulations G.N. 40 of March 2000

The Patents Regulations G.N. 190 of 1994.

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THE REGIONAL INSTRUMENT:

The African Regional Intellectual Property Organization Agreement (ARIPO) October 1983.

The Bajuu Protocol on trademarks, 19th November, 1993

The Harare Protocol on patents and Industrial design, 24th February, 2007

THE INTERNATIONAL INSTRUMENTS:

The Berne Convention for the Protection of Literary and Artistic works July 25, 1994

The General Agreement on Tariffs and Trade (GATT), 1994

The Nice Agreement (International Classification of Goods and Services) September 1999.

The Paris Convention for the Protection of Industrial Property, 28th September, 1979

The Patent Convention Treaty, 19th June, 1970

The Trade Related Aspects of Intellectual Property Rights (TRIPS), January 1995

The Singapore Treaty on the Law of Trade Mark, 2006.

The WIPO Convention December 1983

CHAPTER ONE

1.0 THE THEORETICAL BACKGROUND

1.1 The Background Information

The global system of intellectual property rights (IPRs), as Maskus[1] puts it, is undergoing fundamental changes. Most of the recognized changes for the stronger IPRs system, include the introduction of multilateral Agreements on Trade – Related Aspects of Intellectual Property Rights (TRIPS) within the World Trade Organization (WTO).[2]

The current move towards a stronger IPRs system is not accidental. It is a deliberate move to accommodate[3] the transcendental social economic and political forces in the commercial globalization era. As defined by various scholars[4], globalization is the process in which national and regional markets are more tightly integrated through the reduction of government and natural barriers to trade, investment, and technology flows.

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[1] Maskus, K. E., The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer, in Fink,C. and Maskus K. E. Eds. Intellectual Property and Development: Lessons Learnt from Recent Economic Research, World Bank and Oxford University Press, 198, Madson Avenue, New York, NY, 10016, 2004,

[2] Ibid pg. 41

[3] Maige, I. J., Viability of the Privatization Legal Mechanism in Tanzania. An LL.M coursework paper submitted to the Faculty of Law, University of Dar Es Salaam, 2000, p.9, also quoted in Mashamba, C.J., Enforcing Social Justice in Tanzania: the Case of Economic and Social Rights, a thesis submitted in fulfillment of the requirements of the Masters Degree of the Faculty of Law, Open University of Tanzania, 2007, p. 299

[4] Ibid

Maskus[5] further argues to the effect that the global economy and creation of knowledge and its incorporation in product designs and production techniques are increasingly essential for commercial competitiveness and economic growth. This is because the international mobility of capital and technology has significantly increased relatively than most types of labour.

According to Msuya,[6] the developing countries and their emerging economies have indicated increased interests in attracting foreign trade and foreign direct investment (FDI), Technology expertise transfer. The problem has always been the ongoing fear by the foreign investor to the effect that their technological expertise will be tempered with through domestic programmes in their bid to create local skills and enhance local productivity and bring about competition at the detriment of the foreign investment.

To overcome the above stated morbid fear, international community[7] is tirelessly advocating for the strengthening of Intellectual Property Rights (IPRs) as an important element in a broader policy package that government in developing economies should design to maximize the benefit of expanded market access and promote dynamic competition. In this context, the local firms/companies would take part meaningfully to the economic growth of the country.

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[5]Maskus, supra

[6] Msuya,E., The Impact of Foreign Direct Investment on Agricultural Productivity and Poverty Reduction in Tanzania, Tokyo University, 2007, MPRA Paper No. 3671, posted 7th November, 2007/ at 03:23; available at http://mpra.ub.uni-muenchen.de/3671/ (last accessed in 2011); MPRA means Munich Personal RePEc Archive

[7] See the discussion during the Uruguay Round during GATT and finally leading to the establishment of the World Trade Organization and the TRIPS.

However, the relationship between Intellectual Property Rights (IPR) and Foreign Direct Investment (FDI) is a complicated scenario. According to *pro – imitation*[8] school of thought, preference is posted on weak intellectual property regime, arguing that a weak IPR regime increases the probability of imitation which makes host countries less attractive for foreign investment. But the other school[9] of thought, advocate for strong intellectual property regime, arguing that the existence of strong IPR protection may shift the preference of multinational corporations from FDI towards licensing.

However, the concerns for the strong IPR regime depend on the purpose of investment. For instance, the concern is very high in the case of research and development facilities and lowest for the projects focusing exclusively on sales and distribution. In general observations, as Castern Fink[10] puts it, the weak protection of IPR has a significant effect on the composition of the FDI inflows. Fink says that weak IPR protection deters foreign investors in technology intensive sectors including: drugs, cosmetics, heath care products, chemicals, machinery and equipment. In these sectors, IPR plays particularly a prominent role. On the other hand, weak IPR protection encourages FDI to set up distribution facilities rather than to engage in local productions. However, Fink says that, this much depends on the

[8] Nagesh Kumar, Intellectual Property Rights, Technology and Economic Development: Experiences of Asian Countries, Research and Information System for Developing Countries, Zone 4B India Habitat Centre, Lodi Road , New Delhi-110003, nagesh@ndf.vsnl.net.in (last accessed in June, 2011)a research paper commissioned by the Commission on Intellectual Property Rights.
[9] Maskus, Ibid
[10] Fink,C., and Maskus, K. E.,Why We Study Intellectual Property Rights and What We Have Learnt: in Fink,C. and Maskus, K. E., Eds Intellectual Property Right and Development, World Bank and Oxford University Press, 198 Madison Avenue, New York, NY 10016

controls of privatization, transition progress, corruption level and effectiveness of the legal system and past investment experience.

According to Fink[11] again, IPR do not play an equally important role in all sectors or even in all technology – intensive industries. For instance IPR protection may be less crucial in sectors such automobile productions, in which firms cannot use competitor's technology without many complex and expensive research inputs involved. Thus, Fink is of the opinion that, IPR protection may be of immediate attention in the sectors such as drugs, cosmetics, heath care products, chemicals, machinery and equipment and electronic equipment, where imitation can be carried out in a fraction of time.

During the Doha Round, the fear of developed countries on the possible imitation of drugs by developing countries was very apparent, thus calling for strong IPR regime on health services. Compulsory Licensing by developing countries was the proposed mechanism for technology transfer to developing and least developed countries. However this received a bitter response from the developing and least developed countries.[12]

In February 1967, Tanzania made a decision to put all the strategic commercial activities of the economy under state control, leading to the establishment of numerous parastatal enterprises in all sectors. However, it has turned out to be

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[11] Carstein F. supra note 10.
[12] Sungjoon Cho, The Demise of Development in the Doha Round Negotiations, Texas International Law Journal, Vol.45 No.3 2012, p. 573, also found at www.tilj.org/contents/journal/45/num3/cho573.pdf last accessed on 24th July 2012.

impossible for the Government to manage its investments in parastatals without difficulties, both financial and managerial. The heavy reliance of the parastatals on the exchequer caused a lot of concern and hence the need for change of the government policy.

The Public Corporations Act[13] came into force to co-ordinate the implementation of the Government policy[14] for economic reform, which efforts were in the form of privatization and liberalization of trade, carried out through radical restructuring[15] of the country's economy. The Act also aimed at eliminating subsidies on parastatals and privatization of the failed corporations. On this Maige[16] says that among the objectives of the policy of privatization was to improve performance of the public enterprises with a view to enabling them to contribute considerably in the growth of the national economy. It was the objective of the privatization to encourage wider share of ownership among the public in general and the employees in particular apart from increasing employment among Tanzania.[17]

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[13] Act No. 2 of 1992 (as amended in 1993 and 1999) Cap 257

[14] In January 1992, the parastatal sector reform policy was first pronounced as a national policy by the Government.

[15] *Augustine Masatu v Mwanza Textiles Ltd*, High Court of Tanzania at Mwanza, Civil Case No. 3 of 1986 (unreported) reproduced in Maina, C. P., Human Rights, Selected Cases and Materials. See also Mashamba, C.J., Enforcing Social Justice in Tanzania. The Case of Economic and Social Rights. A Thesis submitted in fulfillment of the requirements of the Master of Laws Degree (LL.M by Thesis) to the Faculty of Law, University of Tanzania, 2007, pg. 299

[16] Maige, I.J., Viability of the Privatization Legal Mechanism in Tanzania. An LL.M Coursework Paper submitted to the Faculty of Law, University of Dar es salaam, 2000, p.9 and in Mashamba C.J., ibid. at p299

[17] Mashamba, C.J., et al, Privatization – Workers Eclipse? Legal and Human Rights Implications of Privatization on Industrial Relations: The case of Divestiture of the Tanzania Electrical Supply Company Limited (TANESCO) and Presidential Parastatal Sector Reform Master Plan, 1992.

The PSRC was created to drive the process of privatization in order to create a competitive economy which would operate successfully internationally, regionally and domestically and a comprehensive privatization program of parastatals was announced in May 1993, in which more than 400 loss-making companies were put up for sale.

In 1996, the Government adopted a milestone decision to include utilities and infrastructure ventures in the privatization agenda. Following a recent far-reaching re-examination of the modalities of privatization undertaken in consultation with the World Bank, the approach followed by the Parastatal Sector Reform Commission (PSRC) has been substantially revamped.

It was thought that as privatization gained momentum, visible results including a more business friendly culture, greater foreign investment and export led growth, would benefit not only Tanzania, but also the increasing number of private investors who had decided to put their faith, and their capital, in a country described as "the rising star in Africa."

Unfortunately, this was not the case todate. There has been endless criticism[18] regarding our choice for privatization and liberalization of economy, arguing that the same does not aim at emancipating the national economy.

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[18] Ibd

The apparent failure of privatization and liberalization of economy in Tanzania is to the great extent attributed to the ineffectiveness of the established providing legal framework including, National Investment (Promotion and Protection) Policy, National Investment (Promotion and Protection) Act, and the Tanzania Investment Act. Surprisingly, intellectual property rights laws seems to have been accorded no weight as the great contributing factors in the foreign trade and foreign direct investment (FDI), technology expertise transfer, the key elements of privatization and liberalizations of trade and free market economy.

1.2 Statement of the Problem

Tanzania has actively legislated for intellectual property rights. The Trade and Service Marks Act[19] was enacted in 1986, followed by the Patents (Registration) Act[20] and the Copyright and Neighbouring Rights Act[21]. Together with others, these laws were considered to create a pivotal role in technology transfer and ultimately towards the country's economic growth.

The strong intellectual property rights system, operating in the paradigm of privatization and liberalization of trade, thought to be an impetus fostering the country's growth of economy through attracting foreign trade and foreign direct investment (FDI), technology expertise transfer from the developed countries to the developing countries, thus enhancing the latter countries' economic growth. [22]

[19] No. 12 of 1986, Cap 326 R.E 2002
[20] No. 1 of 1987, Cap. 217 R.E 2002
[21] No.7 of 1999, Cap.218 R.E 2002
[22] Maige, Supra

To achieve this, Tanzania passed a number of other legislation with a view of creating avenues that would guarantee adequate opportunities for the global free market economy. These laws include, the National Investment (Promotion and Protection) Policy of 1990. The implementation of this policy was regulated by the National Investment (Promotion and Protection) Act of 1990.

However, the implementation of the National Investment (Promotion and Protection) Policy and Act, from 1990 to 1995, witnessed a number of shortcomings[23] which called for an imperative change. Even though, the contribution to be derived from intellectual property rights, has been at a very minimal level, if at all any. The aim of this study is to find out to what extent, if any, has the intellectual property rights contributed to the economic growth in the developing countries, taking Tanzania as a case study.

1.3 Objective of the Research

1.3.1 General Objective

The research aims at establishing the extent, if any, of the contribution of intellectual property rights to economic growth in the developing countries using Tanzania as a case study.

[23] The five main weaknesses were identified. First, the frequent changes that were being made to the provision of investment policy and code reduced the credibility of both the policy and the code. Second, there was an apparent lack of coordination between the IPC and other agencies dealing with foreign investment, and as a result the IPC certificates added to, rather than reducing, the long list of permits/licenses that investors required in order to establish their businesses. Third, there were some administrative weaknesses that on the one hand limited effective attraction of foreign investors and on the other created discontent among the domestic investors who perceived that investment incentives were biased against them, but favoured foreign investors. Fourth, the relatively large size of the area reserved for public investment contradicted the government's declared resolve to promote the development of the private sector. Fifth, there existed several laws and regulations that came into direct conflict with some of the provisions of the Act.

1.3.2 Specific Objectives

The specific objectives of this research engulf the following:

1.3.2.1 To find out whether and to what extent does Tanzania engage itself with the issues of intellectual property rights.

1.3.2.2 To make a finding as to whether the existence or non existence of intellectual property contribution to the Tanzania economic growth can be attributed to the providing legal framework, starting with founding international instruments down to the efficacy of the domestic legislation.

1.3.2.3 To use the findings thereof as a specific tool for advocacy and / or lobbying for comprehensive and effective legislative, policies and /or practice reform that will ultimately improve the contribution of intellectual property rights law to enhance its contribution to the economic growth in Tanzania.

1.4 Hypothesis

This study is envisaged to prove the following assumptions: that intellectual property rights in Tanzania, contributes lowly, if any, to the development of the country's economy.

1.5 Significance of the Study

Intellectual property rights, as a component of study is raising overwhelming interests in the academic field, especially with regard to its contribution to the development of the respective country's economy. As such, the study is expected to

raise pertinent issues which will be of great importance to the academic field as well as to the Tanzanian community, especially to the key decision makers and human rights activists. To them the study will contribute to the ongoing discourse for better legal framework that can better contribute to the development of intellectual property rights law, which forms the basis for sound economic growth.

1.6 Scope of the Study

For the sake of clarity, this study examines the contribution, if any, made by intellectual property rights to the economic growth in Tanzania. Specifically, the study has confined itself to the economic contributions derived from the industrial property rights (patents, trademarks and service marks) and copyright (literally and artistic works). However, a mention was made to traditional knowledge and folklore as the emerging category of intellectual property right, just to complement the other already mentioned rights.

1.7 Literature Review

During this study the researcher got an opportunity to read a number of readings. The following are the summary of readings that forms part of this literature review. Paul Goldstein discusses various aspects of intellectual property rights law at the international level. These include legal principles, economic and cultural issues, trade principles and processes and protections of foreigners under national law. The author proceeds to provide for cases and materials on the above highlighted aspects.[24]

[24] Goldstein, P., International Intellectual Property Law: Cases and Materials, New York. New York Foundation Press, 2001.

Although, the work does not provide specific issues especially the contribution of intellectual property rights law, which would be used as the basis for its contribution in Tanzania; but it has highly contributed to the historical foundation of intellectual property on which rests my work. In the entitled Building Intellectual Property Institutions in Tanzania, Mahingila discusses how intellectual property as an institution can be built in Tanzania. In his work, the author has described a lot on the categories of intellectual property rights. He has gone further to adding another category which has not yet been globally accepted as such. This includes traditional knowledge, expressions of folklore and genetic resources. Further that while folklore is recognized in Tanzania and is included in the Copyright and Neighboring Rights Act, Genetic Resources, as a category of intellectual property rights, on the other hand, has been excluded in that category as its exploitation finally ends up in either an invention or innovation and therefore could be protected as a patent.[25]

But of important to note, this work is basically centered on the detailed description of the categories of intellectual property rights and how are the same addressed by the Tanzania legal framework. It does not in the main, provide for the contribution of the same to the development of country's economy.

Augustino Ramadhan the Honourable Chief Justice of Tanzania, in his work, (Opening speech to the Conference on Intellectual Property Rights in Dar es Salaam) is of the opinion that, historically, inventions and innovations have been indeed the

[25] Mahingila, E. E., Building Intellectual Property Institution in Tanzania, a Paper presented at the Intellectual Property High Level Meeting Kilimanjaro – Kempinsiki, Dar es salaam, 26th March, 2007

history of intellectual property rights and human developments. As such, His Lordship stresses on the importance and advocacy for protecting intellectual property rights on the basis that it is a framework that guarantees a higher level of innovation in society than would prevail if the framework did not exist. [26]

Although this work, discusses on the importance of the legal framework to guarantee for the higher level of innovation, it does not specifically focus on relevant legal framework to be developed and how can the same provide for the guaranteed innovation leading to the country's development.

Kihwelo Paul, in his article Intellectual Property Right (s) Protection in Tanzania: The Nightmare and the noble Dream, discusses intellectual property rights as the concept that can be broadly and roughly defined to include all those tangible and intangible human inventivity and inventively embodied in tangible and intangible human products of labour. The work further presents to the effect that although the protection of intellectual property rights in Tanzania, is still a dream and a noble one, to achieve the same is still a night mare.[27]

This work does not directly touch on issues of contribution of intellectual property rights law to the development of the country's economy, but it greatly assisted in tracing the historical background of intellectual property in Tanzania.

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[26] Opening speech by Augustino Ramadhan, The Chief Justice of the United Republic of Tanzania, to the Conference on Intellectual Property Rights in Dar es salaam, Wednesday, 10th October, 2007

[27] Kihwelo, F. P., Intellectual Property Right (s) Protection in Tanzania: The Nightmare and the Noble Dream, the Tanzania Lawyer Journal, June, 2005 Issue, p.. 54

Carsten, F. Keith M in her work, Why We Study Intellectual Property Rights and What we have Learnt, the inflow of Direct Foreign Investment has been presented as a vital component in enhancing productivity, strengthening local markets and leading to the local economy development. The work further presents that basing on the above scenario; intellectual property rights laws must be strong enough to fight infringements and guarantee foreign investors' confidence in the legal system. [28]

Although this work will create a fundamental foundation to the current work, it does not at all discuss anything on the Tanzania intellectual property rights legal framework and its contribution to the guaranteed economic growth.

Kameja A. K. Godadi B. S., Augustine N. M. and Kamuzora F. in their work entitled An Assessment of Intellectual Property Case Law in Tanzania[29], have discussed intellectual property rights, with regard to already determined court cases in Tanzania. Although, this work does not provide anything on the intellectual property rights law as a contributing factor to the development of Tanzania's economic growth, it has provided the highlighted on case laws used to support various arguments in this work.

[28] Fink, C. and Maskus, K.E. supra note 10.

[29] Kameja A. K., Godadi, B. S. Augustine N. M. and Kamuzora, F, Mkono & Co. Advocate, An Assessment of Intellectual Property Case Law in Tanzania *vis a vis* Established TRIPs Standards: Country Report to the Managing Intellectual Property Global Magazine, an assessment of Intellectual Property.

In January 1992, the Parastatal Sector Reform Policy was first pronounced as a national policy by the Government. The same year, the Public Corporations Act, was enacted to co-ordinate implementation of the government's economic reform efforts (policy) in the form of privatization and liberalization which was carried out through radical restructuring of the country's economy. The Act also aimed at eliminating subsidies on parastatals and privatisation of the failed corporations. The Act has been amended in 1993 and in 1999.

In the work entitled Enforcing Social Justice in Tanzania: the Case of Economic and Social Rights, Mashamba C.J,[30] the author, discusses the failure of privatization based on the legal frame work providing for privatization. However, intellectual property rights law was not considered as a contributing factor to this economic failure. This work will assist the current work when discussing privatization and or liberalization of trade as a bearing failure due to lack of effective intellectual property rights law in Tanzania, thus affecting the economic growth in general. This will equally apply to other authors including Maige, Issa on his work entitled: Viability of the Privatization Legal Mechanism in Tanzania.

In the work entitled Intellectual Property Law, the two co - authors[31], David Bainbridge and Claire Howell have discussed in detail on copyright substances,

[30] Mashamba C.J., Enforcing Social Justice in Tanzania: The Case of Economic and Social Rights, a thesis submitted in fulfillment of the requirements of the Masters Degree of the Faculty of Law, Open University of Tanzania, 2007

[31] Bainbridge, D. and Howell, C., Intellectual Property Law, 2nd Edn, England, Pearson Education Limited, 2011

authorship, ownership and moral rights. They have further discussed the infringements with regard to patents and trade mark.

This work was written in 2011 with recent notions regarding intellectual property rights, e.g the Singapore Treaty for Trade and Service Marks and therefore is a very useful piece of work to this thesis. However, there no anywhere in this work, intellectual property right is presented or discussed as a contributive factor to the economic growth of a country.

In the work entitled How to Fix Copyright by William Patry[32] discusses why we should have copyright laws and what the copyright laws are supposed to do, and how copyright damage cultural heritage. At certain instances, the author presents the shift of advertisers from print copyrighted materials like books and newspapers to broadcasted copyrighted materials due to the respective shift of eyeballs on those categories.

Basing on the shift of advertisers and the reasons for so doing, one would go beyond to discuss the real economic contribution derived from these categories of advertising copyrighted materials, but this work doesn't. As such, this work will try to use it as a foundation and go beyond to derive the economic contribution that copyrighted materials can yield to the country.

[32] Patry, W., How to Fix Copyright, Oxford University Press Inc, New York, 2011.

1.8 Research Methodology

This part deals with the research methodology the Researcher used for data collection and analysis by virtue of which the Researcher was able to reach conclusions and derive recommendations there-from. As such, this part discusses the research design, area of study, population sample/ unit of inquiry, sampling techniques, data type and data collection methods, data analysis and limitation of the study.

1.8.1 Research Design

Kothari[33] describes research design as a road map, or a structure of enquiry for the collection, measurement and analysis of data; further, Kothari says that research design is the arrangement of the conditions for collection and analysis of data in a manner that aims to combine relevance to the research purpose.

Taking into account that, as per the research problem, the research envisaged to examine the effectiveness of the current legal regime in facilitating contribution of intellectual property rights to the economic growth, the researcher largely depended on the qualitative research where international, regional and domestic instruments were analyzed; but also used quantitative research, as well, where data were collected and analyzed to support observations, conclusions and recommendations.

[33] Kothari, C.R., Research Methodology: Methods and Techniques, 2nd Edn, New Age International Publishers, 2009, New Delhi, India. p31.

1.8.2 Area of Study

As stated above, this study examines the contribution, if any, made by intellectual property rights to the economic growth particularly in Tanzania. The study has confined itself to the economic contributions derived from the industrial property rights (patents, trademarks and service marks) and copyright (literally and artistic works).

In this regard the researcher collected relevant information (data) from various necessary institutions, in one way or another, dealing with intellectual property rights in Tanzania, including industries and individuals dealing with intellectual property products. The research has also used information from other countries like Kenya and Canada just for comparison purposes.

1.8.3 Population Sample/ Unit of Inquiry

Successful statistical practice is based on focused problem definition. In sampling, this includes defining the population from which our sample is drawn. A population then includes all people or items with the characteristic one wish to understand. That means the entire objects and events or group of people which is the object of research and about which the researcher wants to determine some characteristics. The foregoing is supported by Mugenda & Mugenda[34] that a complete set of individuals, cases or objects with some common observable characteristics is called population.

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[34] Mugenda, O., & Mugenda, A., *Research Methods: Quantitative & Qualitative Approaches*. Nairobi, Acts Press, 1999, p.41.

As it has been stated earlier, this study examined mainly qualitative data in terms of laws and procedures which a certain points were being supported by specific findings in terms of quantitative e data.

As such, the study population constituted of respondents from the Copyright Society of Tanzania (COSOTA), the Commission for Science and Technology [(one to the Tanzania Intellectual Property Advisory Services and Information Centre – TIPASIC; the Centre for Development and Transfer of Technology (CDTT)], the Tanzania Investment Centre (TIC), the Business Registration and Licensing Agency – BRELA, the Small Industries Development Organization – SIDO; the Ministry of Defense (for permission to visit the *Nyumbu* Automotive Manufacturing Centre), the High Court of Tanzania, and other various private companies whose activities deemed to have a direct bearing to this research, like the Farmcon Tanzania Ltd.

The above identified and so selected respondents, were deemed to be conversant with the legal imports of intellectual property rights and that information derived there - from would pray an important role in assessing the contribution of intellectual property rights to the economic growth in Tanzania.

1.8.4 Sampling Techniques

Sampling[35] is the process of selecting a number of individuals or objects from the population such that the selected group contains elements representative of the

[35] Kombo, D.K., & Tromp, D. L. A., Proposal and Thesis Writing: An Introduction, Nairobi, Paulines Publications Africa, 2006, p. 77.

characteristics found in the entire group. According to Creswell[36], information drawn from a carefully selected sample is sometimes better than that obtained from the entire population. As such, the sampling technique of this study was purposive[37], much based on nexus between the information required and its relevance to the study. Therefore the information required was limited to institutions with direct relevance to the study, as stated in the population sampling aspect above.

1.8.5 Types of Data

In this study, the researcher used primary data being information obtained from original sources, such as respondents authorized as spokesmen of various government and private institutions and departments.

On the same footing, other data primarily collected for other purposes, have been used in this study as secondary data.

1.8.6 Data Collection Methods

In this study, the researcher used field and documentary research approaches as methods of data collection. However, the two methods were used in an intertwined manner where the researcher thought the intended method would be skipped so as to allow data collection through the most favorable method.

Furthermore, basing on the fact that information and /or literature about improving the intellectual property rights, is very skimpy in Tanzania, in this study, the

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[36] Cresswell, J. W. Qualitative Inquiry and Research Design: Choosing Among Five Traditions, London, Sage, 1998. P.47.

[37] The study employed purposive sampling or judgmental sampling. Purposive sampling is applied to get the location in which the units of observation have the required characteristics. See also Mugenda & Mugenda, supra note 34.

researcher also used comparative analysis approach where, in the main, he reviewed literatures on (case) laws, polices and practices regimes from other jurisdictions; and, where possible, conduct interviews (both open and closed) and discussions with selected administrative officers, legal experts, academics and judicial officials, through: questionnaire, interview, observation, internet search engines and e-mail communication.

1.8.6.1 Questionnaire

For the purpose of getting relevant and necessary information based on the hypothesis of the research but also on other information with direct connection to the research in its holistic nature, copies of questionnaires were distributed to the Copyright Society of Tanzania (COSOTA), the Commission for Science and Technology [(one to the Tanzania Intellectual Property Advisory Services and Information Centre – TIPASIC; the Centre for Development and Transfer of Technology (CDTT)], the Tanzania Investment Centre (TIC), the Business Registration and Licensing Agency – BRELA, the Small Industries Development Organization – SIDO; the Ministry of Defense (for permission to visit the *Nyumbu* Automotive Manufacturing Centre) and other various private companies whose activities deemed to have a direct bearing to this research.

The above identified and so selected respondents, were deemed to be conversant with the legal imports of intellectual property rights, or if not so, what are their future planning for the safeguarding of their work. Basing on this, the researcher believes

that the information on this study was derived from genuine and reliable sources that depict the true picture of the contribution of intellectual property rights to the country's economy.

1.8.6.2 Interview Method

Where the researcher had opportunity to direct interview to respondents, the interview approach was used as a means for data collection. In this regard, the researcher has a set of questions which were posed before the respondents, face to face, who in turn, replied in their personal capacity.

In this approach, the researcher was advantaged to influence and control the discussion, by studying the respondent's demeanour. This enabled the researcher to judge the reliability of the data obtained from the respondents.

1.8.6.3 Observation

Whenever the researcher carried out any information seeking method, whether by interview or questionnaire, a keen observation on how respondents comment on the effectiveness of inadequacy of the intellectual property legal framework, was being articulated by respondents. The researcher also took it as a matter of interest, the authorities advanced by respondents in favour of or for against their comments towards intellectual property rights.

This method enabled the researcher to draw own witnessed evidence and conclusions, which formed the Researcher's basis for commenting with confidence on the contribution of intellectual property rights to the economic growth of developed or least developed countries in general, with particular reference to Tanzania.

Through observation, the researcher also took time to watch TV programmes relevant to this study, like the *TecknoLeo programme,* broadcasted by TBC1, in the bid to supplement information obtained from other sources.

1.8.7 Data Analysis Techniques

In this study, the Researcher used the qualitative (descriptive) approach in data analysis. According to Babbie[38] qualitative data analysis is the non numerical examination and interpretations of participant observation and interviews to find out their underlying meanings, patterns of relationship and between the data and study problem being researched about. At this stage the researcher compiled and analyzed data gathered from interviews and questionnaires by using both qualitative (descriptive) and quantitative (quantifiable) approaches. The study employed also quantitative data analysis by including charts and tables in order to present the extent of the issue in question

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[38] Babbie, E., The Practice of Social Research, 10th Ed, Wadsworth, Canada, 2004, p.370.

1.8.8 Limitations of the Study

The Researcher faced some limitations in conducting this research:

The costs for field research, including transport, meals, stationary and communication were born by the Research himself. Thus basing on the personal financial constraints, the exercise was weighing heavily on the Researcher's shoulders. However, using monthly earnings in form of salaries, the researcher managed to carry out this exercise.

There are also challenges of failure to return distributed questionnaires by some respondents or that some respondents were not willing to give out information. In this regard, for instance, the permit sought from the Ministry of Defence to visit the *nyumbu* Automotive Manufacturing Centre was not obtained. The visit to *nyumbu* was therefore frustrated. Thus to fill this gap, the Researcher opted to interview the *nyumbu* retired officers who, the researcher thought have necessary information for this study.

Lastly, poor record keeping in some of the departments visited by the researcher, made the analysis of the contribution derived from intellectual property rights, specifically from the patents, trademarks and copyrights, not an easy task. However, with these challenges, the researcher managed to come up with reliable and authoritative study findings for this work.

CHAPTER TWO

2.0 GENESIS OF INTELLECTUAL PROPERTY RIGHTS

2.1 Understanding Intellectual Property Rights

Intellectual property rights (IPRs) are legal devices that protect creations of the mind which have moral and / or commercial value, such as inventions. They grant exclusive rights to the creators (right-holders) to protect access to and use of their property from unauthorized use by third parties.[39] The term 'intellectual property - (IP)' has no universally agreed definition. Rather than define Intellectual Property as a concept, the various treaties and conventions on IP refer to various categories of IP. For instance, the 1967 Convention establishing the World Intellectual Property Organization (the WIPO Convention) does not offer a formal definition of IP rather 'defining' IP broadly[40] by listing[41] components thought to be forming part of copyright.

However for purpose of working definition, copyright can be defined[42] to mean the exclusive legal right, given to an originator or assignee to print, publish, perform, film or record literary and artistic work.

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[39] ICTSD-UNCTAD Policy Discussion Paper, Intellectual Property Rights: Implications for Development (ICTSD-UNCTAD Geneva Switzerland: August 2003), p. 27.[hereinafter ICTSD-UNCTAD-]

[40] Convention establishing the World Intellectual Property Organization (WIPO), signed at Stockholm on July 14, 1967; Article 2(viii).

[41] Literary artistic and scientific works; performances of performing artists, phonograms, and broadcasts; inventions in all fields of human endeavor; scientific discoveries; industrial designs; trademarks, service marks, and commercial names and designations; protection against unfair competition; and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields

[42] The Canadian Intellectual Property Office at www.cipo.ic.gc.ca last visited on the 24th July, 2012

Similarly TRIPS does not define the term ‘intellectual property’ as a concept, but instead refers to sections of the Agreement that address categories of Intellectual Property Rights[43].

After the 1967 WIPO Convention, the concept of Intellectual Property has been broadened to include not only patents, copyright, industrial designs and trademarks but also trade secrets, plant breeder’s rights, geographical indications and rights to layout designs of integrated circuits.[44] This is evident from the wider categories of Intellectual Property included in TRIPS.

For the purpose of this study, the main categories of intellectual property rights that play a significant role include patents, copyrights, trademarks and protection of undisclosed information (trade secrets).

2.2 The Patents

A patent is a document granted by the authority to vindicate an invention. Unfortunately, TRIPS does not define ‘inventions’ leaving it to members to determine what should be deemed as an invention. The term "patent" usually refers to a right granted to anyone who invents or discovers any new and useful process, machine, article of manufacture, or composition of matter, or any new and useful improvement thereof. Examples of particular species of patents for inventions include biological patents, business method patents, chemical patents and software patents.

[43] See TRIPS Article 1(2)

[44] Article 1(2) of TRIPS for the ‘definition’ of the categories of intellectual property covered by TRIPS

Paul Kihwelo[45] defines patent right as a right granted by the public authority which confers on the owner the exclusive rights to exploit his/her invention or innovation in a given country for a given period of time. In this regard, therefore, patents have two aspects, first, they confer on the owner, exclusive rights; and secondly they serve as a source of useful technological information within a specific time[46].

As such, a patent is not a right to practice or use the invention, rather, a patent provides the right to exclude others from making, using, selling, offering for sale, or importing the patented invention for the term of the patent, usually 20 years from the filing date[47]. A patent is, in effect, a limited property right that the government offers to inventors in exchange for their agreement to share the details of their inventions with the public. Like any other property right, it may be sold, licensed, mortgaged, assigned or transferred, given away, or simply abandoned.

The rights conveyed by a patent vary country-by-country. For example, in the United States, a patent covers research, except "purely philosophical" inquiry. A U.S. patent is infringed by any "making" of the invention, even a making that goes toward development of a new invention — which may itself become subject of a patent. In contrast, Australian law permits others to build on top of a patented invention, by carving out exceptions from infringement for those who conduct research (e.g. for academic purposes) on the invention.

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[45] Ibid.
[46] During the life time of the owner and fifty years after his / her death.
[47] http://en.wikipedia.org/wiki/Intellectual_property (last accessed May 2011)

2.2.1 Historical Background of Patent

The origin of patents is still a debatable issue, raising various arguments backed up by available information and evidence at the time of respective findings. For instance, according to Zorina and Kenneth [48] writing on the history of patents, says that patents might have existed in 500 BC in Sybaris, Greece, where monopolies were granted to new dishes for a period of one year. Others still contend that patents might have originated from the Roman Empire where guild existed and obtained monopolies from the monarchs. Monarchs frequently used patents to raise revenue through the sale of, or to reward favorites with privileges such as monopolies over trade in specified commodities[49].

Yet others argue that patents originated in Italy, though not certain whether in Venice or Florence, where Filippo Brunelleschi of Florence had invented a new kind of boat in which heavy loads could be effectively hauled over the river. As such, in 1421, the Gentlemen of the Works requested from the Lords of the Council of Florence an exclusive privilege for Filippo Brunelleschi to make and use his invention on the waters of Florence for three years[50].

The Gentlemen's argument before the Council of Florence was to the effect that since they had among themselves, men of great genius, apt to invent and discover ingenious devices; and in view of the grandeur and virtue of their city, more such men come to them every day from divers' parts. So, they argued further that if

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[48] Zorina, B. K. and Sokoloff, K. L., History Lessons: The Early Development of Intellectual Property Institutions in the United States, Economic Perspectives Journal, Vol. 15, No. 3 Summer 2001, pp. 233–246,
[49] Ibid
[50] Ibid

provision were made for the works and devices discovered by such persons, so that others who may see them could not build them and take the inventor's honor away, more men would then apply their genius, would discover, and would build devices of great utility and benefit to their commonwealth.

The Council of Florence gave a declaration in the following wording:

> Be it enacted that, by the authority of this Council, every person who shall build any new and ingenious device in this City, not previously made in our Commonwealth, shall give notice of it to the office of our General Welfare Board when it has been reduced to perfection so that it can be used and operated.[51]

From the Gentlemen of Works submission to the Council of Florence and the subsequent declaration, principle elements, condition precedents for the grant of patent, start to emerge. These include novelty (building devices not previously made); inventive step (reduced to perfection) and industrial application (used and operated). However these have developed over years to the present context.

Zorina and Kenneth[52] trace the origin of granting exclusive property rights vested in patents, back to medieval guild practices in Europe. The authors say that, the patents rights were first recognized in England, through the Statute of Monopolies[53] enacted by the England Parliament. The patents evolved from letters patent, issued by monarch to grant monopolies over particular industries to skilled individuals with new techniques. Originally the practice was intended to strengthen England's economy by making it self-sufficient through promoting new industries, the system

[51] Ibid
[52] Zorina B. K., and Sokoloff, K.L., supra note 42.p. 245
[53] 1624

gradually became seen as a way to raise money (through charging patent-holders) without having to incur the public unpopular system of tax payment.

As such, patent rights continued to be regarded as something of a favor from the Crown, and applications had to win approval from a number of different officials before the monarch signed off.

2.2.2 Patents in England: From Discretional Royal Grants to Legal Rights

In Britain, like most other European nations, patents were often awarded to residents who were importing technologies or discovered elsewhere, but imposed "working requirements" to the effect that a patent had to be used in production within the country to remain in force.

Worth noting, the Statute of Monopolies of 1624 (also known as Magna Carta[54]) was enacted to cater for people's complaints against the monopolies granted by Queen Elizabeth I. The queen's grants of monopolies were given in favour with no guiding principle to the extent of terming them as abuse by the queen. As such, there were numerous unresolved disputes and the Statute of Monopolies came in to put monopolies to an end and grant patents within specific life span.

Basing on the work of Edward[55], Queen Elizabeth wanted to stimulate domestic production of goods imported from abroad. She thought by so doing, would help increase the revenue as well as increase her power compared to other states. Thus she

[54] Penrose, E.T., The Economics of the International Patent System, John Hopkins Press, Baltimore, 1951, p.7

[55] Edward, C. W., To Promote the Progress of Useful Arts: American Patent Law and Administration 1787-1836 (PART 2,), Patent and Trademark Office Society Journal, p. 11, (1998).

made efforts to attract the superior continental technology from Italy, Germany and other European states, by assuring them full protection of their produce, through the grant of a patent monopoly which by then, appeared to be the most effective way to lure the foreigners. The economic prosperity envisaged by the Queen, would be realized through complying with the requirements conditional precedent to the grant of monopoly. This is realized from the same Edward when elaborates on the "strings"[56] attached to the grant of monopoly.

These strings include the requirement that the new industry was to be introduced within a stipulated time and depending upon the working of the new industry the patent would be continued or renewed. Failure to introduce the new industry would result in withdrawal of the grant. Secondly, the grant obligated the recipient to train the native artisans to practice the art. This was clearly used to enable the local artisans to pick up the new art and employ it after the expiry of the term of the grant. The recipient of the grant was compelled to employ English artisans to achieve the above objective.

I find the second requirement ('string') above, very important to this work. The imported (foreign) technology was to be imparted to the native artisans who would use it or improve it to another useful technology upon expiration of the patent. Through imitation, the English natives would advance to something else and novel. In modern times this is referred to as utilization of the patents in the public domain.

[56] Edward ,supra note 49.

In this regard, a number of foreigners were attracted to the package and by 1565[57] a number of patents had been granted to foreigners, leading in production and trade. But the monopoly nature of the trade, lead to increased prices. This irked the subjects of the Queen and the former wanted the monopoly to be removed[58].

But the monopoly system did not work smoothly. Foreigners kept on renewing their patents, thus the envisaged imitation as soon as the patent expires did not arise. This was the beginning of disputes. The case of *Darcy v. Allin*[59], for instance, which is still known as the case of monopolies, is regarded as the first case where the House of Lords held that patents were to be regarded as legal rights than being royal prerogative. In this case, Edward Darcy had been granted monopoly on manufacturing playing cards in 1598. This facilitated Darcy's complete monopolization over all manufacture, importation and sales of playing cards. Darcy used the monopoly as a sword to every violator or infringer leading to the public hatred against royal prerogative on monopoly.

Therefore, some writers[60] conclude that basing on the endless disputes over monopoly; a commission was formed to investigate effectiveness of patent system in 1851-1852 and in 1861-1865 and again in 1869 -1872. Some of the testimony[61] before these commissions was so damaging to the repute of the patent system thus

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[57] Ibid
[58] Ibid
[59] Quoted without full citation in Edward. C. W., Charting a Novel Course for the Creation of the Patents Act of 1790,AIPLA Quarterly Journal, 1997, p. 445; and to the great extent used in previously quoted work above of Edward, C.W. supra note 49.
[60] Fritz, M.E., The Patent Controversy in the Nineteenth Century, The Economic History Journal, Vol. 10,1950, pp. 1- 29
[61] Ibid

leading statesmen in the two houses of the parliament proposing for the complete abolition[62] of patent protection

As a result, a patent reform bill[63] drafted on the basis of the 1872 commission's report provided for a reduction of patent protection to seven years. Other requirement in the bill included strictest examination of the patent applications, forfeit of patents not worked after two years and compulsory licensing of all patents.

2.2.3 The Spread of Patent System in the World

According to the UNCTAD[64] reports, after the Statute of Monopolies was adopted in England, the systematic use of monopoly privileges for the inventors gradually spread[65] to other countries and by the end of the nineteenth century several of the present developed countries established their own national patent laws to encourage and reward the invention of new technologies subject to meeting established criteria.

2.2.4 Criteria for Recognized Patents

Registrable patents have requirements to meet. First, the invention must be *new (novel)*, meaning that the invention must not have been disclosed or it must not be in the public domain in any part of the world prior to the application date.

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[62] Ibid

[63] Fritz et all. Ibid

[64] UNCTAD , The Role of the Patent System in the Transfer of Technology to Developing Countries, TD/B/AC.11/19/Rev.19, 1975, para.228, see also JAKKRIT Kuanpoth, The Political Economy of the TRIPS Agreement: Lessons from Asian Countries in Melendez-Ortiz, R. et al (eds), Trading in Knowledge: Development Perspectives on TRIPS, Trade and Sustainability, Earthscan, London, 2003, pp.45-56

[65] The Patent Law was adopted in Russia in 1812, Prussia in 1815; Belgium and Netherlands in 1817; Spain in 1820; Bavaria in 1825; Sweden in 1834; and Portugal in 1837

For instance, in the case of *Wind Surfing international Inc vs. Taber Marine [GB] Ltd*[66], the patent had been granted in 1968 to the plaintiff for the invention of the wind surfing board and other related forms of propulsion. The Plaintiff found Defendant also selling the same equipment thus instituted the legal action in court against the defendant for infringement of his patent granted in 1968.

The defendant objected to the initial validity of the patent arguing that wind surfing was very common (i.e. obvious) method of making sailing board. Actually the defendant argued that the act was anticipation of a boy aged 12 years in 1958, who while on holiday, at hauling island made and used a primitive plain board for his own amusement. The Court held that:

> The patentee improvement to his sail board idea to wind surfing was insufficient to gain patent because there was no inventive step on making an improvement that was regarded as obvious one to make.[67]

Secondly, an invention must have inventive step. The invention must not merely be something new; it must represent a development over prior art. The inventive step is often evaluated by considering the "unexpected" or "surprising effect" of the claimed invention.[68] The invention should not be obvious to a person of ordinary skill in the field concerned; otherwise it would not qualify for patent protection.[69]

As such, if the specification of the patent does not disclose the invention clearly enough and completely enough for it to be performed by a person skilled in the art,

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[66] [1985] RPC 59
[67] Ibid
[68] UNCTAD-ICTSD, *Resource Book on TRIPS and Development,* Oxford University Press, 2005, p. 360
[69] Ibid. See section 10 of Tanzanian Patent (Registration)Act and Section 24 Kenyan IPA 2001

no patent can be granted. The question of who is a person with ordinary skill and what will satisfy this test has been discussed in a number of cases. For example, in *Valensi v British Radio Corporation*[70] Buckley LJ said:

> The hypothetical addressee is not a person of exceptional skill and knowledge that he is not to be expected to exercise any invention nor any prolonged research, inquiry or experiment. He must, however, be prepared to display a reasonable degree of skill and common knowledge of the art in making trials and to correct obvious errors in the specification if a means of correcting them can readily be found.[71]

Thirdly an invention needs to be industrially applicable or useful.[72] The invention must be capable of use in any kind of industry. Industry in this sense is any physical activity of a technical character.[73] WTO Members considerably differ in their treatment of industrial applicability.

2.3 The Trade and Service Marks

Trademarks are defined as signs that individualize the goods or services offered by an enterprise and distinguish them from those of other enterprises.[74] They are marketing tools which provide exclusive rights to use distinctive signs, such as symbols, colours, letters, shapes or names to identify the producer of a product, and protect its associated reputation, for instance Coca-Cola®, Panadol®, Dell® SUMSUNG® . The trademark owner has the exclusive right to prevent third parties

[70]Valensi v British Radio Corporation [1973] RPC 337, 377
[71] Ibd
[72] TRIPS Footnote 5 of Article 27.1 specifically permits a Member to consider that "capable of industrial application" is synonymous with "useful". See also section 11 of the Tanzania Patent (Registration) Act and Section 25 Kenyan IPA 2001
[73] Resource Book on TRIPS at p.361
[74] Section 2 of the Tanzanian Trade and Service Marks Act, No. 12 of 1986 and Kenyan Trade Marks Act Cap. 506 Section 2(1) Cap. 506]

from using identical or similar marks in the sale of identical or similar classes of goods or services that might mislead or confuse customers.

2.3.1 Historical Development of Trade and Service Marks

Historically, the law of unfair competition and of trademark infringement evolved in the general field of torts.[75] It was concerned primarily with wrongful conduct in commercial enterprises which resulted in business loss to another, ordinarily by the use of unfair means in drawing away customers from a competitor.

Basing on the aforegoing, it has been argued that trademark law is primarily derived from the English common law relating to goodwill and the tort of passing off, which has been recognized in England since at least 1585. In the mid-19th century the Parliament of the United Kingdom recognized an increased use of standard marks as badges of origin. After appointing a select committee to investigate that business practice the Parliament passed the *Merchandise Marks Act* in 1862. The Act met with much criticism including that it confused the public and attorneys who were used to the common law approach. In response the Parliament passed the Trade Mark Registration Act in 1875 which is widely recognized as the first system of trademark registration. The registration of trademarks is now used throughout the world and has been incorporated into international law by, among other things, the Madrid Protocol[76].

[75] See Prosser, Torts (2d ed. 1955) sec. 107, p. 745 et seq.; Rest., Torts, pp. 538-539; Nims, Unfair Competition and Trade-Marks (4th ed. 1947) secs. 7-9, pp. 40-51.
[76] The Madrid Protocol was in respect of the Madrid Agreement (Marks) (1891), revised at Brussels (1900), at Washington (1911), at The Hague (1925), at London (1934), Nice (1957) and at Stockholm (1967), and amended in 1979. The said Protocol relating to the Madrid Agreement concerning the

Certain exclusive rights attach to a registered trade mark, which can be enforced by way of an action for trademark infringement, while unregistered trademark rights may be enforced pursuant to the common law tort of passing off. It should be noted that trademark rights generally arise out of the use and/or registration (see below) of a mark in connection only with a specific type or range of products or services.

As time passed and change of circumstances in industrial and economic conditions, the legal concept of unfair competition broadened appreciably. To the great extent the change was brought about by primarily flexibility in law and extent of relief afforded by equity, and partly by changing methods of business and changing standards of commercial morality.

From the Indian jurisprudence, the trademark indicates the quality of the goods and services. For instance in the case *Sumant Prasad Jain vs Shajahan Prasad and State of Bihar*[77] the Court held that trade mark not only identifies itself with its proprietor but also with the qualities of the goods with which it is associated.

As such, the owner of trademark or service mark claims some valuable property in the said trademark or service mark, one uses. Chandrakanthi[78] from the Indian perspective, to which all commonwealth countries subscribe, says that: A trader

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International Registration of Marks Madrid Protocol came into being in (1989), amended in 2006 and in 2007.

[77] AIR 1972 SC 2488

[78] Chandrakanthi, L, (B.Com., LL.M., Lecturer) The Law of Trademarks in India, Sarada Vilas Law College, University of Mysore, Mysore-570004, Karnataka, India, see also the Kenyan case of *Pharmaceutical Manufacturing Co v Novelty Manufacturing Limited* , High Court of Kenya Civil Case No. 746 of 1998 and *Beiersdorf AG v Emirchem Products Limited* ,High Court of Kenya Civil Case No. 559 of 2002 and *Unilever Plc v Bidco Oil Industries* , High Court of Kenya Civil Case No. 1447 of 1999

acquires a right of property in a distinctive trademark merely by using it upon or in relation to some goods irrespective of the length of such use or the extent of his trade[79].

2.3.2 Towards a New Trademark Regime

One cannot fully submit on the law of trade and Service Marks without a word or two on the Singapore Treaty on Trademark. The Singapore Treaty has been necessitated by the new changes of internet and e-mail which were not known in 1994, when the fax-machine was still the most advanced means of communication between an applicant and a trademark office.

The World Intellectual Property Organisation (WIPO) has finally succeeded in its attempt to update and streamline the administrative procedures for national and regional trademark applications. On March 27, 146 WIPO Member States adopted by consensus the Singapore Treaty on the Law of Trademarks[80], concluding four years of work on the revision of the 1994 Trademark Law Treaty (TLT).[81]

The objective of the Singapore Treaty is to create a modern and dynamic international framework for the harmonisation of administrative trademark registration procedures.[82] Building on the TLT 1994, the new Treaty has a wider scope of application and addresses new developments in the field of communication technology. This Treaty, which deals mainly with procedural aspects of trademark

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[79] According to Trade and Merchandise Marks Act, 1958.
[80] WIPO Document TLT/R/DC/30 dated March 28, 2006
[81] Trademark Law Treaty adopted at Geneva on October 27, 2004.
[82] See, Negotiators Adopt Singapore Treaty to Facilitate International Trademark Registration, WIPO/PR/2006/442 dated March 28, 2006.

registration and licensing, ensures that brand owners using the trademark system benefit from greater flexibilities and efficiencies in the delivery of trademark registration services.

2.3.4 The Key Changes under the Singapore Treaty on the Law of Trademark

In the efforts to revamp and maintain the TLT, the Singapore Treaty came with significant changes in the international trademark regime. Among the revisions are measures to simplify the application process for filing national and regional trademark licences by introducing features such as electronic filing, definitions of trademark protection for such as hologram marks, motion marks, colour marks, and marks consisting of non-visible signs[83] such as sound, olfactory or taste and feel marks,[84] l.ike holograms, sounds, and smells.

2.4 The Copyright and Related Rights

2.4.1 Historical Development of Copyright and Related Rights

In England, the growth of copyright law was through development of science and technology and can be traced as far back in the feudal documentation era. As presented by William[85], in his work "Copyright and Practice" the history of copyright law started with early privileges and monopolies granted to printers of books.

Under the British common law, as per William[86] above, an author's right to prevent an unauthorized publication of his or her manuscript appeared to have been recognized on the principle of natural justice, the manuscript being the product of

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[83] See Regulations 5 and 6 of the Singapore Treaty on Law of Trademark of 2006
[84] See, "Whiff of new Trademarks, *ABC Online*, In the news (16-03-2006).
[85] William, F. P., Copyright and Practice, The Bureau of National Affairs, Inc, 1994
[86] William supra note 79

intellectual labor and considered as much the author's own property as the physical substance on which it was written.[87] Sir William Blackstone, an English jurist and writer on law, associated such protection with the law of occupancy, which involves personal labor and results in "property."

The same principle, in a different way, is believed to have been used ages ago by the Irish King Dermot[88] in settling a dispute in the 560s between Abbot Fennian of Moville and St. Columba (in his pre-saintly days) over the latter's furtive (secretive) copying of the Abbot's Psalter. In this dispute, the King held declaring:

> "*la gache boin a boinin, le gach leabhar a leabhrum*" which means "to every cow her calf and to every book its copy." [89]

Although the story is popularly believed to be apocryphal, the nineteenth-century scholar Augustine Birrell[90] relates how a copy of the Psalter in St. Columba's handwriting had been exhibited in the Museum of the Royal Irish Academy in Dublin in 1867, after having spent more than 1,000 years in the private possession of one family.

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[87] William, F. P., supra note 79. quotes *Atkins v. Stationers Co., Carter's* Rep. 89 (1666) ("copyright was a thing acknowledged at common law"). The source of this common law was eloquently stated in Millar v. Taylor, 4 Burr. 2303, 2398, 98 Eng. Rep. 201, 252 (1769) (Mansfield, Lord Chief Justice): "From what source, then, is the common law drawn, which is admitted to be so clear, in respect of the copy before publication? From this argument – because it is just, that an author should reap the pecuniary profits of his own ingenuity and labor." This same emphasis on natural rights as the foundation for copyright is expressed in some of the colonial statutes. *See infra,* notes 63-64. The opinions of the other judges in *Millar v. Taylor* and in Donaldson v. Becket, 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774) are an invaluable resource for research into the existence (or nonexistence) of common law copyright in England. *See also* Prince Albert v. Strange, 1 Mac. & G. 25, 43 (H.L. 1849) "(the exclusive rights in the author of unpublished compositions, depend entirely upon the common law of property"); Jeffreys v. Boosey, 4 H.L.C. 815 (1855).

[88] Ibid

[89] Ibid

[90] Birrell, A., The Law and History of Copyright 42 (1899), referred to in the work of William F. P. supra note 79.

In England[91] during the 17th Century, there were developments in book making, manuscript, by authors and production of those books by publishers. Due to technological advancement, it was by then easy for strangers to copy out and reproduces much faster due to efficient machine, cheap and much faster. To cub endless disputes, England enacted the famously known as the Statute of Anne of 1709[92]

The Statute of Anne granted to the author of the book and other documents the sole right to print their works for the period of 14 years from the day of first publication and subject to addition of other 14 years. In 1882 the amendment to the Statute of Anne required the author to register his work and extended the protection period up to 70 years and 7 years additional whichever the earlier.

In 1911 further amendment to the Statute of Anne repealed, all the legislations concerning copyright consolidated into one legislation, known as the Copyright Act of 1911. The new act removed the requirement of registering one’s literary work, now copyright was secured to the author by the act of creation. Protection was increased from life to 50 years after death.

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[91] William, Ibid.
[92] Full title "An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned"

In the case of *Donaldson vs Beckett*[93] the House of Lords, were tasked with the question whether the statute of Anne really abolished a common law perpetual copyright. This question had occupied the minds of both the book industry (Booksellers) and the judges for more than 60 years famously known as the Battle of Booksellers, since the lower courts kept granting injunctions to booksellers at every expiration of the protected period, almost making it perpetual. Thus in this case, the House of Lords held for the authors "that authors, according to common law, had the exclusive right to the first publication for perpetuity."

The case of *Donaldson vs Beckett* overruled a case decided only five years earlier by the King's Bench, in *Millar v. Taylor,*[94] and introduced two important things: one, that it confirmed the step of the Statute of Anne in moving property rights in literary works away from publishers toward authors; and secondly it provided the basis for an 1834 decision by the Supreme Court, holding that copyright is entirely a creature of statutory law, as contrasted with the natural law approach taken on the continent[95] As can be easily found out, this position has changed to the great extent compared to the legal position of copyright protection today.

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[93] Donaldson v. Becket, 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774) found also on the work of Text source: Cobbett's "Parliamentary History of England", London, 1806-1820, vol. XVII./KET)

[94] 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769). Millar was a member of the Stationers Company, Taylor predictably was not. An earlier collusive suit brought by the Stationers in 1760 to test their alleged perpetual rights, Tonson v. Collins, was dismissed after three rounds of argument (Blackstone represented the plaintiff), when its collusive nature was uncovered.

[95] Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834)

On part of the United States of America, as stated in the case of *Wheaton v. Peters*[96], the copyright law came about as a result of development in science and the useful art. The first Statute on copyright was enacted in 1790 "for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies, during the times therein mentioned."[97]

According to the said 1790 Statute of Copyright, authors in USA were able to obtain copyright protection by registering their works, complying with deposit and notification rules, and paying a nominal fee. Registration initially secured the right to print, publish and sell maps, charts and books for a period of 14 years, with the possibility of an extension for another term. However, the subject matter and scope of copyrights expanded significantly over the course of the nineteenth century to include musical compositions, plays, engravings, sculpture, and photographs.

In 1947 the USA Parliament enacted the comprehensive law on copyright but the most development law of copyright was the Copyright Act of 1976. Under this new Act, copyright protection became a life time factor and 70 after the death of the author.

But in the work of Copyright and Practice, quoted above, William[98] presents some facts vital to this work. He says:

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[96] The U.S. Supreme Court in *Wheaton v. Peters* (33 U.S. 591, 684 [1834]): "It has been argued at the bar, that as the promotion of the progress of science and the useful arts is here united in the same clause in the constitution, the rights of the authors and inventors were considered as standing on the same footing; but this, I think, is a non sequitur . . . for when congress came to execute this power by legislation, the subjects are kept distinct, and very different provisions are made respecting them.

[97] William, ibid.

[98] William, supra note , p. 5

> The United States was long a net importer of literary and artistic works, especially from England, which implied that recognition of foreign copyrights would have led to a net deficit in international royalty payments. Despite the lobbying of numerous authors and celebrities on both sides of the Atlantic, the American copyright statutes did not allow for copyright protection of foreign works for a full century. As a result, the nineteenth century offers a colorful episode in the annals of intellectual property, as American publishers and producers freely pirated foreign literature, art and drama. The publishing industry was further protected by tariffs on books that ranged as high as 25 percent. Other countries retaliated and refused to grant American authors copyright protection.[99]

This is to say that, the delay in enacting the copyright Act in the United States of America, by then, was absolutely a deliberate move, aiming at accumulating enormously through piracy. To hammer this point home, the same writer continues saying that:

> As a result of lack of legal copyrights in foreign works, publishers raced to be first on the market with the "new" pirated books, and the industry experienced ;several decades of intense, if not quite "ruinous" competition. By the middle of the nineteenth century, however, the industry achieved relative stability because the dominant firms cooperated in establishing synthetic property rights in foreign authored books. American publishers made payments (termed "copyrights") to foreign authors to secure early sheets, and other firms recognized their exclusive property in the "authorized reprint." These exclusive rights were tradable, and enforced by threats of predatory pricing and retaliation. Such practices suggest that legally enforceable property rights were of sufficient importance to publishers that, in their absence, the companies attempted to simulate their effects, albeit at higher costs.[100]

In this regard, it is easy to conclude that advocating for copyright protection (also for other categories of IPR), came about after these countries had accumulated enough from pirated work to the extent of claiming originality; but now they were scared of other countries doing the same.

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[99] Ibid
[100] Ibid

2.5 Intellectual Property Rights in Tanzania

2.5.1 The Law Relating to Patents in Tanzania

The Intellectual Property rights as a phenomenon is as old as the colonial rule in Tanzania. At that time, intellectual property laws aimed at protecting foreign inventions. That's why the only categories of intellectual property rights protected during the colonial era included the patents, copyright and neighbouring rights, and trademark.

The Patents (Registration) Ordinance Cap 217[101] of 1931 was the first legislation to regulate patents matters in then Tanganyika. However, three year later, the Patents, Design, Copyright and Trade Marks (Emergency) Ordinance Cap 220 was enacted and came into force on the 3rd September, 1934. It was later repealed and replaced by the Patents, Design, Copyright and Trade Marks (Repeal of Sundry Obsolete Provisions) Ordinance Cap 354, which came into force on the 10th December, 1954.

New legislation containing modern notions pertaining to patents was enacted in 1987as the Patents Act No. 1 of 1987 and assented by the President on the 31st April 1987. According to the Government Notice Number 457 of 1994 the said Act became operational by 1st September, 1994. Its coming into force repealed the Patents (Registration) Ordinance Cap 217.

[101] The Patents (Registration) Ordinance, Cap 217 came into force on the 10th May, 1931.

According to Kihwelo[102] the new Patents (Registration) Act is a modern piece of legislation and has all the regulatory legislation powers of a modern patent protection legislation, which requires equally modern patents infrastructure to comprehend an effective patent protection system.

The Patents (Registration) Act[103] doesn't define the term patent but section 7 of the same Act defines an invention as a solution to a specific problem in the field of technology and may related to a product or process. Section 8 of the Act further states that an invention is patentable if it is new, involves an inventive step and is industrially applicable.

Moving in the steps of section 8 of the Act, Kihwelo,[104] defines a patent as a document which describes an invention. It confers an exclusive right to an inventor to prevent *all* others from using the invention, without license or authorization, for the duration of the patent, in return for disclosure of the invention in a document known as the patent specification.

However, as a condition precedent for the grant of a patent, the description of the invention in the specification must be sufficient so that others skilled in the technological field (skilled in the art) are able to read the specification and perform the invention for them after the patent expires.

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[102] Kihwelo P. supra
[103]Section 7 of the Patents (Registration)Act, [Cap 217 R.E. 2002]
[104] Ibid

2.5.2 The Law Relating to Copyright and Related Rights in Tanzania.

With regard to Copyright and Neighbouring Rights Act, Kihwelo[105] contends that the concept of copyright was introduced in Tanzania, by then Tanganyika through the UK Imperial Copyright Act of 1911. The legislation was amended in 1924 to a Copyright Act, Cap 218[106] , which after independence, was repealed and the Copyright Act No. 61 of 1966 came into force. In 1999 the Copyright Act was further repealed by the Copyright and Neighbouring Rights Act No: 7 of 1999.

Taking literary and artistic works bestowing rights to the authors, section 4 of the Copyright and Neighboring Rights Act defines the "copyright" to mean the sole legal right to print, publish, perform film or record a literary or artistic or musical work. As such, copyright law covers only the form or manner in which ideas or information have been manifested, the "form of material expression." It is not designed or intended to cover the actual idea, concepts, facts, styles, or techniques which may be embodied in or represented by the copyright work.

The current Copyright and Neighbouring Act has to the great extent departed from the previous laws tainted with colonial objectives. In this regard, as captured by the name of the Act itself, the new law included aspects of neighbouring[107] rights. Further protection of computer[108] and folklore[109] issues has been addressed too.

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[105] Kihwelo, P: Ibid.

[106] The Act took legal force in 1st August, 1924

[107] Part IV of the Copyright and Neighboring Act, No. 7, 1999, provides for the protection of neighboring rights related to performers, producers of sound recordings and broadcasting organization.

[108] Section 5 of the Copyright and Neighboring Act, No. 7, 1999

[109] Section 24 of the Copyright and Neighboring Act, No. 7, 1999

2.5.3 The Law Relating to Trade and Service Marks in Tanzania

The trade and service marks in Tanzania, traces its origin as far back as 1922 when the first Trade Marks Ordinance Cap 216 came into operation on 1st April, 1922. Almost 36 years later, the Ordinance was repealed and replaced by the Trade Marks Ordinance, Cap 394.[110]

In 1963 the Merchandise Marks Act, No. 20 of 1963, Cap 85 was enacted. An Act to control the use of marks and trade descriptions in relation to merchandise and other related marks in Tanzania. In 1986 the colonial Ordinance on trademarks was repealed and replaced by Trade and Service Marks Act, No. 12. The Regulations leading to the effective operation of the Act was made in 2000 vide Government Notice Number 40 published on 3rd February, 2000.

Section 367 of the Penal Code, Cap 16 of the Revised Laws of Tanzania also defines[111] Trademarks and section 368 creates an offence by virtue of which the counterfeighting trademarks shall forfeit to the United Republic.

As such, in Tanzania, the above position has to the large extent been observed under the law and has been subscribed to by various academicians , among others being

[110] The Trade Marks Ordinance Cap 394, came into operation on 1st July, 1958
[111] A trade mark is–
(a) a mark lawfully used by any person to denote any chattel to be an article or thing of the manufacture, workmanship, production or merchandise of that person or to be an article or thing of any peculiar or particular description made or sold by him;
(b) any mark or sign which in pursuance of any law for the time being in force relating to registered designs is to be put or placed upon or attached to any chattel or article during the existence or continuance of any copyright or other sole right acquired under that law.

Paul Kihwelo when he quotes section 2 of the Trade and Service Marks Act[112] to the effect that:

> A trademark constitutes any sign individualizing the goods of a given enterprise and capable of distinguishing such goods from the goods of competitors. [113]

In Tanzania, trademarks rights are protected under the Trade and Service Marks Act[114] and the Trade and Service Marks Regulations.[115] These laws have been interpreted by the courts in Mainland Tanzania in various cases.

In the case of *Tanzania Breweries Ltd. v Kibo Breweries & Kenya Breweries Ltd*[116] involving trademarks '*Kibo Peak'* of Mountain Kilimanjaro which appeared on beer brands of the applicant (*Kilimanjaro Premium Larger, Kilimanjaro Larger and Snow cap)* and that of the Kibo Gold beer.

The Honorable Judge in this case held that:

> I have carefully put myself in the shoes of a common consumer and subjected my eyes to the contested registered trademarks. At the end of the exercise, I have concluded that, notwithstanding the presence of Kibo peak on all brands there is no way this can create the deception to the degree complained of by the appellant. As such the applicant has failed to establish the three requisites for securing an order for temporary injunctions.[117]

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[112] Act No. 12 of 1986.
[113] Ibid
[114] ibid
[115] G.N. 40 of March 2000.
[116] See the Country Report to the Managing Intellectual Property Global Magazine, submitted by Audax K. Kameja, Blandina Selle Godadi, August N. Mrewe and Francis Kamuzora of Mkono & Co. Advocate mainly an assessment of Intellectual Property Case law in Tanzania, as to whether the same meet established TRIPs standards.
[117] Tanzania Breweries Ltd vs Kibo Breweries Ltd and Kenya Breweries Ltd, High Court, Civil Case No. 34/1999 (unreported).

2.6 Conclusion

Historically, intellectual property was much characterized by imitations, infringements and pirate of patents, trademarks and or copyrighted works. The imitation, infringement or pirate, as the case may be, was carried out, in some countries with impunity, until the respective country had acquired much capacity to move on their own that is when protection of intellectual property became an imperative agenda.

Currently, intellectual property rights are now contained in international codification instruments, by virtue of which, the rule of originality acquires much advocacy for the sake of protecting the creator's economic rights embodied within the respective intellectual property product.

As it will be discussed in the subsequent chapters, protection of intellectual property rights has raised intensive discussions in international discourses, when economic gain comes at the forefront of the respective country's economic growth.

CHAPTER THREE

3.0 INTELLECTUAL PROPERTY ORGANIZATIONS AND THEIR MANDATE FOR ECONOMIC DEVELOPMENT

3.1 Introduction

Protectionism engulfed the whole concept of intellectual property rights. Lemley[118] says that, industry groups collected intellectual property rights from owners and licensed them as package for huge profit. Further Robert Merges[119] puts that this protectionism nature of intellectual property rights by big companies inconvenienced the country's economic growth aspect of the intellectual property rights, especially for developing countries. In a way, country lagging behind in innovations impliedly seemed left behind economically, if could not purchase the said intellectual property rights through licensing[120]. As such, the creation[121] of intellectual property organizations, was mainly, to play a valuable mediating role in facilitating transactions of intellectual property rights, but putting economic development at the forefront. Tied up with this, therefore, this chapter will discuss the formation of these intellectual property rights organisations in connection to their mandated role for facilitating economic development, especially for the developing countries.

3.2 IP Organisations and their Mandate for Country's Economic Growth

WIPO started as a movement for the protection of Industrial Property rights which resulted into the Paris Convention of 1883 for the Protection of Industrial Property

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[118] Lemley, Mark A., Intellectual Property Rights and Standard –Setting Organizations (April 1, 2002).California Law Review (online), Vol. 90, 2002 and available at http://assrn.com/abstract=310122, visited on 21st July, 2012.

[119] Robert P. Merges, Contracting into Liability Rules: Intellectual Property and Collective Rights Organizations, 84 Cal. L. Rev. 1293 (1996), Available at: http://scholaship.law.berkeley.edu/californialawreview/vol84/iss5/1, visited on the 21st July, 2012.

[120] Ibid

[121] Robert P. Merges, supra.

rights and in the 1886 Berne Convention for the Protection of Literary and Artistic Works. As such, the World Intellectual Property Organization, famously referred to in its abbreviated form as "WIPO" in English, was established in 1967 in Stockholm.[122] It entered into force in 1970 in terms of the "Convention Establishing the World Intellectual Property Organization.

For instance, Article 15 of the Paris Convention provides for the establishment of the International Bureau that will provide for the secretariat of various organs of the union. The same spirit is reflected under Article 24[123] of the Berne Convention, which provides, *inter alia* that the administrative work with respect to the Union, shall be performed by the International Bureau, which is a continuation of the Bureau of the Union united with the Bureau established by the International Convention for the Protection of Industrial Property (this refers to the Paris Convention).

In a particular emphasis, article 24(b) of the Berne Convention, expressly states that the International Bureau, stated above, shall provide the secretariat of the various organs of the Union.

As such, both Conventions (the Paris and Berne Conventions) provided for the establishment of an "International Bureau" or secretariat for the detailed management of intellectual property matters.

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[122] Through a Convention establishing the World Intellectual Property Organization, (WIPO), signed by members States on the 14th July, 1967, in Stockholm Sweden

[123] The Berne Convention for the Protection of Library and Artistic works, of September, 1886, completed at Paris on 4th , May 1896, revised at Berlin on November13th , 1908; completed at Berne on March 20th , 1914; revised at Rome on June 26th 1928; at Brussels on June 26th 1948; at Stockholm on July 14th , 1971 and amended on September, 28th , 1979.

The two Bureaus were united in 1893 and functioned under various names until 1970 when they were replaced by the International Bureau for the Protection of Intellectual Property (commonly designated as "the International Bureau" or known as BIRPI in French) by virtue of the WIPO Convention.

From the WIPO website[124], it is established that as the importance of intellectual property grew, the structure and form of the organization changed as well. That in 1960, BIRPI moved from Berne to Geneva to be closer to the United Nations and other international organizations in that city. Further that a decade later[125], following the entry into force of the Convention Establishing the World Intellectual Property Organization, BIRPI became WIPO, undergoing structural and administrative reforms and acquiring a secretariat answerable to the member States.

In this regard, by 1974[126], WIPO had become a specialized agency in the United Nations system of organizations for intellectual property matters. In terms of Article 3 of the World Intellectual Property Organization, its main objectives mainly include:

(i) To promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization;

(ii) To ensure administrative cooperation among the intellectual property Unions, that is, the "Unions" created by the Paris and Berne Conventions and several sub-treaties concluded by members of the Paris Union.

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[124] http://www.wipo.int (last accessed June, 2011)
[125] WIPO website, Ibid
[126] Ibid

The functions of WIPO, as stipulated under Article 4[127] of the agreement, is mainly for promoting the protection of intellectual property rights and ensure global compliance by assisting in developing domestic legislation to that effect.

By 1996, WIPO entered a cooperation agreement[128] with the World Trade Organization for joint administration of intellectual matters under the two organizations. Intellectual property comprises of two main branches: *industrial property*, chiefly in inventions, trademarks and *copyright*, chiefly in literary, musical, artistic, photographic and audiovisual works.

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[127] Article 4: In order to attain the objectives described in Article 3, the Organization, through its appropriate organs, and subject to the competence of each of the Unions:

(i) shall promote the development of measures designed to facilitate the efficient protection of intellectual property throughout the world and to harmonize national legislation in this field,

(ii) shall perform the administrative tasks of the Paris Union, the Special Unions established in relation with that Union, and the Berne Union;

(iii) may agree to assume, or participate in, the administration of any other international agreement designed to promote the protection of intellectual property;

(iv) shall encourage the conclusion of international agreements designed to promote the protection of intellectual property;

(v) shall offer its cooperation to States requesting legal–technical assistance in the field of intellectual property;

(vi) shall assemble and disseminate information concerning the protection of intellectual property, carry out and promote studies in this field, and publish the results of such studies;

(vii) shall maintain services facilitating the international protection of intellectual property and, where appropriate, provide for registration in this field and the publication of the data concerning the registrations;

(viii) shall take all other appropriate action.

[128] Agreement between the World Intellectual Property Organization and the World Trade Organization, of 22nd December, 1995 and came into force 1996.

In promoting the protection of intellectual property throughout the world, WIPO encourages the conclusion of new international treaties and the modernization of national legislation. Of most importance to this work, WIPO gives legal - technical assistance to developing countries.

Furthermore, WIPO assembles and disseminates information; it maintains services for facilitating the obtaining of protection of inventions, marks and industrial designs for which protection in several countries is desired and promotes other administrative cooperation among member States.

As to the administrative cooperation among the Unions, WIPO centralizes the administration[129] of the Unions[130] in the International Bureau in Geneva, which is the

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[129] In respect of the administrative organs, WIPO has three governing bodies, that is, organs established by the WIPO Convention, the members of which are States. They are the General Assembly (whose members are the States members of WIPO which are also members of the Paris and/or Berne Unions), the Conference (whose members are all the States members of WIPO), the Coordination Committee (whose members are elected among the members of WIPO and the Paris and Berne Unions, Switzerland being an *ex officio* member; on January 1, 1997, this Committee had 68 members).

[130] On January 1, 1997, WIPO administered the following Unions or treaties (listed in the chronological order of their creation): *in the field of industrial property*, the *Paris Union* (for the protection of industrial property), the *Madrid Agreement* (for the repression of false or deceptive indications of source on goods), the *Madrid Union* (for the international registration of marks), the *Hague Union* (for the international deposit of industrial designs), the *Nice Union* (for the international classification of goods and services for the purposes of the registration of marks), the *Lisbon Union* (for the protection of appellations of origin and their international registration), the *Locarno Union* (for the establishment of an international classification for industrial designs), the *PCT (Patent Cooperation Treaty) Union* (for cooperation in the filing, searching and examination of international applications for the protection of inventions where such protection is sought in several countries), the *IPC (International Patent Classification) Union* (for the establishment of worldwide uniformity of patent classification), the *Vienna Union* (for the establishment of an international classification of the figurative elements of marks), the *Budapest Union* (for the international recognition of the deposit of microorganisms for the purposes of patent procedure), the *Nairobi Treaty* (on the protection of the Olympic symbol), the *TLT (Trademark Law Treaty)* (for the simplification of formalities before trademark registries), and, *in the field of copyright or neighboring rights*, the *Berne Union* (for the protection of literary and artistic works), the *WCT (WIPO Copyright Treaty)* (for the protection of

secretariat[131] of WIPO, and supervises such administration through its various organs. Centralization ensures economic efficiency for the member States and the private sector concerned with intellectual property.

As far as WIPO's status as a specialized agency of the United Nations is concerned, it is noted that, under Article 1 of its Agreement[132] with the United Nations, WIPO is responsible for taking appropriate action in accordance with its basic instrument, and the treaties and agreements administered by it, *inter alia*, for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate their economic, social and cultural development, subject to the competence of the United Nations and its organs, and of other agencies within the United Nations system of organizations.

Article 10 cements the above position and further colours some promising light to the developing countries, in terms of accessing technology transferred by developed countries to that effect, Article 12 of the same agreement, aims at facilitating furnishing of States information filed with WIPO to the International Court of Justice, in case of need, as per Article 34 of the Statute of the International Court of Justice.

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certain rights in certain works), the *WPPT (WIPO Performances and Phonograms Treaty)* (for the protection of the rights of performing artists in their live performances and in the aural fixations of their performances and the protection of the rights of producers of phonograms in their phonograms), the *Rome Convention* (for the protection of performers, producers of phonograms and broadcasting organizations; administered in cooperation with Unesco and the International Labour Office (ILO)), the *Geneva Convention* (for the protection of producers of phonograms against unauthorized duplication of their phonograms), and the *Brussels Convention* (relating to the distribution of programme-carrying signals transmitted by satellite).

[131] See Article 24 of the Berne Convention and Article 15 Paris Convention, respectively.
[132] The Agreement between the United Nations and the World Intellectual Property Organization

Further more, Article 4 of the Agreement between WIPO and WTO, provides for cooperation between the International Bureau under WIPO and the Secretariat of the WTO in respect of assistance to developing countries. The assistance is in respect of the legal – technical assistance and technical cooperation, notification and collection of the intellectual property laws and regulations, and the notification of emblems of States and international organizations.

In this regard, the WIPO's planning and activities implementation strategy for developing countries largely is guided by the relevant objectives of international cooperation agreements for development between the two respective bodies[133].
This in particular refers to making full use of intellectual property for encouraging domestic creative activity and for facilitating the acquisition of foreign technology and the use of literary and artistic works of foreign origin, and for organizing easier access to the scientific and technological information contained in millions of patent documents. All this should serve the cultural, economic and social development of developing countries.

Together with the above agreements, Article 66 (2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights, oblige developed countries, to encourage their respective enterprises to transfer technology to the developing countries with a view of enhancing technological base to the latter.

[133] Whether it is the WIPO and UNO agreement or WIPO and WTO agreement.

3.3 The African Regional Developments of Intellectual Property Rights

At the African Region level, organised efforts for intellectual property matters trace its history back in 1970s when a Regional Seminar on patents and copyright for English - speaking African countries was held in Nairobi Kenya. That seminar recommended that a regional industrial property organization be set up.

In 1973 the United Nations Economic Commission for Africa (UNECA) and the World Intellectual Property Organization (WIPO) responded to a request by these English-speaking countries, *inter alia,* in pooling their resources together in industrial property matters by establishing a regional organization.

A number of meetings were conducted with regard to the above efforts. The first one was held at UNECA headquarters in Addis Ababa and the second at WIPO headquarters in Geneva. During the Geneva meeting, a draft Agreement on the Creation of the Regional Industrial Property Organization for English-speaking Africa (ARIPO) was prepared. This agreement is commonly known as the Lusaka Agreement[134], which was adopted by a Diplomatic Conference held in Lusaka, Zambia on December 9, 1976.

As per Article III of the Lusaka Agreement, the organization's objectives were mainly for harmonizing the regional laws on intellectual property matters; creating a

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[134] Agreement on the Creation of the African Regional Intellectual Property Organization (ARIPO) (as adopted by the Diplomatic Conference for the adoption of an Agreement on the Creation of an Industrial Property Organization for English-Speaking Africa at Lusaka (Zambia) on December 9, 1976, and amended by the Administrative Council of ARIPO on December 10, 1982, December 12, 1986 and November 27, 1996, and as amended by the Council of Ministers on August 13, 2004)

forum of focused study, research and experience sharing through conferences; enhancing technological transfer for regional development; and to promote the development of copyright and related rights and ensure that copyright and related rights contribute to the economic, social and cultural development of members and of the region as a whole.

The above stated objectives would be realized through establishment of the close and continuous relationships[135] with the United Nations Commission for Africa, World Intellectual Property Organization and the African Union.

In 1982, ARIPO adopted the first protocol to the Lusaka Agreement at Harare Zimbabwe, also known as Harare Protocol[136]. This protocol mainly addressed, in a specific way, issues of patents, utility models and industrial design. In 1984, ARIPO adopted regulations for implementing the protocol[137] on patents, industrial design within the ARIPO framework.

The Banjul Protocol[138] was the second protocol to be adopted by ARIPO in 1993. It was adopted to address issues pertaining to Trade and Service Marks. The 1995, the

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[135] Article V of the Lusaka Agreement (ARIPO) 1976

[136] Adopted on December 10, 1982, at Harare (Zimbabwe), and amended by the Administrative Council of ARIPO on December 11, 1987, April 27, 1994, November 28, 1997, May 26, 1998, November 26, 1999, November 30, 2001 and November 21, 2003 and as amended by the Council of Ministers on August 13, 2004

[137] It entered into force on April 25, 1984, and amended by the Administrative Council of ARIPO on April 27, 1994, November 27, 1998, November 24, 2000 and November 21, 2003 and as amended by the Council of Ministers on August 13, 2004) (as in force from November 13, 2004

[138] Adopted by the Administrative Council at Banjul, the Gambia on November 19, 1993 and amended on November 28, 1997, May 26, 1998 and November 26, 1999 and as amended by the Council of Ministers on August 13, 2004 and

Administrative Council adopted Regulations[139] for the implementation of the Banjul Protocol.

Although the movement started as a concern for the English Speaking Africa, ARIPO through the Lusaka Agreement was and remained open for the whole of African. As such basing on the Lusaka Agreement and its subsequent protocols, the African Region intellectual Property Organization, has continuously administered intellectual property issues for the African region to-date.

3.3.1 Was there a Need for ARIPO?

As previously established, WIPO had been established to cater for intellectual property matters at the global level. In effect, there would be no need for another organisation addressing the same issues at the regional level. But this was not the case for Africa and else where.

In effect, ARIPO was established as a result of member state's recognition[140] for the need of having an effective and continuous exchange of information, harmonization and co-ordination of their laws, policies and activities on intellectual property matters. Furthermore, that the above purpose would be best achieved in the African context[141] if the African states would collaboratively join efforts from the Economic

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[139] Adopted by the Administrative Council at Kariba, Zimbabwe on November 24, 1995 and amended on November 28, 1997, May 26, 1998 and November 26, 1999 and as amended by the Council of Ministers on August 13, 2004 (as in force from November 13, 2004

[140] Preamble to the Lusaka Agreement, Ibid

[141] According to the Economic Commission for Africa, 2008 report, one of the aims of the World Trade Organization (WTO) Doha Round of Multilateral was to take on board development concerns in the design of the multilateral trading system and address inequities in the existing system, especially those that were significantly disadvantageous to developing countries. Despite such good intentions, little progress has been made in the negotiations. There has not been any major agreement

Commission for Africa, the World Intellectual Property Organization and other appropriate organizations in the study and promotion of and co-operation in intellectual property matters.

In general, the philosophy behind forming ARIPO was to enable African countries pool their resources in order to avoid duplication of financial and human resources in fourteen[142] member states; but also address intellectual property rights matters in a more realistic African context.But of most importance, a need for ARIPO was mainly based on the fact that at that time, the majority of the countries concerned had "dependent industrial property legislations" which did not provide for original grant or registration in the countries concerned but could only extend to their territories the effects of industrial property rights obtained in a foreign country (in most cases the United Kingdom). Such effects were normally governed by law of the foreign country. As such, concerned countries wanted to have an independent system that would provide for intellectual property matters in the African context. As such, the objectives of the ARIPO, as enshrined in Article III[143] of the Lusaka Agreement,

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on the reduction or the removal of agricultural subsidies in major developed countries, and no major breakthrough on nonagricultural market access (NAMA) negotiations. Recent efforts such as the Aid for Trade Initiative intended to serve as a tool to build capacities in trading and marketing to boost trade-related infrastructure in developing countries, particularly in Africa, are yet to begin to bear fruits. See also *Assessing Progress in Africa towads the Millenium Development Goals* by the Economic Commission for Africa, Publications Economic Commission for Africa P.O. Box 3001 Addis Ababa, Ethiopia. 2008

[142] These are Bostwana; The Gambia; Ghana; Kenya; Lesotho; Malawi; Sierra Leone; Somalia; Sudan; Swaziland; Tanzania; Uganda; Zambia; and Zimbabwe. Potential member states who now have observer status are: Angola; Egypt; Eritrea; Ethiopia; Liberia; Mauritius; Mozambique; Namibia; Nigeria ; Seychelles; and South Africa. In November, 1999, Mozambique decided to join ARIPO and the deposit of its instruments of accession is expected in the near future.

[143] Article III of the Convention for establishment of the ARIPO Organization, states that the objectives of the Organization shall be: (a) to promote the harmonization and development of the intellectual property laws, and matters related thereto, appropriate to the needs of its members and of the region as a whole; (b) to foster the establishment of a close relationship between its members in matters relating to intellectual property; (c) to establish such common services or organs as may be

show that, cooperation in industrial property is intended to achieve technological advancement for economic and industrial development of the member states.

According to the Lusaka Agreement[144], ARIPO has three main organs: the Council of Ministers; the Administrative Council; and the Secretariat. The Administrative Council is responsible for formulating and directing the execution of policy, which includes the Banjul Protocol on Marks that was adopted in 1993 and came into force on 6 March 1997. To date, five ARIPO members have become contracting parties to the Protocol: Lesotho; Malawi; Swaziland; Tanzania; and Zimbabwe. Since 1997, the Protocol has been revised in order to conform to the TRIPS Agreement and the Trademark Law Treaty.

3.4 Conclusion

As noted in this chapter above, intellectual property rights became so important in human history, when man started producing for profit making and accumulation of capital for further advances.

The world through international organizations, has tried its best to promote but more importantly to protect intellectual property at the benefit of the right's owner. These

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necessary or desirable for the coordination, harmonization and development of the intellectual property activities affecting its members; (d) to establish schemes for the training of staff in the administration of intellectual property laws; (e) to organize conferences, seminars and other meetings on intellectual property matters; (f) to promote the exchange of ideas and experience, research and studies relating to intellectual property matters; (g) to promote and evolve a common view and approach of its members on intellectual property matters; (h) to assist its members, as appropriate, in the acquisition and development of technology relating to intellectual property matters; (i) to promote, in its members, the development of copyright and related rights and ensure that copyright and related rights contribute to the economic, social and cultural development of members and of the region as a whole; and (j) to do all such other things as may be necessary or desirable for the achievement of these objectives.

[144] Article II of the Lusaka Agreement

organisations include the World Trade Organisation (WTO) and the World Intellectual Property Organisation using the GATT and later the TRIPS as legal working documents.

Besides the global organisations and instruments for the intellectual property rights, there have been regional and national efforts to provide for intellectual property rights too. The African Regional Intellectual Property Organisation (WIPO) was brought into being, at the African level, to cater for intellectual property matters.

Developing the African Regional Intellectual Property Organisation did not aim at duplication the efforts for protection of intellectual property matters, but addressing intellectual property matters in a more detailed African context. Taking into account of the different development levels between the developed and developing countries, WIPO was necessary to bridge the gap and strike the balance between the developed and developing countries, whose differences in their respective economic status made them to address intellectual property rights differently. It is on this African context that the Lusaka Agreement, Harare Protocol and the Banjul Protocol, as elaborated above, were brought into existence.

CHAPTER FOUR

4.0 THE URUGUAY ROUND NEGOTIATIONS AND REACTION FROM THE DEVELOPING COUNTRIES

4.1 What is the Uruguay Round

The Uruguay round traces its origin in the chain of multinational meetings or negotiations on the General Agreement on Tariffs and Trade (GATT) that had began in 1947, with twenty-three (23) signatories, as part of a global approach aimed at restructuring international economic relations. The impetus for the establishment of GATT came from the chaos[145] generated by the pervasive protectionism[146] of the 1930s. The protectionism of that era led to a fall in trade flows which impacted negatively on world economic growth.

As Adede[147] elaborates, the Uruguay Round of multilateral trade negotiations was initiated by the United States in 1985 and was formally launched in September 1986 at Punta del Este, Uruguay to address the significant structural shifts occurring in most of the industrialized countries by then, hence named the Uruguay Round of negotiations.

4.2 Genesis of the Uruguay Round

Before the launching of the Uruguay Round, there was on going discontent[148] among members due to continuous distortions in the international trade. For instance, the

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[145] Sandiford,, W., GATT and the Uruguay Round. A paper last accessed on 25th May, 2012 at http:www.eccb_centralbank/Rsch_Papers/Rpmar94.pdf.

[146] Ibid, see also the GATT, Report on the Group of Experts on Trade in Counterfeit Goods, L/5878, 9 October 1985

[147] Adede, A.O. The Political Economy of the TRIPs Agreement: Origins and History of Negotiations, A paper last accessed on 25th May, 2012 at http:www.eccb_centralbank/Rsch_Papers/Rpmar94.pdf.

[148] See also Foreign Protection of Intellectual Property Rights and the Effects on US Industry and Trade, USTIC Pub. 2065, 19858, ITC, Economic Effects of Intellectual Property Rights Infringements

service industry had grown and was continuing to expand while at the same time communication technologies were revolutionized. It also came at a time when there was a certain degree of crisis[149] in international agricultural markets, for instance there was a serious decline in agricultural export earnings and growing protectionism on one hand and emergence of major reconfiguration of global economic and political balance of forces on the other.

Therefore, the General Agreement of Tariffs and Trade (GATT) and the subsequent signing of the same, was an attempt to prevent a recurrence[150] of the protectionism in trade of that period. As such, the underlying assumptions[151] of GATT were that free trade and open markets were the most efficient basis upon which to conduct international trade. Therefore measures which impede trade should minimize the distorting effect on markets and should be eliminated as soon as possible.

It was therefore agreed upon by signatories to GATT, that by signing, member countries gave up some of their freedom to regulate trade and accepted international rules. In so doing member countries committed themselves to three basic obligations. It was thus agreed that: first, that should protection be necessary member states would apply instruments only approved in the agreement[152], the primary one being

22/4 Journal of World Trade 101 – 14 (1988), as cited in T. Collier, The Prospects for Intellectual Property, in GATT, Common Market Law Review 383, at 385, n. 4 (1991), as quoted by Adede

[149] GATT, Report on the Group of Experts on Trade in Counterfeit Goods, L/5878, 9 October 1985, p.3

[150] Preamble to the GATT and Article II (c) of GATT, 1947

[151] Ibid

[152] Article II(b) of GATT, 1947

the tariff; secondly[153], that the instruments would be applied in a non-discriminatory manner. This meant that the opening of any market should be extended to all members; and thirdly, that member states would subject all protective measures to successive non-reversible reductions through negotiations[154].

Basing on the above agreed upon principles, member states (s) found themselves committed to participate in regular negotiations on tariff reductions. These regular multilateral trade negotiations later became known as Rounds of GATT. The most recent of such Rounds is the Uruguay Round which was launched at Punta del Este, Uruguay.

4.3 Intellectual Property Rights Protection and the Pre – TRIPS Competing State Interests

Advocating for intellectual property protection, in pre – TRIPS era was largely founded on egocentric[155] motives for maximization of profits, in a form of stronger parties taking advantage of the weaker parties. In this regard, some countries were making sure that in every transaction carried out, the protection of intellectual property should be at the fore front[156].

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[153] See Article I and XIII of GATT, 1947
[154] See Article XXI of GATT 1947
[155] Falvey R., Foster, N. and Greenaway D., Intellectual Property Rights and Economic Growth, in Research Paper Series: Internationalization of Economic Policy, University of Nottingham, p. 2, 2004.
[156] Ibid

4.3.1 The Unilateral IP Protectionism: The Case of the United States of America

After the apparent tension[157] between the developed and developing states in the Uruguay negotiations, stronger states like the USA, for example started using the Bilateral Investment Treaties (BITs) as a fundamental instrument for putting in force of their desired propositions of the Bilateral Intellectual Property Treaties (BIPs), by inserting desired BIPs sections in the BITs.

For instance, section 301 of the US Tariffs and Trade Act[158], was used as a national trade enforcement tool that allowing the US to withdraw the benefits of trade agreements or impose duties on goods from foreign countries. In 1988 the section was further enhanced in the form of what came to be known as the 'Special 301' provisions.

Under the special 301 provision, United States Trade Representative (USTR) was empowered to identify foreign countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to US intellectual property holders and withdraw, limit or suspend or prevent the application of benefits of trade agreement concessions or "impose duties or other import restrictions on the goods of, and fees or restrictions on the services of, such foreign country for such time as the Trade Representative determines appropriate. This was an express violation of the GATT provisions[159] by the United States of America. The USA position triggered off a number of reactions from other countries

[157] Cotter,T, The Prospects for Intellectual Property in the GATT, 28 Common Market
[158] US Tariffs and Trade Act of 1974
[159] See Article II of GATT, 1947, for instance.

4.3.2 Conflicting Interests within the European Community on IP Protection

Practically, the US position regarding intellectual property rights protection, attracted bitter opposition[160] from her counter parts of European Community countries including Canada and Japan. The main argument was to the effect that the couching of special section 301 of the US Tariffs and Trade Act[161] and its inclusion in the Bilateral International Agreements or negotiations, was primarily aimed at administering royalties of US intellectual property rights holders against weaker countries than furthering the global course of intellectual property rights.

The European Community's argument before the Panel[162] was further based on the fact that the period of time stated under section 306 of the Tariff and Trade Act, within which USA can take remedial measures against the violation by the foreign state, including acts that can trigger retaliation, is in contravention with the procedure stipulated under the WTO and GATT. Therefore it was specifically praying to the body, that the United States, by failing to bring the Tariff and Trade Act of 1974 into conformity with the requirements of GATT 1994[163] and other relevant bodies[164],

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[160] On 25 November 1998, the European Communities requested consultations with the United States under Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Dispute ("DSU") with regard to Title III, chapter 1 (Sections 301-310) of the United States Trade Act of 1974, as amended (19 U.S.C., paragraphs 2411- 2420)(WT/DS152/1). The United States agreed to the request. Dominica Republic, Panama, Guatemala, Mexico, Jamaica, Honduras, Japan, and Ecuador requested, in communications dated 7 December 1998 (WT/DS152/2), 4 December 1998 (WT/DS152/3), 9 December 1998 (WT/DS152/4, WT/DS152/5 and WT/DS152/6), 7 December 1998 (WT/DS152/7), and 10 December 1998 (WT/DS152/8 and WT/DS152/10) respectively, to be joined in those consultations, pursuant to Article 4.11 of the DSU. Consultations between the European Communities and the United States were held on 17 December 1998, but the parties were unable to settle the dispute. On 26 January 1999, the European Communities requested the establishment of a panel pursuant to Article 6 of the DSU (WT/DS152/11).

[161] ibid

[162] The panel established pursuant to Article 6 of the Dispute Settlement Unit (DSU) (WT/DS152/11)

[163] Articles I, II, III, VIII and XI of the GATT

acted inconsistently with its obligations under those provisions. Thus, if put into effect, nullifies or impairs the benefits directly or indirectly accruing to the European communities under the GATT and WTO and also impedes important objectives of the GATT 1994 embodied in the TRIPS and therefore enforceable under the WTO.

The panel held, *inter alia,* that the United States, by failing to bring the Trade Act of 1974 into conformity with the requirements of Article 23 of the DSU and of Articles I, II, III, VIII and XI of the GATT 1994, acted inconsistently with its obligations under those provisions and under Article XVI.4 of the WTO Agreement and thereby nullifies or impairs them.

4.3.3 Reaction by Nicaragua and Jordan (Developing Countries)

All the Bilateral Investment Treaties the US entered with Nicaragua in 1995 or Jordan in 1994, contained special 301 provisions on Intellectual Property, of which Nicaragua and Jordan, forming part of the developing countries group[165], opposed and come with their counter draft text in 1990.

In this regard, the developing countries especially conceded to the introduction of the special section 301 in the bilateral agreements, (although seeing it as a threat) not in their own will but on balance of probability, where expected gains out of it seemed to be the lesser evil. For instance, in the article by Dr. Adede[166] makes a finding on this

[164] Article 23 of the DSU and Article XVI.4 of the WTO Agreement.

[165] Other countries forming the Developing Countries Group in the negotiations included, Bolivia, Colombia, Peru and Venezuela; Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, Nigeria, Tanzania and Uruguay.

[166] Adede A.O. The Political Economy of the TRIPS Agreement: Origins and History of Negotiations, p 20, (available on line and not yet published)

scenario that, firstly, it is evident that the United States threats to use “Super 301” procedures and retaliate against what the U.S. administration unilaterally considered to be insufficient protection and unfair trade, have greatly enhanced the attractiveness of an overall multilateral framework. Many consider it more beneficial to defend their interests in a multilateral system with well-defined standards rather than being exposed to unilateral determination. Moreover, a failure of negotiations could also lead to similar policies on the part of the European Economic Community and Japan.

Secondly, that it should not be underestimated that increased standards of protection in intellectual property rights also reinforce retaliatory powers of LDCs in trade disputes where their own export interests are affected. But beyond trade and politics, the process also began to shift legal and economic attitudes towards the functions of IPRs for the benefit of long-term social and economic development[167].

This is to say that not only the developing countries, but also the European Communities, as identified by Dr. Adede, were not at ease with the American forceful strategy towards protection of intellectual property. It was vividly clear, there was something beyond protection.

[167] Ibid.

According to Ostry [168] while writing on the North-South Issues and their implications for WTO negotiations, is of the view that it will be some time before a new round of negotiations is underway in part because of American domestic politics and also because no WTO member wants to risk another high profile failure. This is probably all to the good if the time is used to begin the process of trying to bridge the North-South divide. Ostry [169] adds that the futile debate on the implementation issues is unlikely to be resolved since the Americans are opposed to any across-the-board extension of transition periods demanded by the developing countries.

Ostry [170] further says applying a one size-fits-all approach to countries at widely differing stages of development and innovation capabilities was not likely to yield the best results. But, she[171] says, that the TRIPS agreement was a top priority for American multinationals in the pharmaceutical, software and entertainment industries who wanted it in the GATT rather than the UN agency WIPO (World Intellectual Property Organization) which had no enforcement mechanism.

Tied up with the above Ostry's[172] submission, Dr. Adede[173], quoted above, supports this idea that USA wanted to have IPR in an organ that would seriously enforce

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[168] Ostry S., The Uruguay Round North-South Grand Bargain: *Implications for Future Negotiations*, The Political Economy of International Trade Law, University of Minnesota September, 2000, pg. 17-22
[169] Ibid
[170] Ibid
[171] Ostry, Supra
[172] Ibid
[173] Ibid

them. Adede says that the USA, was on the other hand, not happy with the progress made towards intellectual property rights protection within WIPO[174].

That points out the failure of the Conferences in 1980 – 1984 for revise the Paris Convention on the Protection of Industrial Property, and therefore preferred the GATT Forum for negotiating effective regime for the protection of IPRs. It was pointed out that the GATT Forum provided for effective enforcement of agreements and for dispute settlement mechanisms which were practically lacking in the WIPO-administered Conventions[175]. Thus, the USA continued with their efforts to introduce, in the GATT Forum, an item dealing with IPRs to address the problem of counterfeit products and later of copyrights piracy which had kept increasing in the developing countries in the 1980s[176].

So the TRIPS Agreement was contentious from the outset and indeed a number of trade economists opposed its inclusion in the round. But the law of unintended consequences has been at work and has both heightened and expanded the conflicting aspect of the agreement.

4.3.4 Reaction from China

On the 17th January, 1992[177], the USA entered a Bilateral Agreement with the People's Republic of China and the United States. The Bilateral Agreement meant at

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[174] Adede,supra.
[175] Ostry, supra
[176] Ibid
[177] Goldstein, P., International Intellectual Property Law: *Cases and Materials*, New York, New York Foundation Press, 2001, pg128 – 1139. See also the Bilateral Agreement signed on the 17th January, 1992 at Washington between US and the Peoples' Republic of China.

enabling the US intellectual property rights holders to access markets in China under the same and equal protection as the Chinese[178].

Until 1995 China ignored the agreement as no US Intellectual property right holder was accorded access to the Chinese markets as the agreement envisaged. In this regard, the US resorted to section 301 and '*special section 301';* by virtue of which the Chinese items in the US were subject to seizure, increased tariffs on Chinese exports and all US financial support to China brought to a stand still. The Chinese[179] intervention[180] to rescue the situation was to immediately put into effect of the terms and conditions as per the Bilateral Agreement.

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[178] Ibid

[179] On the 26th February, 1995, Mr. Wu Yi, the Chinese Minister of Foreign Trade and Economic Cooperation, wrote a letter to the US Trade Representative (Ambassador Michael Kantor), to the effect that China has now started implementing the Bilateral Agreement as agreed between the two.

[180] See the letter by the Chinese Minister of Foreign Cooperation to US:

February 26, 1995

United States
U.S. Trade Representative
Dear Ambassador Kantor:
I have the Honour to refer to the consultations between representatives of the government of the People's Republic of China (China) and the Government of the United States of America (United States) which were conducted in the spirit of the 1992 Memorandum of Understanding between our governments concerning the protection of intellectual property rights. Both of our governments are committed to providing adequate and effective protection and enforcement of intellectual property rights and have agreed to provide this to each other's nationals.
China's actions in this respect show considerable progress and determination to achieve effective enforcement of intellectual property rights through judicial and administrative procedures. China has created specialised intellectual property courts to hear these cases and I can confirm that the civil and criminal procedure laws of the people's Republic of China empowers the courts to address infringement of intellectual property rights through measures to stop infringement, preserve property before and during litigation and order the infringer to provide compensation to the rights owner for the infringement of their intellectual property rights. In addition, the courts also act to preserve evidence to permit effective litigation.
China's Supreme Peoples Court has issued circular instructing courts at various levels to address intellectual property cases expeditiously, including cases involving foreign right holders. In respect of taking criminal action against infringers, our prosecutors are actively pursuing criminal infringement cases.

The two cases above show the two diametrical approaches to the US section 301 which formed a central part of the Bilateral Trade Agreements (BITs) and the Bilateral Intellectual property rights agreements (BIPs).[181] While Canada was complaining of unfair dealing in deploying section 301, the implementation of which rendered the provisions of GATT and WHO agreements nugatory, China was busy putting in effect the infrastructures that favoured the US intellectual property rights owners to access the Chinese markets and get profits therefrom[182]. The economic disparities between Canada and China, by then, leads to different steps in tackling US measures for protection of intellectual property rights in the bilateral agreements.

4.4 The Incoming of TRIPS and its Mandate for Economic Growth

The Uruguay Round of multilateral trade negotiations which was launched at Punta del Este, Uruguay in 1986 took place in the background of the claim by American industries that they were suffering from heavy losses from the absence of adequate protection of their intellectual property rights abroad. The industries in such sectors as computer software and microelectronics, entertainment, chemicals, pharmaceuticals, and biotechnology, had become concerned about the loss of commercial opportunities abroad and wanted notable changes.

… on this basis of the foregoing, the United States will immediately revoke China's designation as a "special 301" priority foreign country and will terminate the section 301 investigation of China's enforcement of intellectual property rights and market access for persons who rely on intellectual property protection and rescind the order issued by the US Trade Representative on February 4, 1995, imposing increased tariffs on Chinese exports

[181] ADEDE, Supra, pg.22
[182] Ibid

In 1987 a survey[183] by the United States International Trade Commission (ITC) confirmed, on the basis of public hearings held and questionnaires administered, that the United Stated firms were loosing some 50 billion dollars, owing to lack of protection abroad of the intellectual property.[184] In this regard, USA found the idea of taking up the issue of protection of intellectual property rights (IPRs), within the General Agreement on Tariffs and Trade (GATT) framework, being more useful and practical[185].

There was consequently a general feeling[186], among the developing countries, that the concern with the protection of IPRs was being expressed by the American government on behalf of the industries. Therefore, all such efforts towards the establishment of an effective regime for the protection of IPRs was aimed at furthering the interest of the American and Western industries and not those of the developing countries[187].

This feeling was not without reasons. As observed, the USA private sector, in particular the pharmaceutical industry, was already leading in the effort to establish a trade-based approach. Thus, their argument was to the effect that: “We must also work to get more broadly based economic organizations, such as the OECD and the GATT, to develop intellectual property rules, because intellectual property protection

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[183] Adede ibid p 6
[184] See also Foreign Protection of Intellectual Property Rights and the Effects on US Industry and Trade, USTIC Pub. 2065, 19858, ITC, Economic Effects of Intellectual Property Rights Infringements 22/4 JOURNAL OF WORLD TRADE 101 – 14 (1988), as cited in T. Collier, The Prospects for Intellectual Property, in GATT, COMMON MARKET LAW REVIEW 383, at 385, n. 4 (1991), as quoted by Adede.
[185] Ibid
[186] Adede, supra, pg 8
[187] Ibid

was essential for the continued development of international trade and investment."[188]

As already presented before, the developing countries were vehemently opposed to the idea of including intellectual property issues in the discussion under the multilateral trade negotiations with such strong industry influence and specific agenda. The developing countries, considered intellectual property a matter that exclusively belonged within the competence of the World Intellectual Property Organization (WIPO).

However, in 1970s the developing countries had already initiated their own initiatives to revise the Paris Convention on the Protection of Industrial Property.[189] The developing countries were worried on the link that would be established between the TRIPS Agreement under GATT Forum and the existing intellectual property rights conventions such as the Berne Conventions for the Protection of the Literary and Artistic works[190], the Rome Convention for the Protection of Performers, Producers and Broadcasting Organizations,[191] and the Treaty on Intellectual Property in Respect of Integrated Circuit.[192]

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[188] As cited in T. Cottier, The Prospects for Intellectual Property in the GATT, 28 Common Market Law Review, Vol, 383, n. 9, 1991, p385.
[189] Adopted 20 March 1883, as revised at Stockholm 14 July 1967, in 828 United Nations Treaty Series (UNTS) 305 (hereinafter referred to as the Paris Convention).
[190] Adopted 9 September 1886, as revised at Paris 24 July 1971, in 1161 UNTS 31 (hereinafter referred to as the Bern Convention).
[191] Adopted 26 October 1961 in 496 UNTS 43, (hereinafter referred to as the Rome Convention.
[192] Adopted 26 May 1989, reprinted in 28 International Legal Materials, (ILM) 1477, 1989 (hereinafter referred to as The Washington Treaty).

Not only the developing countries that were unenthusiastic to linking intellectual property protection with the GATT Forum, but also even the European countries did. USA, on the other hand, was also unhappy with the protective measures taken under WIPO for the protection of intellectual property rights. This was mainly to the fact that WIPO lacked the enforcement mechanism, thus USA referred to it as the administrative body. This was because imitations were being carried out with impunity at the detriment of industrialized countries.

As such, USA pioneered the inclusion of the TRIPS Agreement to the Uruguay Negotiations. It was also contended that the lack of adequate protection and enforcement of IPRs in the developing countries had led to serious distortions and increasing damage to world trade.[193]

For example, it was estimated by the US International Trade Commission that the percentage of international trade involving IPRs had grown dramatically, and had more than doubled since the Second World War. It was also claimed that the US had lost between $US 43 to $US 61 billion in 1986 due to foreign counterfeiting and product piracy[194]

On this Adede[195] says that counterfeiting and copyrights piracy increased in the 1980s because of the desire of the developing countries to catch up in the

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[193] GATT, Report on the Group of Experts on Trade in Counterfeit Goods, L/5878, 9 October 1985, p.3.
[194] USITC, Foreign Protection of Intellectual Property Rights and the Effect on US Trade and Industry, Pub.2065, Inv. No.332-TA-245, 1988; Slaughter, J. "TRIPS: The GATT Intellectual Property Negotiations Approach their Conclusion," [1990] 11 EIPR 418.
[195] Ibid p 7

industrialization process and to have access to printed educational material which they needed in that context.

Adede further states that situation was accelerated by the advent of copy-prone electronic-based technologies and products; the growing competitiveness of newly industrialized developing countries in the manufacturing sector; the increasing globalization of the market-place; and the growing perception of intellectual property by the enterprises of the developed countries as a strategic asset.

Thus, Adede finalizes that there was tension between the quest for tighter protection of IPRs for the promotion of creativity been pursued by the industrialized owners of the property and the policy of maximization of social welfare arising from an impeded diffusion of that creativity, being pursued by the developing countries, through more relaxed protection of IPRs.

The first move by the USA to introduce TRIPS in the Uruguay Negotiations was during the Tokyo Round[196] on the Anti-Counterfeit Code (ACC). However, the said Anti-Counterfeit Code was not adopted that time. Thus, when the GATT Ministerial Conference convened in Punta del Este, Uruguay[197] to discuss the mandate of the next round of negotiations, with a view also of adopting the said Anti-Counterfeit Code, USA mounted measures to include IPRs beyond the question of counterfeiting

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[196] Agreement on Measures to Discourage the Importation of Counterfeit Goods. GATT.Doc. L/4817, 31 July (1979).
[197] On the 15th – 20th September, 1986

and piracy, among the issues of discussion under the Uruguay Round of Multilateral Trade Negotiations.

Thus because the meeting was primarily on the Trade Related Economic Measures, the Trade Ministers at Punta del Este coined the IPR agenda in the same expression to read as "Trade – related Aspects of Intellectual Property Rights - TRIPS " and included it on the agenda of the Uruguay Round.

Various intellectual property experts have been concerned with the USA abruptly and serious fight for inclusion of the TRIPS on the GATT Forum. According to them, the fact that the fight for TRIPS aimed at enhancing technological transfer to developing countries is far fetched, if at all.

The inclusion of the TRIPS agenda on the Uruguay Round, Adede puts it, came as "a political compromise whose legal foundation was yet to be clarified"[198]. This is because the TRIPS agenda on the table was so trivial and featured as a footnote on the list of the proposed agenda for the discussion.

Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT. These negotiations shall be without prejudice

[198] Adede, Ibid. p.7

to other complementary initiatives that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters.[199]

To convince the opposing forces, the developed countries, in particular, the USA[200] raised an argument to the effect that:

> Under the GATT Forum, the developing countries may have opportunities to use a bargaining power and secure trade offs in negotiating favourable terms on issues such as textile and clothing, agriculture, tropical products and safe guards as part of the package that include the IPRs.[201]

In this way, the presentation of the above opportunities which seemingly indicated tangible gains to the developing countries, if they accept the proposed package deal, the latter were convinced and ultimately accepted the proposal. This was because after weighing the positiveness and negativeness of their continued rejection of the IPR inclusion in the GATT Forum. So the developing countries accepted the inclusion of the IPR issues in the GATT Forum as a *quid pro quo* to transfer of technology and developmental policies, but after taking into consideration of the shadow proposal prepared and presented by the developing countries[202].

Thus in 1993 the TRIPS Agreement was adopted and came into force in 1994. The developing countries had three reasons in support of the TRIPS. One was the

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[199] One may wish to refer to the Ministerial Declaration on the Uruguay Round: Declaration of 20th September 1986 (Min. Dec.), in GATT, Basic Instruments and Selected Documents [BISD] reprinted in 25 ILM 1623, 1626 (1986).
[200] Adede ibid, p9
[201] Ibd
[202] It was not until May 1990 that a group of twelve developing countries including Argentina, Brazil, Chile, Columbia, Cuba, Egypt, India, Nigeria, Peru, Tanzania and Uruguay, later joined by Pakistan and Zimbabwe, agreed to participate in the negotiations on the TRIPS Agreement by producing their own detailed proposal known as the "proposal of the group of fourteen." See also Annex 1 GATT. Doc. MTN/GNG/NG11/W71 of 14th May, 1990

expectations of gains in other trade areas by way of trade offs; protection against unilateralism envisaged by USA under section 301; possibilities for benefits from improved market access in general and from market – based policies for attracting foreign investments.

4.5 The TRIPS Application and its Economic Implications to Developing Countries

The effect of TRIPS on technology diffusion, according Linda[203], holds significant implication for economic growth. As argued herein above, the justification for intellectual property rights generally relates to the need to protect the incentive to innovate weighed against the social cost of allowing monopoly profits to accrue and the loss to society of not having free access to the protected goods.

The IPR regime therefore could also affect the inflows of FDI, technology transfers and trade that might impinge on growth. The relationship between IPR and development could be subject to the causality problem as developed countries are likely to have a stronger IPR regime than poorer ones. In this regard, the study suggests, that the relationship between IPR protection and development are non linear[204].

In other words, this means that patent protection for instance, will tend to decline in strength as economies move beyond the poorest stage into a middle-income stage. The reasons advanced to this effect, has always been that middle – income countries,

[203] Linda supra.
[204] Ibid.

have greater abilities to imitate new technologies. That's why Falvey says that providing stronger IPR protection to foreign firms could cripple domestic industry of emerging states or economies previously relying on pirated technologies.

The preference of imitation over innovation has got significant acceptance in China which of recent, is referred to as the world's factory. Kevin Zheng Zhou[205], a Chinese scholar and professor at the School of Business University of Hong Kong says that:

> Innovation, however, is not the only choice for a product introduction. Because there can be only one pioneer in any product market, imitation remains a viable and moe common strategy than innovation. Imitation can take different degrees, from pure clones, which represent "me - too" products to creative imitation, which takes an existing product and improves on it. And products development accordingly can take a mixed form between two extremes of a continuum from brand new innovation to pure imitation.[206]

Principally Kevin Zheng[207] encourages the developing and least developed countries to broaden their technological base through imitation. This is due to the fact that, according to Kevin Zheng, pure innovation takes effect after the country has heavily invested in Research and Development (R&D) strategies, which bearing in mind of the economic position of the countries in question, may prove futile.

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[205] Kevin Zheng Zhou, Innovation, Imitation and New Product Performance: The Case of China, Industrial Marketing Management, Elsevier Inc, 35 (2006) 394 – 402, also available at www.sciencedirect.com. Kevin Zheng Zhou is a Chinese scholar and Professor at the School of Business, University of Hong Kong, Pokfulam, Hong Kong

[206] Ibid

[207] Ibid

As such, basing on the findings of other scholars, like Lieberman[208] and Schnaars[209], Kelvin Zheng further presents that unlike imitators, innovators have the potential to create markets, shape consumer preference, and even change consumer's basic behavior. He says the consumer's behavior can change fundamentally to the effect that the consumer cannot imagine living any other way.

But what drives Kevin Zheng[210] to opt for imitation, as the best strategy for technology advancement in the developing countries, is found in his conclusion on this argument saying that: "… an imitation strategy may also lead to better new product performance. Imitation costs often are much lower than innovation costs because an imitator, for example, does not need spend as many resources on research; the existing products already provide the imitator with information for its product development."

As such, 'one – size- fits- all'[211] concepts advocated by the TRPS under Articles 3[212] and 4[213] has received significant discontentment specifically from developing and least developed countries. Their argument has been founded on Article 7 of TRIPS

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[208] Lieberman, M. B. and Montgomery, D.B. First –mover Advantages, Strategic Management Journal, 9(1-2), 41-58.

[209] Schnaars, S.P. Managing Imitation Strategies: How Late Entrants seize Marketing from Pioneers , New York, the Free Press, 1994

[210] Ibid

[211] Chon. M., Intellectual Property and the Development Divide, an article presented in various venues, including the Pacific Intellectual Property Scholars (PIPS) Conference (2003 and 2005), the Pacific Northwest Center for Health Law and Policy Conference on Corporate Health Care and Governance in the Health Care Marketplace (2004); the Michigan State University Conference on Intellectual Property, Sustainable Development and Endangered Species: Understanding the Dynamics of the Information Ecosystem (2004).

[212] Under Article 3 of TRIPS providing for National Treatment in effect to accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals.

[213] Article 4: Most-Favoured-Nation Treatment: With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.

that defines the objectives of the TRIPS Agreement. It clearly establishes that the protection and enforcement of intellectual property rights do not exist in a vacuum. They are supposed to benefit the society as a whole and do not aim at the mere protection of private rights.

During the Doha Ministerial Conference[214] the developing and least developed countries, commonly known as Group – of 14 developing Countries[215] were of considered argument that TRIPS cannot place limits (in terms of Article 3 of the TRIPS) on health priorities.

The best example advanced by developed countries in favour of access to medicines by developing countries was compulsory licensing of drugs, (like antiretroviral drugs for instance) by developing and least developed countries. The argument by the developing countries mainly was that while the need for drugs was of utmost urgency, there existed none of their own pharmaceutical industries and necessary infrastructures, thus rendering the TRIPS provisions on compulsory licensing nugatory.

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[214] World Trade Organization, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002) (*adopted* Nov. 14, 2001) [hereinafter Doha Declaration] (affirming "WTO members' *right* to protect public health and, in particular, to promote access to medicines for all") (emphasis added). Note that two separate Doha Ministerial Declarations were issued on November 14, 2001; the one referenced herein as the "Doha Declaration" was specific to the issue of TRIPS and public health. The other, referenced herein as the "Doha Ministerial Declaration," more generally addressed the objectives of the so-called "Doha development round." *See* World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) (*adopted* Nov. 14, 2001) [hereinafter Doha Ministerial Declaration].

[215] According to Adronico O. Adede, *Origins and History of the TRIPS Negotiations*, *in* TRADING IN KNOWLEDGE …. these were: Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Pakistan, Peru, Tanzania, Uruguay and Zimbabwe. Other participants in the Uruguay round that submitted proposed drafts included the European Community, the United States, Switzerland, Japan and Australia.

According to Servaas van Thiel[216], the 2000 study commissioned by WIPO established also that access to affordable drugs in developing countries, involves numerous and complex issues, including healthcare infrastructure, international pricing mechanisms, financing and debt, tariffs and patents. The study also found out that patent protection, though an important issue that can be addressed in the context of public health and AIDS crisis, cannot possibly be an important factor impeding access to AIDS medicines in Sub – Saharan Africa. To cement the finding the study cited the TRIPS Agreement which extended the compliance to it by developing countries up to 2016.

It can be noted that even the developed countries are still divided on the issue of compulsory licensing. To some it is seen as a set back to economic progress. Justine Charles Ward[217] says that:

> Mandatory licensing need not be economically destructive, but if and only if carried out in a controlled manner. However, there is no free lunch here either – the royalty fees generated by the mandatory licensing scheme must be sufficient to offset the planned-for level of revenue (for cost repayment and for return to the investor) which is being set aside in favor of anticipated revenues from the mandatory licensee. The cost to the consumer may indeed be reduced, but if and only if the total costs to the generic licensee are sufficiently low to generate an adequate profit for a non-innovator/licensee[i] while at the same time paying the necessary royalty to the pioneer innovator who did have such expenses.[218]

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[216] Servaas, T., Public Health versus Intellectual Property; Or How Members of the World Trade Organization (WTO) without pharmaceutical production capacity could have access to affordable medicines in public health emergencies by using compulsory licenses. Professor van Thiel works for the Council of Ministers of the European Union in Geneva. He teaches international law at the post-graduate Program on International Legal Co-operation of the Free University Brussels, Belgium, and serves as a Substitute Judge in the Regional Court of Appeal in Den Bosch, the Netherlands.

[217] Justin, C.W, (J.D.I.P., M ay 2004, The John Marshall Law School, Chicago, Illinois. Bachelor of Science – Molecular and Cellular Biology, The University of Arizona, Tucson, Arizona) TRIPS-Promoter of Innovation or Illusory? Intellectual Property Law Server (on line),

[218] Ibid

Justin's argument above has been to the effect that immediate mandatory licensing does not give an opportunity to the patent holder to work on the patent for profit. Thus due regard should be given to matters of genuine emergency and for a limited time. Failure to this, may result in the damage to subsequent investor's confidence for other innovation destroying results. By necessary implication, the motive by developing countries in objecting to the TRIPS "one size – fits – all" approach, was quite different from economic gain but society welfare in general.

According to Chon the developed countries discontent towards compulsory licensing in respect of drugs for instance, during the Doha Ministerial Conference, was based on further argument that the language referencing development to TRIPS is not mandatory but rather hortatory[219] and is placed within parts of the treaty that are not in the main treaty body.

However this position has received a rebuttal from developing countries, advancing Art. 31(1) and (2) of the Vienna Convention[220] which deals with the general rule of interpretation, to the effect that, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose; and secondly, that the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

[219] Chon Margaret. Supra.
[220] Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331

The WTO was developed as the intellectual property law enforcer and the WIPO remained as the administrative body for the major multilateral intellectual property institutions such as the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works. But during the Doha negotiations the developing countries remained vocal calling for WIPO to change its outlook from high protectionism to flexibility[221].

In this regard, scholars[222] have established that WIPO had been historically more receptive to producers than to users' interests, due to the fact that WIPO's operating budget is largely derived from Patent Cooperation Treaty filing fees, most of which come from applications filed by developed country members.

In order to clear its image and make members have faith in WTO and WIPO, article 68 of TRIPS set out the framework in which WIPO and TRIPS Council would work for the interests of all members and an agreement to this effect was executed[223].

In this regard, the extension of time in applying TRIPS provisions given to developing countries, under Article 66[224] of TRIPS, remained meaningless to these

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[221] Chon supra at p 24, quoting Pedro de Paranaguá Moniz, The Development Agenda for WIPO: Another Stillbirth? A Battle Between Access to Knowledge and Enclosure 29-32 (July 1, 2005) (unpublished LLM thesis in Intellectual Property, Queen Mary & Westfield College, University of London), *available at* http://ssrn.com/abstract=844366 (claiming the existence of an historically close relationship between WIPO and copyright industries). WIPO's operating budget is derived substantially from fees generated from Patent Cooperation Treaty filing fees, most of which come from applications filed by developed country members. For example, in the year 2005, WIPO projected that approximately 90% of its income would be derived from filing fees (PCT Union, Madrid Union and Hague Union combined). Of a total projected income of 313,560 francs, only 17,223 would come from member state contributions and 284,578 would come from filing fees.

[222] Ibid

[223] Agreement between the World Intellectual P roperty Organization and the World Trade Organization, Dec. 22, 1995, 35 I.L.M. 754 (1996) [hereinafter WIPO-WTO Agreement].

countries, including Tanzania, mainly because there was no apparent efforts to let them access necessary technology.

4.6 TRIPs and Technology Transfer from Developed to Developing Countries

The developing countries, as per the TRIPS, were given a grace period of suspending[225] the enforcement of the Agreement, until they created a sound technological base. Article 66 (2) of the TRIPS, obliges developed countries to encourage their respective enterprises and institutions to transfer technology to the developing countries with a view of enhancing technological base to the latter. Reports on the implementation of Article 66 (2) must be submitted annually by the respective developed countries to TRIPs Council, since its commencement in 1999.

However, available findings, for instance Suerie Moon[226], indicate that there hasn't been mandated technology transfer as per Article 66 (2), but on the basis of *quid pro quo* offers – that is, technology transfer in exchange for other concessions – in other treaty negotiations.

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[224] Article 66: Least-Developed Country Members:

1. In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65. The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.

[225] Articles 65 and 66 of the TRIPs

[226] Ruffolo, G., Doctoral Research Fellow and Doctoral Candidate Center for International Development, Kennedy School of Government, Harvard University.

4.7 Problems Related to Technology Transfer from Developed to Developing Countries

According to Article 66.2 of the TRIPs, developed countries are obliged to encourage technology transfer to LDCs and developing countries. However, the same instrument does not provide a clear definition of what constitutes developed countries. Most of the scholars have been defining developed countries basing on the classifications by the Organization for Economic Cooperation and Development (OECD) and World Bank which classified developed countries as high-income countries (with annual gross national income (GNI) per capita (Atlas method) greater than $11,116). As such, there is a lack of clarity as to which countries are legally obliged to encourage technology transfer under Article 66.2.

Secondly, neither WTO nor TRIPS which states what constitutes technology transfer as a term. Most of them have been relying on the relatively broad definition used in the TRIPS Council submissions of New Zealand[227], which states that:

> Technology transfer is interpreted in this report broadly to include training, education and know how, along with any capital component.[228]

Using the United Nations definition, New Zealand sees four key modes of technology transfer: (i) physical objects or equipment; (ii) skills and human aspects of technology management and learning; (iii) designs and blueprints which constitute the document-

[227] The Council for Trade Related Aspects of Intellectual Property Rights - Report on the Implementation of Article 66.2 of the TRIPS Agreement - New Zealand - IP/C/W/497/Add.3. 3 December 20
07, para. 3.
[228] Ibid

embodied knowledge on information and technology; and (iv) production arrangement linkages within which technology is operated.

Lack of clear definition as to what constitutes technology transfer, has created room to developed countries to interpret and stretch whatever activity carried out to constitute technology transfer at the detriment of the developing countries.

Thirdly report submission on the implementation of article 66.2 of the TRIPs is not governed by any common format. As such reports may be adversely impacted by bias and overstatements. In this regard, it has been difficulty to establish, basing on the report data, as to what extent, are policies specifically targeted towards developing country members and whether do the programmes encourage the transfer of technology to developing country members. See the tables below.

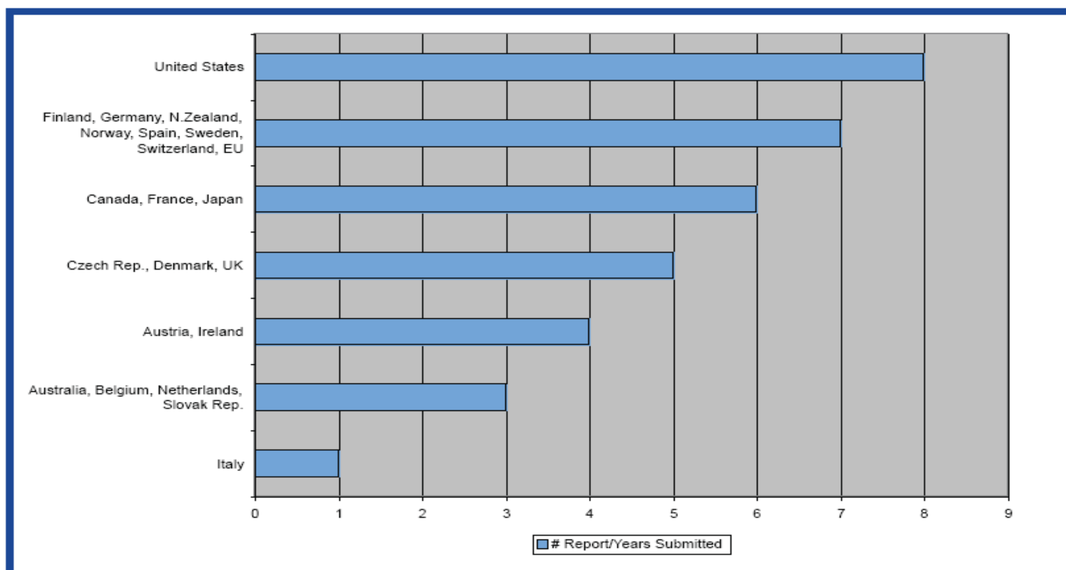

Figure 4.1: Developed Country Report Submissions (1999-2007)

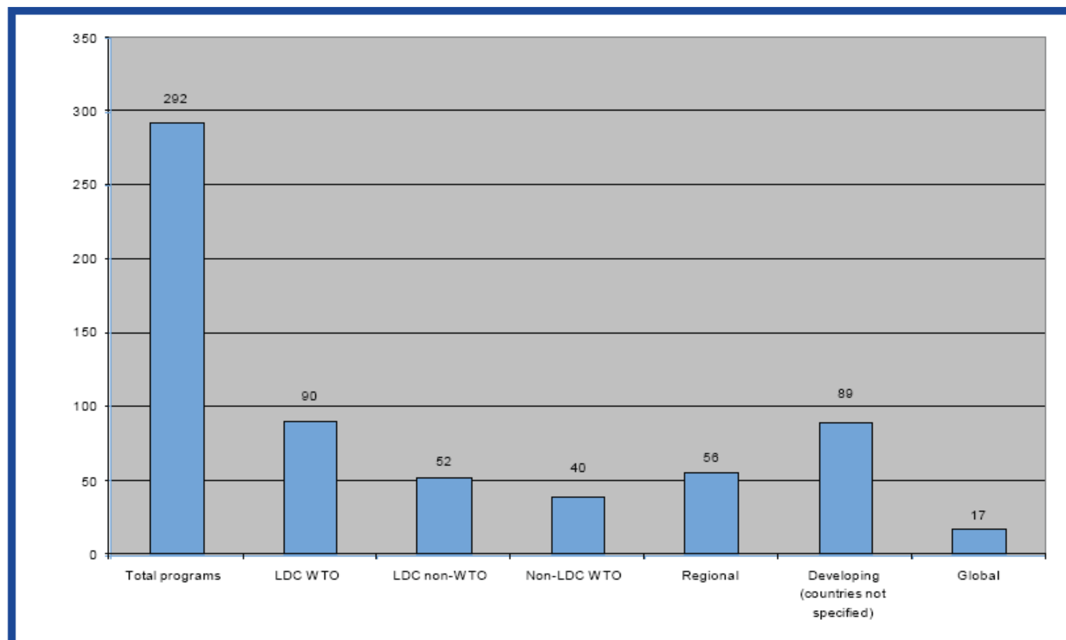

Figure 4.2: Countries Targeted by Incentives

Source: UNCTAD – ICTSD Project on IPRs and Sustainable Development: An Analysis of the Country submissions to the TRIPs Council (1999 - 2007): Policy Brief Number 2, December, 2008, p4.

Although, primarily, the concern for the developing countries is economic implications for the implementation of such intellectual property regimes in their respective countries, the reality has not been the case. To the LDCs the objective has been even more relentless because implementation of intellectual property rights is thought to be the impetus or driver to obtain high technology costs and barrier breaker to technology access. Bilal Mirza[229] opined that:

> … such lucrative offer in exchange for intellectual property rights in the developing countries, according to some developing countries, are in view of developed nations benefits and they would not be able to the economic conditions in the developing countries from their present states.[230]

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[229] Bilal, M., A Dilema of Intellectual Property Rights for Developing Countries? United Nations University - Maastrich Economic and Social Research & Training Centre on Innovation and Technology (MERIT), Keizer Karelplein 19, 6211 TC, Maastrich , The Netherlands.

[230] Ibid

Professor Frederick Abbott[231], international IP expert and arbitrator for WIPO, at the conference in Geneva, supported the above position when he said that it is of course no doubt true that WIPO member governments are sovereign states. But, when WIPO provides technical guidance to least developed countries, most of the government officials in those countries are only vaguely familiar with some of the very technical elements of intellectual property law; and WIPO, of course, has an enormous expertise in this area. That the process of providing technical assistance is a give and take, which involves many subtleties and many different levels and layers of communication.

4.8 Conclusion

In this chapter, I have tried to explore the contribution of Intellectual Property Rights to economic growth in the holistic manner but touching important parts of the new global regime pertaining to intellectual property, as well as the implications for economic growth.

As Yueh[232] concludes her work Global Intellectual Property Rights and Economic Growth, that it is too early to examine the evidence concerning convergence since the advent of TRIPS, it is fairly evident that the new regime will impose monopoly prices on technology transfers that are the engine of "catch up" growth.

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[231] Conference Report on the Implementation of the Doha Declaration on the Trips Agreement and Public Health: Technical Assistance – How to get it Right, Held on 28th March 2002, International Conference Centre of Geneva (CICG)

[232] Ibid

According to the findings above, in this chapter, globalization is increasingly governed by a rules-based system, which as result if the “one-fits-all rule of the TRIPS takes into consideration that technological transfer by developed countries to Developing and Least Developing Countries, as per Article 3(2) of TRIPS takes precedent in a more realistic nature before Article 3(1) of TRIPS is observed strictly.

Currently, as established above greater foreign investment and /or capital still tends to flow to Asia and successful emerging markets, such as China, suggesting that other factors are at play.

If the TRIPS strictness on implementation is improved as suggested above, it may prove to be the most significant provision concerning economic development derived from international economic law, otherwise, intellectual property rights principles will remain beneficial only to developed countries and remain illusory to the others.

CHAPTER FIVE

5.0 THE CONTRIBUTION OF IP TO THE ECONOMIC GROWTH IN TANZANIA.

5.1 Introduction

According to the CUTS report[233], numerous efforts in Tanzania have been made, at least at the policy formulation and institutional framework arrangements, to foster technological advancement in the country. These efforts have included approaches geared at fostering and increasing indigenous technological level, and importation of technology transfer from abroad. There is, however, little evidence of any improvement in this situation.

The report says that restrictive investment policy environment, combined with lack of strategies for standardization and acquisition of varied technologies that were being imported, hampered early efforts to import technology, while weaknesses in the education system hampered efforts to improve technological capacity in the country.

The National Science and Technology Policy (NSTP) was revised in 1996 to address this anomaly and also to align it with Tanzania's progress towards a market-oriented economy. But, the same reports[234] puts further that even with this revision, technology policy reforms appear to be lagging behind other policy reforms,

[233] CUTS Centre for Competition, Investment & Economic Regulation, D-217, Bhaskar Marg, Bani Park, Jaipur 302 016, India , Ph: +91.141.220 7482, Fax: +91.141.220 7486 Email: c-cier@cuts.org, Website: www.cuts.org , in association with Economic and Social Research Foundation, PO Box 31226, 51 Uporoto Street, Dar-es-Salaam, Tanzania, Ph: +255.22.276 0260/276 0758, Fax: +255.22.260 2649, Email: esrf@esrf.or.tz, Website: www.esrf.or.tz, by Jaipur Printers P. Ltd., Jaipur 302 001, 2003

[234] The CUTS Report further quotes the UNCTAD Report on Tanzania's for 2001

especially since the institutional framework and support systems remain unchanged and are more geared to serving the pre-liberalization objectives, which are not in line with the technological needs and problems of the private enterprise sector. The same finding was also made by UNCTAD in 2001.

This chapter presents the findings obtained from the field during data collection between September 2010 to 25th March, 2011, through library research, questionnaires and direct interviews from various respondents.

5.2 Lack of or Very Minimal Technological Transfer from Developed to Developing Countries

According to Article 10 of the Cooperation Agreement[235] between WIPO and the United Nations, it was agreed between the two parties that the United Nations organs[236] would be instrumental in promoting and facilitating the transfer of technology to developing countries in such a manner as to assist developing and least developed countries in attaining their objectives in the fields of science and technology and trade and development

Hammering the point home, is Article 66 (2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which in effect obliges developed countries, to encourage their respective enterprises to transfer technology to the developing countries with a view of enhancing technological base to the latter.

[235] This Agreement entered into effect on December 17, 1974. A Protocol incorporating the Agreement was signed by Kurt Waldheim, Secretary-General of the United Nations, and Arpad Bogsch, Director General of the World Intellectual Property Organization, on January 21, 1975.

[236] Particularly the United Nations Conference on Trade and Development, the United Nations Development Programme and the United Nations Industrial Development Organization, as well as the agencies within the United Nations system

Contrary to what the above quoted instruments portray, the research revealed a different situation on the ground. For instance the research made to the Tanzania Intellectual Property Advisory Services and Information Centre – TIPASIC, on the 28th September, 2010, affirmed the above finding.

According to TIPASIC[237], only 266 patents have registered since 1987 when the Patents Act came into force. Among these, 147 patents have been registered by the foreign individuals or foreign entities; while only 113 patents were registered by Tanzanians but mainly Tanzanians with the Asian origin (the Indians, Pakistanis etc).

The Coordinator further told the researcher that the producer does not go to the market, and therefore the intermediary, in absence of protection, can reproduce the products through imitation. Thus registering a patent is more beneficial to the patent holder because protection of the same creates certainty in holding the patent and gaining royalty or profit by licensing.

Answering the question as to whether intellectual property protection is aimed at protecting the patent holders from developed countries, the respondent was of the different view. His reply was to the effect that due to globalisation, trade and investments are no longer confined within boarders. Huge companies are now trading beyond boarders and thus would like to be protected. Tanzanian economy to the large extent depends on direct foreign trade and investments.

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[237] The Tanzania intellectual Property Advisory Services and Information Centre – TIPASIC was established under the umbrella of Tanzania Commission for Science and Technology and the Business Registration and Licensing Agency – BRELA

Secondly that Tanzania is carrying out a lot of research and basing on raised awareness of the people in Tanzania, they would opt for protection of their research findings for immediate profits or further studies. As such Tanzania is naturally driven to join hands with other states in protecting intellectual property.

When asked as to why despite the agreement between WIPO and United Nations Organisation on one hand and TRIPS instructions upon developed countries, encourage technological transfer to developing countries, on the other, the Coordinator was of the view that from the start, technological transfer has been effected through reverse engineering or use of patent information. Reverse engineering has been at the heart of Chinese technological advancement, where a patented product (e.g a car), is dismantled and all components imitated. The imitated components are assembled to make new product where modifications applied to suit the circumstances and bring about a complete new product.

Further that the use of patented information requires application for licensing where patents formulae and principles are revealed to the licensee upon payment of agreed fee for royalty. This becomes difficulty because the financial foundation of developing countries does not make it easy for them to pay. This may be the reason that, basing on the patents registration records with BRELA for the ten years from 2000 to 2009, indicated that foreigners have been taking a lead in patents registration than local citizens.

With specific note on TRIPs implementation, the respondent stated that it was the LDCs which proposed for grace period up to 2016 for medical related rights and up to 2013 for other intellectual property related issues. Generally the respondent was of the view that if the same is not politically handled, it is not feasible for developed countries to transfer technology to developing countries without any apparent gain between the transferor and the transferee.

Information obtained from the Tanzania Commission for Science and Technology, (COSTECH), hammered home the fact that no technology transfer is taking place from the developed countries to the developing and least developed ones.

The Tanzania Commission for Science and Technology – COSTECH, is a parastatal organisation under the Ministry of Communication, Science and Technology. It is entrusted with the responsibility of co-ordinating and promoting science and technology development activities. It is the sole advisor to the Government on all matters pertaining to science and technology and their application for socio-economic development of the country.

In this regard, the researcher wanted to find out whether, under such mandate, as described above, COSTECH is in a position to establish whether there has been technology development in Tanzania, and if yes, whether the same has been as a result of technology transfer from developed countries to Tanzania, as one of the developing countries as per the requirement of Article 10 of Cooperation Agreement between WIPO and the United Nations and clause 66.2 of the TRIPs.

The said COSTECH, with powers under Part IV of the Commission for Science and Technology Act, established the directorate of Centre for Development and Transfer of Technology (CDTT), as the principal organ of the commission responsible for matters pertaining to the transfer, adaptation and development of technology. On a specific accent, the centre is mandated to develop a data bank on emerging technologies that may be useful for short as well as long term needs of Tanzanians. Lastly, by means least, the centre keeps abreast with the development of new and emerging technologies and where appropriate, facilitate their transfer (dissemination)

Despite all this laid down beautiful legal infrastructure, the Director of the centre told the researcher, through a direct interview, that the centre has no single data on any type of technology transfer ever made from developed countries to Tanzania. He further told the researcher that the only problem is that, the Tanzania Investment Act did not address patents or registration of technologies as a condition precedent for foreigners to obtain the TIC Certificate, until recently when the said aspect as been contained in the forms to be filled in by foreign investors for the TIC Certificate.

5.3 Lack of Innovations and Prevalence of Illegal Imitations

The promotion of adequate and effective protective global legal framework for intellectual property rights was a result of members' desire to reduce distortions to international trade through imitations. Imitation has always been condemned and the respective conventions have set out judicial measures for legal redress in case imitation is carried out.

In this regard, Article 2 of the TRIPs, states that all Member States are obliged to comply[238] with the Paris and Berne Conventions, Rome Treaty and others without discrimination. These instruments lay fundamental foundation for the protection of intellectual property rights. The following findings present the above position in the affirmative.

According to the patents statistical data issues by BRELA, indicated that the patents registered, by BRELA office, from 2000 to 2009 weigh heavily on part of foreigners than residents. The table below hammers the above points home.

Table 5.1: Patents Registration Data in Tanzania (2000 - 2009)

Patents Registration in Tanzania (2000 – 2009)										
	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Local	3	2	3	2	9	17	23	18	13	17
Foreign	5	12	7	3	4	5	22	22	35	17

Source: BRELA as of 17th December, 2009

From the fields findings made on the 8th March, 2011, one Windmill Enterprises, showed that innovations are moving at a very lackadaisical pace in Tanzania.

The respondent at the windmill enterprise was available for direct interview on the same day. According to the presentation on his personal particulars, respondent was born in Songea where he got up to standard seven level of education in 1974. From

[238] Article 2: Intellectual Property Conventions: (1) In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967). (2) Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.

1977 to 1978, he became an apprentice in one setup where he learnt how to repair radio and other music instruments.

Later the respondent started learning driving and motor vehicle mechanics for two years. He started driving lories for almost five years. Gaining little from the carrier, the respondent decided to shift from Songea, in 2010 and joined Windmill Enterprise in Dar es Salaam.

Together with other windmill enterprises workers, the respondent has been able to manufacture for sale various windmills for generating electricity or pumping water from ground wells.

The respondent was able to identify parts of the functional windmill he is manufacturing to include the following: the rotating fun, the tail; the neck; the mechanical gear box; the mounting tower; the cable; control charger; and inverter.

The respondent further stated that the rotating fun runs the mechanical gear box which in turn runs the Permanent Magnetic Motor. The generated energy is sent down the mounting tower through the cables to the control charger. The control charger stores energy as per need for use through the invetor. The tail assists in positioning the rotating fun towards the wind to enhance rotation. The neck acts as the supporting pivot (between the rotating fun and the tail) on the mounting tower.

The respondent informed the researcher that the income generated from the undertaking for the complete functional windmill set amounts to Tanzania Shillings eight million (TZS: 8,000,000/=).

The respondent was asked whether their windmill contains any new invention on the process, to differentiate it from the old discovery of windmills. The response was to the effect that their type of windmill was different from the known windmills; their type was different in the arrangement of the fun plates which are curved to easily tap wind and that increases speed. The plates of the old windmill are flat; secondly their windmill contains weight balance to make it rotate evenly. Lastly, that their windmill contains the mechanical gear box of their invention which is not found in the old windmills.

When asked as to whether they have a registered patent to protect their invention if at all. The respondent replied that they have a registered business name registered with the Business Registration and Licensing Agency – BRELA under the Business Name Registration Act. They knew nothing about patents and /or patent registration requirements.

Although the respondent stated that a number of people have studies their windmill mechanism and are manufacturing the same for sale in Arusha, Dodoma and Singinda, categorically he doesn’t know what is a patent and whether what he does can be protected through the patent registration system. Neither did the respondent know that basing on the patent registration system; measures can be taken against

imitation by any natural or legal person. However, if accessed based on the three criteria for patent, it will be vivid that the said Windmill Enterprise has not invented anything new which possess new industrial applicability from the already known wind mills.

The above finding is also vindicated by findings obtained from the Massawe Fabricating Zone[239], specifically dealing with manufacturing of vibrated bricks machines. On this factory, the respondent said that he invented the fabricating mechanism after conducting a long research in Arusha in 1992 – 1995. However, he said the machines are now being made everywhere in Dar es Salaam and in the up country regions.

The respondent further informed the researcher that did not take any measures to register his invention in bricks making, nor does he know anything about registration or know what to register or its importance. In fact the respondent carries out the business under no any legally registered entity be it a business name under the Business name Registration Act or the company under the Companies Act. Even if the registration of patent is important and protective measure, the respondent said it was too late to register since the machines are now being fabricated everywhere in Tanzania.

[239] The visit to Massawe Bricks Fabricating Machine Zone was made on 8th March, 2011. The Massawe Fabricating Zone is situated at Tegeta, along Bagamoyo road, few metres after the BM Complex on the way to Bagamoya. Mr. Dismass Massawe is the proprietor of the establishment. The zone fabricates bricks making machines. The machines comprises of a mixer machine and a vibrator machine. The mixer is run electronically for mixing sand and cement with water in determined ratios. The vibrator makes bricks through a compacting vibrating process to make them harder and durable.

The Researcher also visited the Farmcon International Co. Ltd. This company was established in 1981 for manufacturing agricultural mechanised machines. It is situated along Mandela road, adjacent to Kinyaiya and Landmark Hotels. One respondent was available for direct interview.

During the interview, the respondent told the researcher that they are able to fabricate any machine for agricultural purposes. Most of the machines made are being imitated from the already existing foreign ones. The imitated machines prove better performance and durability. However, when asked on the issues of patents registration, the respondent indicated no measures already taken for patenting them because they are imitated ones. But even those few purely invented by Farmcon International Company limited, have not obtained any patent.

Furthermore, the manufacturing of the motor vehicle named MSETO concretized the imitation exercises carried out in Tanzania. One Pamela Chilongola[240] reporting in the Citizen newspaper, on the home made car named Mseto, said that if he were in a developed country where talents and innovations are highly valued, the innovator, one Ntumbanga Beleng'anyi could be someone else.

[240] Chilongola, Pamela is the Citizen correspondent and reported on the Tanzanian locally made motor vehicle, by Ntumbanga Beleng'anyi vide her article: Mseto: A worthy 'home made' car, The Citizen newspaper, Tuesday, 8 March, 2011, p 24

Ntumbanga[241] said that despite not doing well in other subjects, he used to make toy cars and always held the first position in arts, science and mathematics subjects in class. From the horse's mouth, Beleng'anyi made the said car from various materials, including iron sheets and metal and grinding machine engine which has 185 rpm kilogrammes and 2200 piston type. He said the vehicle uses very little diesel and performs a lot of work at one litre per hour and will cost almost 2.3 Million Tanzania shillings to completion.

Upon completion, the car will be able to produce electricity, pumping water, cutting wood and removing husks from maize. The inventor's aim for the said dream car is to assist peasants in generating more income and slowly get rid of poverty. And if the project will be sponsored will create job opportunities for youths. However, the respondent said he obtained the knowledge not from specific training but gathered the same practically. It was also noted that the respondent does not know whether what he does is an invention that needs to be registered as a patent and whether the same qualifies for registration.

The *Teknoleo* TV Programme broadcasted by TBC 1 has been contributing highly in highlighting the public on technology and development issues. From the said programme broadcasted on the 14th March, 2011, one George Buchafwe presented his machine he personally fabricated for the production of soaps. Buchafwe told the viewers that he made the machine after imitating for a long time on other machines and finally he produced one of his own.

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[241] The Citizen newpaper, Tuesday, 8 March, 2011 p 24.

The SIDO officer appeared under the same TV programme and submitted on their interventions to support the said initiatives by providing them with small scale loans and further on the collaboration between SIDO and COSOTA in facilitating the said innovators to register their inventions with the Business Registration and Licensing Agency (BRELA) and other relevant agencies or bodies.

In this aspect, Buchafwe presented two very important aspects. One is the invention of the machine for making soaps, which was mastered after repeated imitations. Secondly is the invention for the production of soaps. While the innovation of the machine attracts patent the soap aspect calls copy right on the soap formula and for the use of trade mark.

Further the same Buchafwe presented another machine for making plastic products like plastic pipes and plastic pipe connectors. The machine had been bought from China but Buchafwe had imitated and produced similar and better machine doing the same work. Lastly Buchafwe told the viewers that in inventions, one must pirate, imitate, improve products and finally make himself capable.

On the same footing, Nyumbu Automotive Manufacturing Corporation was expected to contribute highly in the field of innovations and technology transfer for the countries development. *Tanzania Automotive Technology Centre (commonly known as Nyumbu),* is a Tanzanian achievement of a plant that had grown to the extent of producing its own motor vehicle named *nyumbu*.

The *nyumbu Centre* was established during the reign of the Father of the Nation, His Excellence Mwalimu Julius Kambarage Nyerere, the First President of the United Republic of Tanzania. At that time the *nyumbu* centre produced one car and made other technical activities in the country. These include manufacturing of a number of spare parts for the internal industries like textile industries, fisheries and agricultural equipment industries.

The researcher tried all his efforts to visit the establishment but the said efforts were brought to a stand still for want of the necessary permit to be issued by the Ministry of Defence and National Service, which was sought but not issued, despite several follow ups on the issue.

However, sources outside the centre but which happened to work with the centre had been very instrumental for the data. Through this method, it was possible to know that the *nyumbu* centre had the capacity to imitate every machine and produce an improved product. This was in respect of motor vehicles, machines for textiles, fisheries, agricultural equipments, hydroform machines for making bricks, to mention but a few. It was further established that to develop a motor vehicle in its complete and functioning form, as the *nyumbu* centre did, that country in question, has a capacity of more than a thousand functioning industries in place.

With regard to the manufacturing of the hydroform machine originally imported from Scandinavian countries, the respondent said that the *nyumbu* plant had capacity to and

so did imitate and produced a better machine and at a cheap price. The original machine was purchased at 22 Million Tanzanian shillings and the *nyumbu* type would be available at only Seven Million Tanzania shillings, at that time. On the question why didn't the *nyumbu* automotive technology centre improve to the extent of satisfying the internal and if possible the external markets, the respondent replied that the centre is capable of making any machine if deliberate support is available.

This respondent could not tell on the issues of patents registration or on the patentability of the produced machines. However telling the ripe corn by its look, one could see the imitation or reverse engineering at the heart of the undertaking for technological transfer. Most developed and some developing countries have used this as the best methodology for technological transfer.

5.4 Unrecorded Revenues from the Proceeds of IP Products

This study, in the main, ventures to establish to what extent do intellectual property rights contribute to the country's economic growth. The said growth can be assessed at the individual, community and finally at the national levels. The information obtained from the Copyright Society of Tanzania (COSOTA), in this regard, revealed that there is a poor recording of revenues derived from the copyrighted work to the extent that it is extremely difficult to scale the contribution of copyright in this aspect.

During the direct interview conducted on the 14th December, 2010, the respondent[242] informed the researcher that unlike in the United States of America- USA, copyright

[242] Mr. Mkinga, the Chief Executive Officer (CEO) the Copyright Society of Tanzania (COSOTA).

is an automatic right in Tanzania. There is no registration of the same but the author enters a declaration, although the said procedure contains the same requirements and implications as the registration process.

Further that according to section 3(6) even foreigners receive protection equal that extended to the citizens. This is in line with TRIPS on national treatment and it derives its foundation from the Madrid Protocol on which once registration is done in one state, it is recognised in the all other member states. COSOTA further provided the following data, as contained in the tables, from which one can describe the artistic work and the economic contribution derived from copyrighted work:

COSOTA Literary, Music and Artistic Works for the Years 2001 – 2010.

Table 5.1: COSOTA's literary members and their works from 1st January 2001 to 31st December, 2001

Category	Years									
	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	TOTAL
Author & Performers	-	-	31	30	28	1	32	107	154	140	
Publisher & Producer	-	-	1	-	-	1	-	3	13	22	
Works	-	17	140	-	65	64	111	-	13	436	

. Source: COSOTA Head Office Dar es Salaam, as of 25th March, 2011

Table 5.2: COSOTA's music members and their works from 1st January 2001 to 31st December, 2001.

Category	Years										
	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	TOTAL

Author & Performers	20	136	189	109	111	42	84	80	223	215	
Publisher & Producer	2	3	5	1	3	3	2	2	5	4	
Works	-	-	1137	789	1113	662	1445	1574	2143	897	

Source: COSOTA Head Office Dar es Salaam, as of 25th March, 2011

Table 5.3: COSOTA's artistic members and their works from 1st January 2001 to 31st December, 2001.

Category	Years									
	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	TOTAL
Author & Performers	-	47	20	16	23	13	23	47	78	29	
Publisher & Producer	-	-	-	-	-	-	-	-	-	-	
Works	-	12	9	44	34	25	57	167	219	154	

Source: COSOTA Head Office Dar es Salaam, as of 25th March, 2011.

It was presented to the researcher that COSOTA is responsible for collecting royalties for and on behalf of copyright owners, in terms of section 48 of the Copyright and Neighbouring Act. The royalties so collected, have an impact on assessing the economic contribution of copyright to the individual and the country as a whole. To this end, COSOTA stated to the researcher that from 2004 to 2009, it had collected TShs: 610,159,133/= as royalties (see details in the Appendix).

COSOTA identified the big challenge in its discharging functions under its mandate to be lack of honest among the distributors in submitting revenues derived from copyrighted work. To vindicate the above challenge, COSOTA advised the researcher to contact the Independent Producers Association. Through phone interview made on the 15th December, 2010, to establish the extent of withholding tax paid, the respondent replied to the effect that no available records to establish the requested information.

COSOTA further stated to the researcher that the non availability of records is due to the fact that there has been dubious deals among the authors/performers and producers on the question of revenue. In effect there has been under declaration of proceeds, thus, minimal revenues if at all. That's why COSOTA is proposing for amendments in the Copyright Law to introduce systematic collection of royalties and revenues and establishment of the Tribunal that would deal with copyright issues in a specialised manner.

5.5 Limited Revenues Derived from IP in Tanzania

5.5.1 The Economic Contribution Derived from the Copyright and Neighbouring Rights

At the time of this research, the research found similar efforts of WIPO[243] in respect of copyright at a global level. The WIPO research aims at comparing the findings to the already established findings made in USA, the Netherlands, Sweden, German, Finland, United Kingdom, Australia and Japan. According to the WIPO Guide[244] on

[243] WIPO Guide on Surveying the Economic Contribution of the Copyright – Based Industries: Review of Economic Research on Copyright Issues. 2004, vol. 1(1), pp 5-16

[244] Ibid.

surveying the economic contribution of the copyright industries, the copyright contribution to economic growth has attracted the global attention. The Guide provides that some have been arguing for significant improvement of copyright protection if not to abandon it all together, as its contribution to wealth creation in many ways is neglected.

The problems does not lie in copyright's vivid contribution to economic growth or not, but according to the Guide[245], the issue lies in the relationship between copyright as the legal mechanism for protecting the property rights in literally and artistic work and economic life which has always not been obvious.[246] As such, WIPO has developed the guide for research around the world, aiming at establishing the link between copyright and economic performance of nations. The research aims at demonstrating the economic importance of copyright through studying multiple economic effects produced in terms of creating value – added jobs and trade. COSOTA has confirmed that Tanzania is one of the selected countries for this research and efforts to that effect are already in place.

As such, the economic contribution of copyright has always been derived from rewards of copyrighted work as a result of deployed skills and judgement. The said rewards can be derived from direct sales done by the author or damages granted by courts upon being moved by authors claiming compensation for loss occasioned by piracy.

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[245] Ibid
[246] When referring to copyright it is understood the notion of related rights is also included in the broader notion of copyright.

The Supreme Court of Canada in the case of *CCH Canada Ltd v the Law Society of Upper Canada*[247], held that the purpose of copyright law is to balance the public interest in promoting encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator.

Section 5 of the Tanzanian Copyright and Neighbouring Rights, is so couched to protect the originality of the artistic work, as per the aforegoing, is the comparatively recognised internationally. The said protection pertains to the exclusive economic and moral rights as per section 8 to 21 of the Act. Part V of the Act, specifically sections 36 and 37 provide for judicial interventions the copyright holder may resort to if his /her rights are in imminent danger of being infringed or have been infringed.

In this regard, the law protects the economic profit of the copyright holder by ordering compensation in form of damages but further the court may order exemplary damages if the infringement went as far as damaging the reputation of the copyright holder.

[247]CCH Canada Ltd vs. the Law Society of Upper Canada (2002), 2002 FCA 187. In this case, the Plaintiffs were Canadian publishers of law reports, law text books and other legal publications. The Defendant was a non-profit corporation that governed the legal profession of Ontario pursuant to the statutory authority. The defendant maintained and operated a reference library for its members and the judiciary. The defendant had free standing photocopiers for the use of library patrons using coins and prepaid cards. Above each photocopier the defendant posted a notice stating that certain types of copying might infringe copyright law and disclaiming liability by the defendant for infringing copies made by library patrons. The defendant also provided a custom photocopying service by making copies available in person in person, by mail or by facsimile transmission machines. The defendant's access to the law policy" provided that for a fee, single copies of library materials required for research, review, private study and criticism as well as for use in court, tribunal, and government proceedings could be provided to patrons of the library. The Plaintiffs alleged that the defendant infringed their copyright by its photocopying policies and activities in supplying for the legal profession and judiciary limited copies of legal materials published by the plaintiffs and held in the defendant's reference library. Hence commencing a suit

Section 37 goes further to stop the wrongdoer from committing further infringement. The injured party may cease and desist the infringing items and recover the profits derived by the infringer from acts of infringement. The parties holding neighbouring rights like performers, broadcasting corporations have the similar rights under section 38 of the Act. This legal position has got a wide application at least for the East African Community. In the case of *Alternative Media Ltd v Safaricom Ltd Civil Case no. 263 of 2004*[248] reported in the (2005) EKLR, the High Court of Kenya awarded damages to the plaintiff and ordered the destruction on oath of the infringing materials.

In this, case, the plaintiff was asserting ownership to a copyright in some artistic work; and that the defendant had infringed the said work. The plaintiff moved the High Court for orders of injunction, damages, and forfeiture or in alternative destroying the infringing items.

5.5.2 The Economic Contribution Derived from the Patents

The economic contribution by the patents is directly recognised from the profits gained as a result of royalties or sales of products derived from innovations and inventions. The more the patents, the more the inventions, the more the industrial products, sales and finally the country's economic growth.

[248] www.kenyalaw.org

As established by the European Patents Office (EPO)[249] it is not only the innovators that benefit from patents. Consumers as well benefit in incalculable ways from development of technology facilitated by the patent system. As employees, their jobs may depend on a particular technology and the patent protecting such technology. As such, EPO further states that all citizens benefit from the technological progress supported by the patent system and the contribution it makes to the country's economy. In short, patents are good for the economy and good for the consumers.

Professor Kotter[250] adds to the above EPO position saying that the patent system plays a major part in the transfer of technology, which acts as a stimulus to technological innovations. That the exclusive right to exploit an invention commercially makes it easier for companies to finance research and development. With exclusive rights, patents strengthen the company's market position. Patent inventions encourage research into alternative solutions and the licensing of patents promotes the dissemination of new technologies. Thus patents indicate the level of innovative activity in a particular market. They generate new investment and are a motivating force behind technical progress.

It is thus argued that the contribution of patents to the Tanzanian economy should be in the same line of income derived from protected technologies and further innovations or inventions thereof. Whether to enhance significant economic contribution the protection should be accorded to foreign or domestic innovations

[249] http:www.european-patent-office.org/gr_index.htm
[250] Kotter, Professor, A Compendium of Lectures on International Intellectual Property, 2007,p21

and technologies is a question of ongoing hot debate, as discussed in Chapter Three above.

But for the purpose of this chapter, it is better to note that the contribution of patents to the Tanzanian economy lies in the protection of technologies and subsequent innovations and /or inventions through the patent system, licensing (whether compulsory of voluntary) and use of patents already in the public domain.

Basing on the patent statistical data issued by BRELA, stated above, an inference can be drawn that there has been a more lackadaisical pace in carrying out innovations or inventions on part of the citizens of Tanzania than foreigners. In effect, the patents registered, as given by BRELA office, from 2000 to 2009 for the protection of the said innovations weigh heavily on part of foreigners than residents.

In Tanzania, for purpose of this work, the contribution by patents to the economic growth can be set in two categories. The first one is the self-executing economic income, as a result of protecting technologies and subsequent innovations. This creates a monopoly in production and markets hence spontaneous economic growth.

The second category of patents contribution to Tanzania's economic growth is realized through judicial gears, where, as a result of infringements, the patent holders are awarded damages in monetary terms through executable court decrees. However, from the obtained information from the High Court of Tanzania, Dar es Salaam Registry, no record of the case concerning patent infringement in Tanzania. The question remained to the researcher was whether there is no patent cases in

Tanzania because inventors are complying to the providing laws or to the contrary, no inventions and therefore no infringement cases.

5.5.3 The economic Contribution Derived from Trade and Service Marks

Trade and service marks generally, are symbols or characteristics that identify[251] the unique source of a product or service. Upon dully registration[252], the mark gives or is deemed to have given to the registered proprietor the exclusive right to the use of a trade or service mark in relation to any goods including sale, importation and offer for sale or importation.

A trade or service mark owner, exclude others from using the symbol in connection with the sale of goods or services that is likely to cause confusion as to source, sponsorship or origin.

The above stated exclusive right conferred to the mark proprietor can be infringed[253] upon, if any unauthorised persons, in the course of trade, in respect of goods purchased from the proprietor of the trade mark, apply the said mark after they suffered alteration in respect of their state, get up or packaging; altering, removing or obliterating the marks or other related matter on the goods; applying or adding any other trade mark or matter on the goods.

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[251] But these marks must be differentiated from certification marks which represent that one's goods or services have been 'certified' by some organisations, for instance TBS mark for the case of Tanzania Bureau of Standard.
[252] Section 31 of the Trade and Service Marks Act, No. 12 of 1986
[253] Section 32 ()

Like the previously discussed types of intellectual property rights, the economic contribution of the trade and service marks is derived from the monopolistic nature accorded to the proprietor to the sale or importation of certain goods or services in relation to the mark. Infringement of the trade and /or service mark gives right to the proprietor for legal action for remedies. In Tanzania, this has received a considerable judicial attention.

In the case of *Tanzania Breweries Ltd vs Kenya Breweries Ltd*[254] , the applicants sought court injunctive orders against the respondents from selling, distributing, disposing the products depicting the image of Kibo peak of Mount Kilimanjaro in Tanzania which forms part of the Applicant's trade mark. The Applicant's bear brands of "Kilimanjaro Premium Lager", "Kilimanjaro Lager" and "Snow Cap" contained a trademark whose features included the Kibo peak on Mount Kilimanjaro. The Respondent also came up with a beer branded Kibo Gold of which the features in its trade mark was the Kibo peak of Mount Kilimanjaro.

The Applicant sought an injunction on ground that the Respodent's trademark will create confusion in course of their trade or business because being indentical or nearly resembling will impair the distinctive character or acquired reputation. Further that the infringement will be of an irreparable magnitude since the injured goodwill will occasion a permanent injury of their market. Further that the infringement will destroy the value of their trademark or nullify the expensive advertisement that cannot be quantified into monetary terms at the end of the trial.

[254] Civil case No. 34 of 1999 , High Court of Tanzania, unreported

His Lordship Kalegeya, J, as he then was, said that the Applicant ought to show that the two trademarks have resemblances which to an eye of a common person are capable of deception, making that person to think of one product as being the other.

Quoting the holding in the case of *Colgate Palmolive Company Ltd vs Zakaria Provision Stores and 3 Others*[255], His Lordship further held that:

> If the court is satisfied that there is a strong probability of such confusion or deception occurring in the normal course of trade and that what is necessary is to compare the whole of the Plaintiff's mark and get up with the whole of the defendant's mark and get up to see whether there are similarities which go to create or show the prospect of the confusion or actual deception.[256]

To cement the point home, His Lordship further held that

> I have carefully put myself in the shoes of a common beer consumer and subjected my eyes to the contested registered trademarks. At the end of this exercise I have concluded that notwithstanding the presence of "Kibo Peak" on the brand there is no way this can create the deception to the degree complained of by the Applicant.[257]

If it can be added, after being satisfied that an infringement has occurred and economic loss suffered by the plaintiff in form of injured good will the court in the *Colgate Palmolive Company Ltd vs Zakaria Provision Stores and 3 Others,* above, awarded Tshs 500,000,000/- as loss of goodwill and TShs:200,000,000/- as general damages.

Again in the case of *Sabuni Detergents Limited vs. Murzah Oil Mills Limited*[258]

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[255] Civil Case No. 1 of 1997 High Court of Tanzania, unreported
[256] Ibid
[257] Ibid
[258] Commercial Case No. 256 of 2001, High Court of Tanzania, unreported

The Plaintiff alleged infringement on its trade mark number 28080 "FOMA LIMAO".[259] Before registration of the said mark, the plaintiffs had carried out a considerable research on consumer's needs. The cost from research to registration amounted to between 120 Million and 130 Million.

It was further alleged that the mark of the words FOMA LIMAO together with the slice of lemon and drops on the packages attracted the market to the extent of generating an income of 200 Million a month. But a year later, their sales dropped to 50%. The passing off of the Defendant's product TAKASA LIMAO with the same lemon slices with drops positioned the same way on the packet, deceived the customers.

The court in this case established the infringement and as such granted an injunctive order and ordering destruction of infringing items on oath. But on the issue of damages the court awarded only 30 Million as general damages[260] since the Plaintiff could not prove the special damages as required in law. His Lordship Bwana J[261]. as he then was finally held that:

> There is no doubt that there was an infringement on the plaintiff's trademark. An infringement by the defendant occurred after the plaintiff had registered and introduced his product in the market. The defendant was passing off its products at the expense of the former. As a consequence therefore the plaintiffs' sales failed…. The harm and the loss has already been caused and suffered. The plaintiff has to be compensated for the said loss. All considered I ward the plaintiff the sum of shs.30, 000,000/- as general damaged. The plaintiff also awarded costs of the suit.[262]

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[259] Registered on the 20th June, 2000.
[260] Instead of 98 Million as special and general damages combined.
[261] Commercial Case Ibid.
[262] Ibid

Generally, the intellectual property's contribution to the country's economic growth, is usually observed in a very tricky way. This is because, basing on the above sited examples of intellectual property rights in form of patents, copyright, trade and service marks seen to directly benefit the individual either natural or juridical person. But on the other side of the coin, the involved companies of individual persons engage employees who contribute to the countries economy through statutory deductions and contribution in terms of the Income Tax Act[263] of Tanzania. Section 4 of the said Income Tax imposes an requirement for payment of tax for every person (a) who has total income for the year of income; (b)who has a domestic permanent establishment that has repatriated income for the year of income; or (c) who receives a final withholding payment during the year of income.

Section 7(1)[264] of the same Act also provides for payment of tax to the government chargeable from an employment income.

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[263] Income Tax Act No. 11 of 2004.

[264] Income Tax Act, section 7.-(l) An individual's income from an employment f or a year of income shall be the individual's gains or profits from the employment of the individual for the year of income.

(2) Subject to the provisions of subsection (3), in calculating an individual's gains or profits from an employment for a year of income the following payments made to or on behalf of the individual by the employer or an associate of the employer during that year of income shall be included:

(a) payments of wages, salary, payment in lieu *of* leave, fees, commissions, bonuses gratuity or any subsistence traveling entertainment or other allowance received in respect of employment or service rendered;

Other aspects chargeable on employment income include items as enumerated on section 7 (b) – (g) of the Income Tax Act. Section 8 of the same Act provides for payment of income gained by an individual as a result of business while section 9 provides for payment of tax from the income derived from the investment.

However, the contribution to economic growth derived from patents, is of three folds. The first and the second are as addressed above in line of income gained from payment of tax and income accrued from judicial remedies, in form of special or general damages. The third and very crucial or vital aspect of contribution is the increase in innovations leading to advanced technologies. This in return enhances increase in production.

As Chon[265] puts it in a summary form:

> Patents are one way of addressing the market prosperity or failure. By conferring temporary market exclusivities, patents allow producers to recoup the costs of investment in R&D and reap a profit, in return for making publicly available the knowledge on which the invention is based. However, someone else can only put that knowledge to potential commercial use with the authorization of the patentee. The costs of investment in R&D and the return on that investment are met by charging the consumer a price based on the ability to exclude competition.[266]

For instance, Nagesh Kumar[267] says that 'the optimal degree of patent protection cannot be accurately defined. If protection is too weak, then the development of technology may be inhibited through insufficient incentives for R&D. If too much protection is conferred, consumers may not benefit, even in the long run, and

[265] Chon, ,supra.
[266] Ibid
[267] Nagesh Kumar, supra

patentees may generate profits far in excess of the overall costs of R&D. Moreover, further innovation based on the protected technology may be stifled because, for instance, the length of the patent term is too long or the scope of the protection granted is too broad.

5.6 Improved Legal Framework and its Impact on Intellectual Property

In 1990, Tanzania passed the National Investment Policy, to address investment issues was first formulated in 1990. The objectives of this policy were to ensure that an environment that would attract and promote both local and foreign investment is created. The government's intention in formulating the policy was to ensure that investment would be promoted in a manner that among others would create conducive[268] investment environment.

In addition, during the same year, the government specifically enacted a new Investment (Promotion and Protection) Act in 1990 that offered a variety of incentives and legal guarantees. These included, inter alia, tax holidays and exemptions, foreign exchange benefits and rights to land.

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[268] According to the CUTS Report, supra, the proposed conducive environment would: (i) Foster utilization of the nation's natural and other resources; (ii) Maximize foreign resource inflows through export oriented activities; (iii) Discourage debt accumulation; (iv) Facilitate substantial foreign exchange savings through efficient import substitution; (v) Facilitate increase in food production; (vi) Foster linkages among various economic sectors; (vii) Foster transfer of appropriate technology; (viii) Develop human resource; (ix) Promote balanced and equitable growth throughout the country; and (x) Enhance the development of economic cooperation within Eastern and Southern Africa.

To enhance the legal framework for arbitration of investment disputes, Tanzania joined the International Centre for Settlement of Investment Disputes (ICSID) and the Multilateral Investment Guarantee Agency (MIGA). This aimed at consolidating the proposed guarantees that would give confidence to the private investors. The Act provided a legal and regulatory framework for investments and laid out a broad and comprehensive schedule delineating priority investment areas, controlled areas (requiring certain minimum amount of foreign investment), reserved areas (for public sector), and those activities which were reserved for local investors.

In an attempt to establish an elaborate institutional framework, an autonomous organ of the government to oversee investment activities, the Investment Promotion Centre (IPC), was established in the same year. However, the formulated policy and enacted law precipitated some weaknesses[269] within the first five years of implementation, the encouraging trends notwithstanding. Thus the policy and the law called for imperative change[270].

[269] Five main weaknesses were identified. First, the frequent changes that were being made to the provision of investment policy and code reduced the credibility of both the policy and the code. Second, there was an apparent lack of coordination between the IPC and other agencies dealing with foreign investment, and as a result the IPC certificates added to, rather than reducing, the long list of permits/licenses that investors required in order to establish their businesses. Third, there were some administrative weaknesses that on the one hand limited effective attraction of foreign investors and on the other created discontent among the domestic investors who perceived that investment incentives were biased against them, but favoured foreign investors. Fourth, the relatively large size of the area reserved for public investment contradicted the government's declared resolve to promote the development of the private sector. Fifth, there existed several laws and regulations that came into direct conflict with some of the provisions of the Act.

[270] To rectify this situation, both the Act and Policy were reviewed and in 1996 a new National Investment Policy was put in place to replace the one adopted in 1990. This policy outlined the framework with which the following objective could be achieved: (i) Promotion of exports; (ii) Facilitation of new technologies; (iii) Optimization of foreign exchange inflows/earnings; (iv) Equitable and balanced development in the country; and (v) The establishment of a transparent legal and regulatory framework.

The Tanzania Investment Act of 1997, was enacted to provide the legal framework within which to operate the new investment policy. Under the new Act, investment approvals were given on a nondiscriminatory basis, provided a minimum sum to be invested was met by local and foreign investors[271] The only categorization made under this Act is that of opportunities in which sectors are categorized as either lead[272] or priority[273] sectors based on the importance attached to the respective sector's potential to trigger a rapid and sustainable growth process in the country.

The Export Processing Zones (EPZ) law was enacted[274] in 2002 and the National Development Corporation (NDC) has been appointed to supervise the establishment of the zones. However, the World Bank has shown opposition to the EPZ law arguing the operationalization of the Act, is likely to undermine the tax revenues.

The 1997 Investment Act also sets out a minimum period of 14 days in which relevant government agencies are supposed to process applications and provide a framework through which land can be acquired, incentives spelt out and revenue laws assessed.

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[271] Remember the 1990 Act in which the investment categories were delineated.

[272] According to the CUTS report, the lead sectors have been identified as agriculture and agro-based industries, mining, tourism, petroleum and gas as well as infrastructure.

[273] Priority sectors include manufacturing, natural resources such as fishing and forestry, aviation, commercial buildings, financial services, transport, broadcasting, human resource development, and export promotion projects – export processing zones (EPZ). Efforts to establish EPZs in mainland Tanzania have been underway since 1990s.

[274] Given the large resource requirement for the EPZ, the government has decided to delineate areas where zones could be established and offer these as investment opportunities to the private sector providing the land and the required legislation with which necessary infrastructure will be developed by private investors. It is expected that EPZ status would also be given to individual factories that have the potential to export 80 percent or more of their production.

However, the provisions of the Tanzania Investment Act are not applicable to:

(i) Investment in mining and oil exploration currently covered under the Mining Act of 1998 and the Petroleum Exploration and Production. Act of 1980 respectively;

(ii) Investment in Zanzibar which are administered under a separate legislation applicable in Zanzibar only; and

(iii) Investment below US$300,000 for foreign investors and US$100,000 for local investors (wholly owned or joint venture).

Foreign investors, in terms of natural persons, are defined as persons who are not citizens of Tanzania. For companies or corporate bodies, foreign investors are defined as companies incorporated under the law of any country other than Tanzania and where a person(s) who is(are) not a Tanzanian holds more than fifty percent of the shares. In the case of partnerships, foreign investors are defined as those in which a Tanzanian does not own controlling interests.

The Tanzania Investment Centre (TIC) was established under the new investment Act to serve as a "One-stop Investment Promotion Agency" in the country. The TIC is expected to coordinate, encourage, promote and facilitate investment in Tanzania and advise the Government on investment policy and related matters. The TIC is required to serve all investors, including those who are not bound by the provisions of the Tanzania Investment Act of 1997, to obtain the necessary permits, licenses, approvals, consents, authorizations, registrations and other matters required by the law to enable them to set up and operate their investments. Unfortunately intellectual

property regime, is mentioned nowhere as praying a pivotal role in technological advancement and country development.

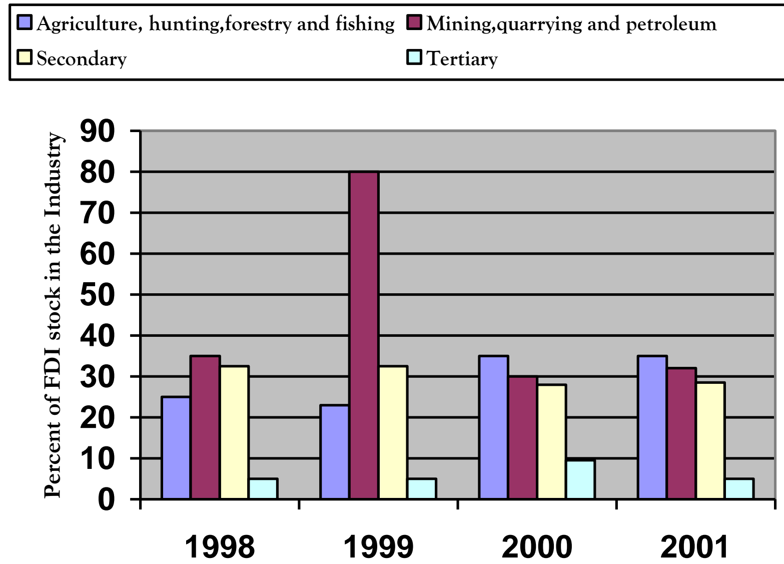
As a result of these changes in legal framework, Tanzania witnessed increased inflow of FDI into Tanzania in various sectors. According to the Tanzania Investment Centre report, there was an increase of FDI inflow for the years 1990 to 2003. For instance during that period, manufacturing sector had 986 projects; Tourism had 370 projects; construction had 178 projects; agriculture and livestock had 163 projects; and telecommunication ranked the last with 29 projects, to mention but a few. The manufacturing sector mentioned above comprised of brewing, tobacco, cement, sugar processing, textile and electronic equipments. The following tables elaborate the above stated in detail.

Table 5.4: Summary of Types of FDI and Country of Origin into Tanzania

SN	Type of FDI	Industry	Country of Origin
1	Market –seeking FDI	Brewing	South Africa
		Tobacco	Japan
		Electronic Equipmen	Japan, Republic of Korea, UK
		Cement	Norway, Zambia
		Sugar Processing	South Africa, UK
		Financial Services	South Africa, UK, Saudi Arabia, Belgium, France, Kenya, Malays
2	Export – oriented FDI	Mining	UK, SA, Ghana, Canada, Austra
		Textile	China
3	FDI in infrastructure and utilities	Energy (electricity)	Malaysia, Canada
		Tellecommunication	Geraman, Netherlands, US, EU
		Port handling faciliti	Philippines, UK, EU

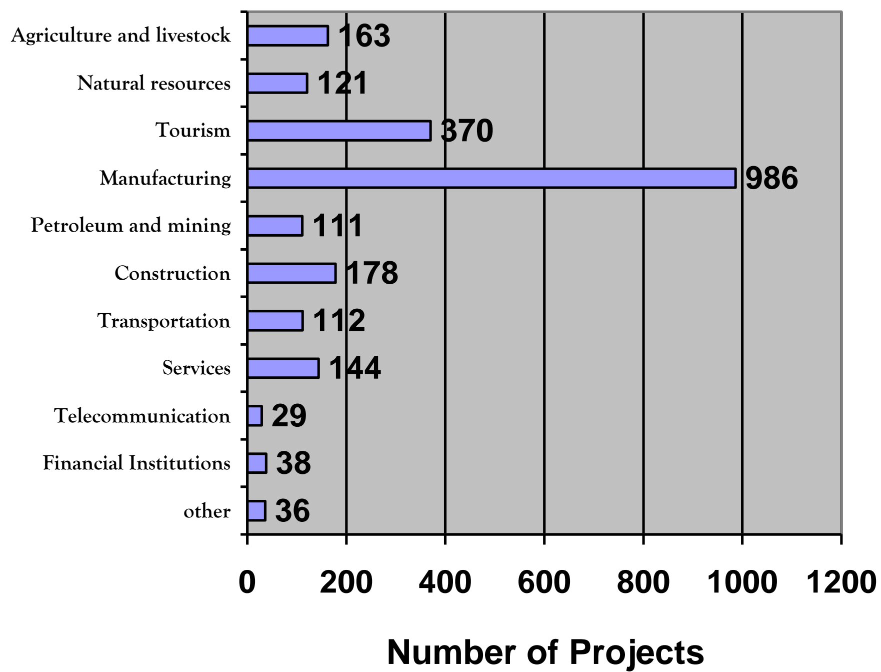
Source: UNDP, 2007

Figure 5.1 (above): Distribution of FDI Stock (%) by Sector for 1998 - 2001



Source: Tanzania Investment Centre (TIC) report

Figure 5.2 (above): New Investment projects in Tanzania by sector for 1990 – 2003



Source: Tanzania Investment Centre (TIC) report

However, despite the above stated inflow of FDIs, no significant changes were noted in the country's economy. The economic benefits which thought would be derived from foreign direct investments - FDIs, were as good fish in the sea, as never come out of it. Njamasi[275] complements this finding by saying that: decades have passed now, host countries natural and human resources have been exploited a great deal, few country's GDPs have risen because of FDIs; yet local communities still live a deplorable life. Lastly Njamasi[276] poses a very difficulty question that: Where did the fruits of their labour and natural resources go? In conclusion, Njamasi[277] says that it is high time now to look into the laws regulating investments and the role they can play to make FDIs and investments in general a contributory factor in the development processes.

5.7 Conclusion

As presented above, the introduction of the TRIPS to the GATT Forum had a multifaceted undertaking. From its outset, the introduction of and fighting for the inclusion of the TRIPS Agreement by the USA, initially and latter by other European countries, was seemingly for the protection of intellectual property rights. As argued by the pioneers, this was at the advantage of developing countries.

But as established herein above, increasing pressure from the USA and European industrial community, on their respective governments, lead to the stern fight for the incorporation of the TRIPS in the GATT Forum agenda.

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[275] Sehewa S. Njamasi, The Role of the Law in the Conduct of Foreign Direct Investments in a Developing Country: A Critical Study of the Role of the Law in the Conduct of Foreign Direct Investments in Tanzania. A Dissertation submitted in partial fulfillment of the Requirements for the Degree of Masters of Laws (LL.M.) of the University of Dar es Salaam, 2010/2011, pg. 30.
[276] Ibid
[277] Ibid

Although the developing countries rightly conceived TRIPS as a live threat to their economic advancement, the suggested advantage package (of accessing advanced markets for their agricultural and textile products) overwhelmed their decision-making. However, as seen also, such proposed package had never been realized to-date.

While Tanzania has enacted laws in compliance to the established international standards, it is still clear that the recorded economic growth as a result of the established legal framework is still minimal

CHAPTER SIX

6.0 GENERAL OBSERVATIONS, CONCLUSIONS AND RECOMMENDATIONS

6.1 General Observations

6.1.1 That the Aim for Economic Growth in Developing Countries under the TRIPS Agreement is Far – Fetched.

It has been observed that the coming into force of the TRIPS Agreement reinforces the Paris, Berne conventions and the Rome Treaty in a more significant way than ever, because implementing the TRIPS Agreement must comply with the already existing obligations upon members under the provisions of the latter. Article 3 of the TRIPS expressly puts clear that the above stated conventions, treaties and other organisational regulations must be observed evenly without any discrimination among the developed and developing countries.

If these countries would be standing on the same stance, surely Article 3 of TRIPS would be the most recommendable provision. However, basing on the diametrical positions with regard to economic power, Article 3 of TRIPS as been a subject of debate. The Doha Ministerial Conference[278] and the subsequent Declaration by the

[278] World Trade Organization, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002) (*adopted* Nov. 14, 2001) [hereinafter Doha Declaration] (affirming "WTO members' *right* to protect public health and, in particular, to promote access to medicines for all") (emphasis added). Note that two separate Doha Ministerial Declarations were issued on November 14, 2001; the one referenced herein as the "Doha Declaration" was specific to the issue of TRIPS and public health. The other, referenced herein as the "Doha Ministerial Declaration," more generally addressed the objectives of the so-called "Doha development round." *See* World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) (*adopted* Nov. 14, 2001) [hereinafter Doha Ministerial Declaration].

developing countries, commonly known as Group – of 14 developing Countries[279] were the result of dissatisfaction by these countries.

Although their apparent concern was on health and agricultural products, but in the main, their disquiet rested on evenness implementation or compliance advocated by Article 3 of TRIPS as being unacceptable in the circumstances. For instance, while the developed countries advanced compulsory licensing as the best potions for developing countries, especially on drugs, their (developing countries) argument was to the effect that, there existed none of their own pharmaceutical industries, thus rendering the TRIPS provisions on compulsory licensing, *as good fish in the see as never come out of it*.

Noted with concern is the fact that the developing countries efforts against compliance to Article 3 of the TRIPS were exerted while mindful of Articles 64-65 of the TRIPS providing for extension of time for the developing countries to comply to the TRIPS; and Article 66(2) of the same, that urges developed countries to encourage technological transfer to the latter.

In effect these articles remained meaningless to developing countries on the following reasons: one that even if the grace period for compliance is extended for 100 years, will not achieve expected goals because the targeted countries have no programmatic strategy for technology acquisition. Two that Article 66 (2) of the

[279] According to Adede A. O., *Origins and History of the TRIPS Negotiations*, *in* Trading in Knoweledge, the group comprised of: Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Pakistan, Peru, Tanzania, Uruguay and Zimbabwe. Other participants in the Uruguay round that submitted proposed drafts included the European Community, the United States, Switzerland, Japan and Australia.

same cannot assist the targeted countries, on ground that there is no scaled mechanism for compliance and/or implementation by the developed countries.

Hence, as it has been established by various scholars[280], the couching of Article 3 of the TRIPS did not aim at assisting these countries in accessing means to technological transfer but to deter them from the same. This is because, according to these scholars, the implementation of Article 3[281] of TRIPS negates the spirit of Article 31 of the Vienna Convention on the Law of Treaties.

That is why Margaret Chon [282] still proposes the substantive equality norm to address the issue of implementation equality in a more broad sense to engulf or take into consideration of the prevailing economic capabilities in the developing countries.

In this regard, Chon[283] continues to argue that although the principle of substantive equality is required, it is not enough to insist on procedural fairness or that countries adhere to formal equality in the form of national treatment coupled with minimum standards, as stated by Article 3 of the TRIPS. There must also be a focus on substantive equality.

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[280] For instance MARGARET Chon, Intellectual Property and the Development Devide; LINDA Y. Yueh , Global Intellectual Property Rights and Economic Growth, Northwestern University Law Journal of Technology and Intellectual Property, Vol. 5:3, 2007 p 437; WILLIAM, F. Patry, Copyright and Practice, The Bureau of National Affairs, Inc, 1994; KUMAR ect

[281] *Article 31: General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

[282] Chon Margaret, Supra

[283] Ibid

Basing on foregoing, it is vividly clear that if the world will continue to address protection of intellectual property rights, as per the current legal framework, which advocates for "one-fits-all" doctrine, without taking into account of the prevailing setbacks in the economic growth strategies in developing countries, no better results will be yielded by the process.

6.1.2 That Imitation Takes Preference over Innovation and / or Inventions

The establishment of the global intellectual property legal framework, especially the incoming into force of the TRIPS Agreement, was mainly to avoid distortions in the world trade, but also to encourage creativity through innovations and inventions, which would be facilitated by Article 66(2) of the TRIPS Agreement.

However, basing on what has been presented in chapters two and three, Article 66 (2), there has been a persistence failure of creating a sound technological base in developing countries through transfer of technology. As a result of this apparent vacuum, imitation has been preferred over innovation and or invention.

In such circumstances, but also taking in mind the historical background of patents in England or copyright in the United States of America, it has been strongly argued that imitation is considered to be the better option to enhance economic growth in developing countries.

6.1.3 That the Tanzania IPR Legal Framework Needs Reform

It has been observed that the Tanzania legal framework providing for intellectual property rights, within the scope of this study, needs reform. This includes the Patents (Registration) Act, the Copyright and Neighbouring Act and the Trade and

Service Marks Act. The scope of amendments proposed aim at making these laws more effective and will be discussed in the following aspect of recommendations.

6.2 Conclusion

As established above, Tanzania has established a legal framework to cater for intellectual property laws. These laws include Acts providing for the patents (the Patents Registration Act), copyright (the Copyright and Neighbouring Rights Act), trade and service marks (the Trade and Service Marks Act).

To the great extent, the said pieces of legislation have complied with the providing conventions (The Paris and the Berne Convention). However, there are some gaps especially those occasioned by technological advancement for instance the incoming of electronic issues.

In this regard, the Trade and Service Marks Act, for instance, is seriously lacking provisions related to electronic aspects. For instance while the Singapore Treaty made substantive amendments to the Paris Convention by introducing new types of marks, the Tanzanian Trade and Service Marks Act recognises none.

For instance, the Singapore Treaty explicitly recognizes that trademarks are no longer limited to two-dimensional labels on products.[284] Under this Treaty a new set of marks has been introduced. This includes hologram marks, motion marks, colour marks, and marks consisting of non-visible signs such as sound, olfactory or taste

[284] Article 2of the Singapore Treaty.

and feel marks.[285] The Tanzanian law, on the other hand, is still coined in the antique model and therefore calls for amendments to encompass the above stated electronic aspects.

Not only the Trade and Service Marks Act that suffers short comings but also the Patent Registration Act and the Copyright and Neighbouring Act too.

On part of the Patent Registration Act, electronic registration of patents is yet to be recognised under the law; while easy and prompt electronic copying of copyrighted materials calls for reform in the Copyright law in Tanzania.

Failure to amend the law will lead to loss of rights and income which will resultantly occasion economic loss to an individual and the nation as a whole.

Lastly, it has been established that despite the short-comings identified above, the respective Acts have prayed a vital role in the promotion and protection of intellectual property rights in Tanzania.

The apparent failure of economic growth cannot be attributed to the legal framework per se, but to the fact that the global framework providing for intellectual property rights is concocted in a way that developing countries will continuously be dependent. This is due to the fact that imitation will persistently be prohibited and voluntary technological transfer will not be carried out if the regulating instruments

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[285] See, "Whiff of new Trademarks, *ABC Online*, In the news (16-03-2006).

are not amended to that effect. On the same ground, technological transfer through compulsory licensing will not take place due to lack of industries themselves, in the first place, but also where industries exist, however small, lack of required compensation by the government to the patent right(s) holder due to limping economies.

6.3 Recommendations

Basing on the above observations, the Researcher has proposed corresponding recommendations as herein below:

6.3.1 That the TRIPS Agreement must be Amended to Reflect Practicability on Technology Transfer

Articles 3 and 66 (2) of the TRIPs have been a subject of critique from all developing countries especially during the Uruguay Round Negotiations as discussed in chapter 4 above.

Although article 66 (2) obliges developed countries to encourage technological transfer by their respective institutions, to developing countries, it has been practically difficulty to transfer the said technology due to number of issues. These include lack of reporting mechanism on the transfer, lack of clear definition of which one is a developing country and what constitutes technological transfer.

Basing on these issues, equal observation of the TRIPS Agreement on a linear equation by all member states has been difficulty and subject to discontent. This is simply because while developed countries are strongly capable in terms of technological capacity, the developing countries have no or limping technological capacity.

In this regard, it is difficulty to place the two parties on a balanced equation in terms of article 3 of the TRIPS Agreement to the effect that every member state should accord to IPR owners conditions not less favourable than it accords to nationals.

But, if article 66(2) is amended to address the above identified shortcomings then linear observation of the TRIPS Agreements without discrimination, as per article 3 would be a very recommendable intervention.

6.3.2 That Imitation is a Better Option for Developing Countries than Innovation

As presented in chapter two and three, the present global legal framework for intellectual property rights, was a result of members' desire to reduce distortions to international trade and promote adequate and effective protection of intellectual property rights. It was intended that by so doing, the law would remove barriers to international trade. Thus the International Agreement of Trade - Related Aspects of Intellectual Property Rights – TRIPs, the WTO and the WIPO came into force, each with its respective objective, functions and/or obligations, as identified above.

For instance, the main objective[286] for the TRIPs was, among others that the protection and enforcement of the intellectual property rights should necessarily contribute to the promotion of technological innovation and to the transfer and dissemination of technology. This was supposed to be done for the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to the balance of rights and obligations.

[286] Article 7 of the TRIPs

The TRIPS Agreement came into force therefore, specifically[287] for creating better environment where new rules and discipline concerning the basic principles of GATT 1994, the Paris and Berne Conventions, and other international intellectual property agreements or conventions would take roots in applicability.

In principle, the Paris and the Berne Conventions, advocate for strong protection of intellectual property rights on patents and copyright, respectively. This must be done at the global and domestic levels with the same accent. Imitation is condemned and the conventions set out judicial measures for legal redress. That's why Article 2 of the TRIPs, states that all Member States are obliged to comply[288], to the Paris and Berne Conventions, Rome Treaty and others without discrimination.

It has also been found out that the above protectionism position stated by the TRIPS has obtained support from a number of intellectual property experts. For instance Falve[289] and Others have been quoted arguing that the role for IPR protection arises because intellectual property displays many of the characteristics of a public good. That in the extreme these characteristics could remove the incentive to invest in R&D, and IPR protection can therefore restore that incentive. Hence, strong protectionism.

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[287] See the Preamble to the TRIPs Agreement

[288] Article 2: Intellectual Property Conventions: (1) In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967). (2) Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.

[289] Falvey R., Foster, N., and Greenaway, D., Intellectual Property Rights and Economic Growth, Research Paper: internationalization of Economic Policy, University of Nottingham, 2004/12, p 7

Although no express objection to protectionism spirit of the international legal system on intellectual property, the concern is whether the same can assist the developing countries, in this case Tanzania, to acquire its own broadened technological base. This proposition is not in isolation of the compulsory licensing methodology which is strongly objected by developing countries.

In this regard, if one takes the other side of the coin and examines the genesis of intellectual property rights, a different outlook is observed. This is in respect of the patent rights and copyright specifically. For instance William[290] has expressly stated that the United States of America for centuries refused to grant protection to *foreign artistic works*[291], until their citizens had pirated enough on the foreign literature, art and drama.

England is also on record in respect of patents. In granting patent to the foreign investor, it was a condition precedent that the grant obligated the recipient to train the native artisans to practice the art. This was clearly used to enable the local artisans to pick up the new art and employ it after the expiry of the term of the grant, through imitation and improvement on the same. The recipient of the grant was compelled to employ English artisans to achieve the above objective. Through imitation, the English natives would advance to something else and novel.

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[290] Willian supra note 79, p. 5

[291] The United States was long a net importer of literary and artistic works, especially from England, which implied that recognition of foreign copyrights would have led to a net deficit in international royalty payments. Despite the lobbying of numerous authors and celebrities on both sides of the Atlantic, the American copyright statutes did not allow for copyright protection of foreign works for a full century. As a result, the nineteenth century offers a colorful episode in the annals of intellectual property, as American publishers and producers freely pirated foreign literature, art and drama. The publishing industry was further protected by tariffs on books that ranged as high as 25 percent. Other countries retaliated and refused to grant American authors copyright protection.

According to the empirical study made by Kumar[292], the Intellectual Protection Rights regime is likely to affect economic growth indirectly by encouraging the innovative activity that in turn is the source of total factor productivity improvements. The IPR regime therefore could also affect the inflows of FDI, technology transfers and trade that might impinge on growth. The relationship between IPR and development could be subject to the causality problem as developed countries are likely to have a stronger IPR regime than poorer ones. In this regard, the study suggests, that the relationship between IPR protection and development are non linear[293].

For the countries like China and other tiger or economically emerging countries, the preference of imitation over innovation, as being propounded by Zheng Zhou,[294] is very high and significant. In the sense that imitation can take different degrees, from pure clones, which represent *"me – too products"* to creative imitation, which takes an existing product and improves on it. And products development accordingly can take a mixed form between two extremes of a continuum from brand new innovation to pure imitation.[295]

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[292] Nagesh Kumar, supra
[293] Ibid.
[294] Zheng Zhou, K., Innovation, Imitation and New Product Performance: The Case of China, Industrial Marketing Management, Elsevier Inc, 35 (2006) 394 – 402, also available at www.sciencedirect.com. Kevin Zheng Zhou is a Chinese scholar and Professor at the School of Business, University of Hong Kong, Pokfulam, Hong Kong
[295] Ibid

In his thesis, Innovation, Imitation, and New Product Performance: the case of China, Kevin Zheng[296] encourages the developing and least developed countries to broaden their technological base through imitation. Because, according to him, pure innovation takes effectively after heave investment in Research and Development (R&D) strategies. This strategy might prove negatively in countries with limping economies and limited resources.

Therefore, as Kevin Zheng[297] concludes an imitation strategy may also lead to better new product performance. Imitation costs often are much lower than innovation costs because an imitator, for example, does not need spend as many resources on research; the existing products already provide the imitator with information for its product development[298]

In principle, Kevin Zheng's argument quoted above is in accord with the Latin maxim saying: *"repetitio est mater studiorum"* literally meaning that "repetition is the mother of study" or in our case, that repeated imitation finally bestows perfect knowledge and skills to the imitator.

Taking this in mind and the hot debates during the Ministerial Conference and the subsequent Doha Declaration, it is evidently clear and more so recommended that developing countries cannot create their technological base without heavily resorting on imitation.

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[296] Ibid
[297] Ibid
[298] Zheng Zhou, K., supra

6.3.3 What Measures Should be Taken to Improve current IP Legal Framework in Tanzania.

The scope of this study has been limited to patents, trademark and copyright laws. As such, suggestion for measures to be taken towards improving IP legal framework in Tanzania, in this regard, will align itself with the scope of the study as stated above. There are almost nine Acts providing for patents in Tanzania. These Acts have addressed the issues of patents differently depending on the specific circumstances covered by the respective Act. In order to have patent, as a concept, addressed in a comprehensive and the same manner, these laws need be harmonised. On part of the Trade and Service Marks Act, has been found to lacking new elements as per the Singapore Treaty; and the Copyright and Neighbouring Act (plus its Regulations) contains gaps thorough which revenues filtrate unnoticed. So in this regard, the following recommendations have been presented.

6.3.3.1 Harmonisation of Laws Relating to Patents in Tanzania

The patent matters are addressed by various laws in Tanzania. The laws addressing patent issues include the Patents (Registration) Act[299], the Tanzania Investment Act[300], the Fair Competition Act[301] the Tanzania Commission for Science and Technology Act[302] the Tanzania Engineering and Manufacturing Designs Organization Act[303]; the Tanzania Industrial Research and Development Organization Act[304] the Centre for Agricultural Mechanization and Rural

[299] Cap 217 RE 2002
[300] Cap 38 RE 2002
[301] Cap 285 R.E. 2002
[302] CAP 226 RE 2002
[303] Cap 176 RE 2002
[304] Cap 159 RE 2002

Technology Act[305], the Small Industries Development Organization Act[306] Under the Above stated laws, patent issues are being addressed differently and with different weight.

For instance the main functions[307] of the organization, so established under the Tanzania Engineering and Manufacturing Designs Organization Act, stated above, include, among others, design and promote the designing of products and processes for Tanzanian industry in accordance with national industrial development policy; but also to adapt foreign designs of machinery and equipment to suit local conditions of manufacture, use and maintenance.

According to section 4 (1) (c) of this Act, the Organization can manufacture and develop prototypes and spares based on designs produced by the Organization as well as those which may be brought to the Organization.

The word ‘prototype’ in this regard, means developing example or first of its kind products basing on the designs of the products brought to the organization. In other words, this is to say that one carries out a number of imitations and develop an improved product after mastery. Section 4(1) (b) gives power to the Organization to adapt foreign designs of machinery and equipment to suit local conditions of manufacture, use and maintenance.

[305] Cap 181 RE 2002,
[306] Cap 112 RE 2002
[307] Section 4 of the Tanzania Engineering and Manufacturing Designs Organization Act, Cap 176 R.E 2002

Adaptation in the field of intellectual property means to reproduce the copyrighted or patented right in a way that will suit the locality. Normally the complete phrase is the *adaptation certificate* meaning the right granted by the copyright owner or the patent holder to the third part to reproduce the copyrighted or to manufacture the patented material or product. This may be referred to as licensing.

In this way, if section 4 (1)(b) gives powers to the Organization to adapt foreign designs of machinery and equipment to suit local conditions without seeking necessary authorization in form of license; and if section 4(1)(c) of the same Act empowers the Organization to produce the prototype of the adapted foreign designs of machinery and equipment, then imitation under our domestic laws have a legal blessing before one can go further to dig on its implication in terms of international instruments.

But Part XV of the Patents (Registration) Act, specifically in sections 66 and 67, infringement of a patented invention is strictly prohibited and attracts judicial intervention for relief(s).

As such, to remove this confusion, one comprehensive legislation on matters pertaining to patents need be enacted.

6.3.3.2 Amending the Trade and Service Marks Act to Incorporate the Singapore Treaty

It has been established above that the Tanzania Trade and Service Marks has to the large extent addressed trade mark issues as provided in the Paris Convention. It has also been elaborated that the Singapore Treaty on trademarks has established new features for trademarks which need be addressed under domestic laws, including Tanzanian ones. As such, amendments to the Trade and Service Marks Act to incorporate new changes under the Singapore Treaty be effected.

6.3.3.3 Amendments to the Copyright and Neighbouring Act and Related Regulations

In this part, suggestions given are in respect of the Copyright and Neighbouring Act and related Regulations including the Copyright (Licensing of Public Performances and Broadcasting) Regulations of 2003[308]; The Copyright and Neighboring Rights (Registration of Members and their works) Regulations of 2006[309], the Copyright and Neighboring Rights (Production and Distribution of Audio and Audio Visual Recordings) Regulations of 2006[310]

For instance, Part IV of the Copyright and Neighbouring Rights Act, specifically section 31, provides protection to performers by giving to them exclusive right to authorise broadcasting or communicating to the public of their non fixed performances. In the same footing, section 32 gives power to the producer to authorise the reproduction of the sound recording and making it available to the public; and section 34 of the same Act gives the similar powers to broadcasting corporations to authorise re- broadcasting or fixing the broadcast.

[308] Government Notice No. 328, Published on 10th October, 2003
[309] Government Notice No. 6 of 20th January, 2006
[310] Government Notice No.18 of 10th February, 2006

However, in case of imminent danger of being or have been infringed redress to the said right has been left to the judicial[311] processes alone for injunction and payment of compensation in normal courts.

Although, section 36 of the Act is a commendable measure in the protection of copyright and neighbouring rights in Tanzania, it is suggested that if the law would establish a special tribunal that would address copyright disputes in a more specialised way, would positively add to the protection of copyright in general.

Section 46 of the Copyright and Neighbouring Act, establishes the copyright society of Tanzania, in acronym COSOTA, which as per section 47 of the same Act, its functions, *inter alia*, include collecting and distributing royalties for and on behalf of authors and performers from producers and distributors.

Although some record of collected royalties could be tracked from COSOTA, yet the society still advises to collect information from other external sources like BASATA, STEPS and Independent Producers Association. In effect, no information was obtained from BASATA, STEPS, nor from the Independent Producers Association.

According to COSOTA, the distributor enters into recording and distributing agreement with the artist, upon which the former pays the latter, in advance, with further understanding that the former will pay withholding tax to TRA upon completion of the undertaking.

[311] See section 36 of the Copyright and Neighboring Act, 1986

As stated above, basing on the information obtained from BASATA, STEPS and Independent Producers Association, there is no even a single record showing retaining of or paying withholding tax to the government. In absence of the said record, it is impliedly concluded that the government revenues are being lost on the way, at the detriment of the country's economy.

On the other hand, failure to collect royalties by COSOTA, as per the law, places the authors in a more losing economic stance, at the individual level. Furthermore, lack of record keeping regarding the collected royalties and withholding tax to be paid to the Tanzania Revenue Authority, is attributed deliberate intent to deprive authors of their rightful entitlement and tax evasion.

That's why COSOTA, among other things, prays for amendment of the laws including the Copyright and Neighbouring Act to be in line with the current global developments. Other suggestions by COSOTA include preparation of the intellectual property policy that would reflect the government's direction for implementation. Availability of resources that would enable funding the use of stickers and holograms to identify the original copyrighted materials from the fake ones. Lastly public awareness measures, in form of trainings, seminars, media programmes would boost the public's knowledge on intellectual property issues. It is therefore suggested that COSOTA's suggestions for amendments be effected in the Copyright and Neighbouring Act.

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APPENDIX

Appendix One: **Research questionnaire for COSOTA on the contribution of intellectual property rights to the economic growth In Tanzania**

By: Mutakyahwa Charles (Advocate)
LL.M Candidate, , The Open University of Tanzania, OUT

PART ONE

Introduction:

The Researcher, one, Charles Mutakyahwa Nkonya, is an Advocate of the High Court of Tanzania, save subordinate courts thereto. He is working with the National Organization for Legal Assistance, nola[i], as a Director of Human Resources Development (DHRD) and the Coordinator of the Legal Aid Project to the Refugees in Northwestern Tanzania. He is currently a LL.M Candedate with the Open University of Tanzania, researching on the Contribution of Intellectual Property Rights to the economic growth in Tanzania, hence this questionnaire.

Research Problem

The Global System of intellectual property rights (IPRs) is undergoing fundamental changes. Most of the recognized changes are the introduction of multilateral Agreement on Trade – Related Aspects of Intellectual Property Rights (TRIPS) within the World Trade Organization (WHO).[i]

The developing countries and their emerging economies, like Tanzania, have indicated increased interests in attracting foreign trade and foreign direct investment (FDI), Technology expertise transfer.

The problem has always been the ongoing fear by the foreign investors to the effect that their technological expertise will be tempered with through domestic programmes in their bid to create local skills and enhance local productivity and bring about competition at the detriment of the foreign investment.

To overcome the above stated morbid fear, international community is tirelessly advocating for the strengthening of Intellectual Property Rights (IPRs) as an important element in a broader policy package that government in developing economies should design to maximize the benefit of expanded market access and promote dynamic competition. In this context, it is sought that the local firms/companies would take part meaningfully to the economic growth of the country.

However, the relationship between Intellectual Property Rights (IPR) and Foreign Direct Investment (FDI) is a complicated scenario. According to one school of thought, it is argued that a weak IPR regime increases the probability of imitation which makes host countries less attractive for foreign investment. But still another school advances its concern that the existence of strong IPR protection may shift the preference of multinational corporations from FDI towards licensing.

In Tanzania, it was thought that as privatisation gained momentum, visible results including a more business friendly culture, greater foreign investment and export led growth, would benefit not only Tanzania, but also the increasing number of private investors who had decided to put their faith, and their capital, in a country described as "the rising star in Africa."

Unfortunately, this was not the case todate. The ongoing criticism from the renowned scholars[i] against the third phase government for opting for and /or pioneering privatisation and liberalization of economy is an indication that the system didn't and still doesn't work.

The apparent failure of privatisation and liberalization of economy in Tanzania is to the great extent attributed to the ineffectiveness of the established providing legal framework including, National Investment (Promotion and Protection) Policy, National Investment (Promotion and Protection) Act, and the Tanzania Investment Act. Surprisingly, intellectual property rights laws seems to have been accorded no weight as the great contributing factors in the foreign trade and foreign direct investment (FDI), technology expertise transfer, the key elements of privatisation and liberalizations of trade and free market economy.

Research Objective.

Basing on the above stated, Tanzania opted for privisatization and liberalization of trade as an impetus to foster the country's growth of economy through foreign trade and foreign direct investment (FDI), technology expertise transfer, the key elements of privatisation and liberalizations of trade and free market economy.

To achieve this, the government of Tanzania passed a number of legislations which from the beginning, intellectual property rights laws seems to have been accorded no importance as the pivotal contributing factor in attracting the beneficial foreign trade and foreign direct investment (FDI), technology expertise transfer, the key elements of privatisation and liberalizations of trade and free market economy, and finally to vibrant growing economy.

As such, this study envisages to find out as to whether the International Bilateral Agreements regulated by GATT, TRIPS and WTO of the 1980s todate, aimed at supporting the economic growth in the least developed countries (LDCs) and Developing countries or otherwise, or whether the available legal framework providing for the intellectual property in Tanzania, are and or were strong enough to guarantee the foreign direct investment through liberalization, privisatization and free market economy making the same be of great benefit to the country as the whole.

___

Suppose a lacuna is identified in the present policy legal and practical regimes, should we go on with the said lacuna? What should be done?

As such, therefore, considered as an important stakeholder in this research, the Research Fellow requests for your assistance and positive collaboration in responding to the list of questions below. This will enable him obtain reliable data and or information, leading to more workable conclusions. I assure you that the information given will be held with high degree of confidentiality and your name kept in anonymity save under your consent.

PART TWO

Place: ______________________________________

Date : ______________________________________

Name of Respondent : ______________________________

Occupation: ______________________________________

Address: ______________________________________
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___

2.1 Policy and Law regulating Intellectual Property rights in Tanzania.

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***2.**1(a) Is there any policy and law regulating intellectual property rights in Tanzania that you know?*

Yes _____
No ______

Policy/policies
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If the answer is yes, explain as whether that policy sufficiently cater for the current needs in the field of intellectual property rights:

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Laws
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If the answer is yes, explain as whether such laws sufficiently regulate the current needs in the field of intellectual property rights:

2.1(b) Ttanzania is among the few least developed countries which took part in the Uruguay round negociations on intellectual property rights, do you know why?

YES _____
NO _____

If the answer is yes, explain why Tanzania participated fully in the Uruguay round negotiations on intellectual property rights what was its objective(s) in so participating:

If the answer in 2.1(b) above was YES, were the objective(s) for its participation in the negotiations achieved? If yes elaborate on that acievements?

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2.1(c) COSOTA is established by law to promote and protect the interest of copyright owners, how is this done?

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Does COSOTA keep the register of copyright owners in Tanzania?

YES _____
NO _____

If yes, are there statistics of copyright owners, indicating nationals against foreigners, since its establishment, year by year? Show details

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One of COSOTA functions is to collect royalties for and on behalf of copyright owners. How is this collected and how does it benefit the copyright owner.

Can you show how the protection/promotion of copyright has and /or the establishment of COSOTA has contributed to the economic growth of an individual on one part and the nation in general?

INDIVIDUAL ECONOMIC GROWTH

NATIONAL ECONOMIC GROWTH

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_____

Is there any dispute that has arisen between copyright owners that has been addressed by COSOTA and or any judicial tribunal or court that you know?

YES _____
NO _____

If the answer is YES, mention the title, facts, reasoning and holding of the case (among Tanzanians), if possible:

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If the answer is YES, mention the title, facts, reasoning and holding of the case (among Tanzanians and foreigners), if possible:

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PART THREE

3.1 Is there any international Instrument and body for the protection of copyright that you know?
YES _______

NO _______

If yes mention international instruments providing for the international protection of intellectual property rights:

If yes mention international bodies for international protection of intellectual property rights:

How does Tanzania benefit economically by being a member to such bodies?

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Is there any dispute/case on record on copyright ownership involving Tanzania (as a state) with another state or individual, addressed by the said international bodies/tribunals?

YES _____
NO _____
State the title, facts, reasoning (RD) and the holding of the case:
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PART FOUR

3.2 what do you think must be done for the effective and to both sides beneficial legal system for the protection of intellectual property rights?

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3.3 any additional opinion concerning this research?

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Would you like your name to be mentioned?

YES ________________ SIGNATURE _________________

NO ________________ SIGNATURE _________________

I thank you for spending your time in responding to these questions.

Appendix Two: Research questionnaire for on the contribution of intellectual property rights to the economic growth in Tanzania

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Intended to be administered to the *Nyumbu* Automotive Corporation.

By: Mutakyahwa Charles (Advocate)
LL.M Candidate,, The Open University of Tanzania, OUT

PART ONE

Introduction:
The Researcher, one, Charles Mutakyahwa Nkonya, is an Advocate of the High Court of Tanzania, save subordinate courts thereto. He is working with the National Organization for Legal Assistance, nola[i], as a Director of Human Resources Development (DHRD) and the Coordinator of the Legal Aid Project to the Refugees in Northwestern Tanzania. He is currently a LL.M Candidate with the Open University of Tanzania, researching on the Contribution of Intellectual Property Rights to the economic growth in Tanzania, hence this questionnaire.

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The developing countries and their emerging economies, like Tanzania, have indicated increased interests in attracting foreign trade and foreign direct investment (FDI) and Technology expertise transfer.

The problem has always been the ongoing fear by the foreign investors to the effect that their technological expertise will be tempered with through domestic programmes in their bid to create local skills and enhance local productivity and bring about competition at the detriment of the foreign investment.

To overcome the above stated morbid fear, international community is tirelessly advocating for the strengthening of Intellectual Property Rights (IPRs) as an important element in a broader policy package that government in developing economies should design to maximize the benefit of expanded market access and promote dynamic competition. In this context, it is sought that the local firms/companies would take part meaningfully to the economic growth of the country.

However, the relationship between Intellectual Property Rights (IPR) and Foreign Direct Investment (FDI) is a complicated scenario. According to one school of thought, it is argued that a weak IPR regime increases the probability of imitation which makes host countries less attractive for foreign investment. But still another school advances its concern that the existence of strong IPR protection may shift the preference of multinational corporations from FDI towards licensing.

In Tanzania, it was thought that as privatisation gained momentum, visible results including a more business friendly culture, greater foreign investment and export led growth, would benefit not only Tanzania, but also the increasing number of private investors who had decided to put their faith, and their capital, in a country described as "the rising star in Africa."

Unfortunately, this was not the case todate. There has been endless criticism regarding our choice for privatisation and liberalization of economy, arguing that the same does not aim at emancipating the national economy.

Although a number of academicians argue to the effect that shortcomings in privatisation and liberalization of economy, as a mechanism for economic growth, to the great extent be attributed to the ineffectiveness of the established providing legal framework, including, but not limited to National Investment (Promotion and

Protection) Policy, National Investment (Promotion and Protection) Act, and the Tanzania Investment Act; this research seeks to establish that, intellectual property rights laws seem to have been accorded not enough weight as the great contributing factor in the foreign trade, foreign direct investment (FDI) and technology (expertise) transfer.

Research Objective.

Privisatization and liberalization of trade aimed at creating an impetus to foster the country's economic growth through foreign trade, foreign direct investment (FDI) and technology expertise transfer, the key elements of privatisation and liberalizations of trade and free market economy.

To achieve this, the government of Tanzania passed a number of legislations which from the beginning, intellectual property rights laws seems to have been not at the fore front, as the pivotal contributing factor in attracting the beneficial foreign trade and foreign direct investment (FDI), technology expertise transfer, the key elements of privatisation and liberalization of trade and free market economy, and finally to vibrant growing economy.

As such, this study envisages to find out as to whether the International Bilateral Agreements regulated by GATT, TRIPS and WTO of the 1980s todate, aimed at supporting the economic growth in the least developed countries (LDCs) and Developing countries or otherwise, or whether the available legal framework providing for the intellectual property in Tanzania, are and or were strong enough to guarantee the foreign direct investment through liberalization, privisatization and free market economy making the same be of great benefit to the country as a whole.

On the other side of the coin, It is on record that during 1980's Tanzania, through the Nyumbu Automotives Corporation, advanced in technology to the extent of manufacturing automotives in Tanzania, as a country of origin. Todate not much is heard on the already recorded achievement. As such, as part of the patent aspect of intellectual property, a scope of this work, the researcher, intends to visit the Nyumbu Automotive Corporation, with a view of finding out: objectives, activities being carried out; and achievement reached, in respect of technological advancement in Tanzania. Also to find out the challenges the plant faces, if any, in line with compliance to the GATT, TRIPS and WTO regulations with regard to creating a broad technological base in and for the country.

As such, therefore, considered as an important stakeholder in this research, the Research Fellow requests for your assistance and positive collaboration in responding to the list of questions below. This will enable him obtain reliable data and or information, leading to more workable conclusions. I assure you that the information given will be held with high degree of confidentiality and your name kept in anonymity save under your consent.

____

PART TWO

Place: ____

Date : ____

Name of Respondent : ____

Occupation: ____

Address: ____
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2.1 Policy and Law regulating Intellectual Property rights in Tanzania.

***2.**1(a) Is there any policy and law regulating intellectual property rights in Tanzania that you know?*

Yes _____
No ______

Policy/policies
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If the answer is yes, explain as whether that policy sufficiently cater for the current needs in the field of intellectual property rights:

Laws

If the answer is yes, explain as whether such laws sufficiently regulate the current needs in the field of intellectual property rights:

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2.1(b) Tanzania is among the few least developed countries which took part in the Uruguay round negociations on intellectual property rights, do you know why?

YES _____
NO _____

If the answer is yes, explain why Tanzania participated fully in the Uruguay round negotiations on intellectual property rights what was its objective(s) in so participating:

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If the answer in 2.1(b) above was YES, were the objective(s) for its participation in the negotiations achieved? If yes elaborate on that achievement?

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2.1(c) WHEN was the Nyumbu Automotive Corporation established? What were its objectives?

When:

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____

Its objectives:

As its objectives achieved so far ?

YES ______
NO ______

If yes, to what extent

If no, why or what are the possible reasons?

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Has the plant already produced any industrial product? What is it? Do you have a registered patent on the same? Registered under which system?

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Had the plant already tried to imitate any industrial product, the technological know how of which originates from another country?
YES ________
NO ________

If yes, what was the outcome when the imitated product entered the market?

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If no, why?

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Did you ever enter into any agreement with any other individual, company or firm for the latter to bring in new innovation or technology, with a view of enhancing production?

YES __________

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NO __________

If yes, what was the terms and conditions of the agreement? Or were the terms and conditions thereof aiming at facilitating the acquisition of the said innovation or technology by Tanzanians for the future use? How?

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Have you ever tried to utilize the technologies contained in the patents found in the public domain?
YES ______
NO ______

If yes, what was the patent and the product thereof? Were there any deliberate measures to improve the said technology beyond the public domain? How?

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If no why?

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Have you ever been involved in any infringement case? What were the facts, parties, tribunal and decision of the case?

Can you show how the protection/promotion of patent rights has and /or the establishment of the Nyumbu Automotive Corporation has contributed to the economic growth of an individual on one part and the nation in general?

INDIVIDUAL ECONOMIC GROWTH

NATIONAL ECONOMIC GROWTH

____

PART THREE

3.1 Is there any international Instrument and body for the protection of patent rights that you know?
YES _______
NO _______

If yes mention international instruments providing for the international protection of intellectual property rights:

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If yes mention international bodies for international protection of intellectual property rights:

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How does Tanzania benefit economically by being a member to such bodies?

Is there any dispute/case on record on patent ownership involving Tanzania (as a state) with another state or individual, addressed by the said international bodies/tribunals?

YES _____
NO _____
State the title, facts, reasoning (RD) and the holding of the case:

PART FOUR

3.2 What do you think must be done for the effective and to both sides beneficial legal system for the protection of intellectual property rights?

3.3 Any additional opinion concerning this research?

Would you like your name to be mentioned?

YES ______________ SIGNATURE _______________

NO ______________ SIGNATURE _______________

I thank you for spending your time in responding to these questions.

Appendix Three: Application Letter to the Tanzania Defence Force for permit to conduct research interviews in the nyumbu automotive corporation area

Charles Mutakyahwa, Advocate
National Organization for Legal Assistance (**nola**)
Box 10096
Dar es slaam

Date: 23rd February, 2011

TO: The Permanent Secretary
The Ministry of Defense and National Service
Dar Es Salaam

RE: **REQUEST TO VISIT NYUMBU AUTOMOTIVE CORPORATION FOR ACADEMIC RESEARCH**

As you may wish to note, I am a Tanzanian, an Advocate by occupation and currently pursuing LL.M Degree at the Open University of Tanzania. My research Topic is on "**The Contribution of Intellectual Property Rights to the Economic Growth of Developing Countries: The Case of Tanzania**"

As part of the research, I must address the issues of patents and industrial products and their respective contribution to the country's economic growth in line with the established international principles, as contained in the GATT, TRIPs and the WTO. This is established at a general level but particularizing it to Tanzania at the end.

In line with the aforegoing, I found the Nyumbu Automotive Corporation, as a key source of data for my research regarding the patent (system) implications, at the global but as well as at the domestic (Tanzania) level. Thus it is very important for me to visit the said Nyumbu Operations carry out informed discussions with a view of collecting relevant data/information for the research

In order to have easy access, I pray to your esteemed office for the permission to issue that would enable me enter the premises, hold discussions with respective resource persons and where possible collect data for academic purposes.

The deadline for submitting my thesis is scheduled for 31st March, 2011.
Thanking you in advance and longingly to hear from you, I remain sincere yours.

____
Charles Mutakyahwa, Advocate

Find enclosed herewith, a copy of questions to guide the discussion, letter of admission from the Open University of Tanzania and copies of my Identity Cards.

Appendix Three:

COSOTA royalties collected and distributed from 2006 to June 2009.

COSOTA's Royalties collected and distributed from 2006 to June 2010

S/NO	Details of Collection	Amount collected	Distribution Date
1	Total collection from 2004 to May ,2006	8,300,000	Distributed on 28th June 2006 after deducting 30% Administrative costs and 20% Social and cultural Funds)
2	Total collection from 1st June to 30th December ,2006	74,712,000	Distributed on 28th Dec 2006 (after deducting 30% Administrative costs and 20% Social and cultural Funds)
3	Total collection by agents from 1st Dec. to 30th May ,2007	27,369,500	Distributed on 28th June 2007 (after deducting 30% Administrative costs and 20% Social and cultural Funds)
4	Total collection by agents from 1st June 2007 to 31st December,2007	76,706,350	Distributed on 25st January 2008 (after deducting 30% Administrative costs and 20% Social and cultural Funds)

5	Total collection by agents from 1st January, 2008 to 31st May,2008	30,655,000	Distributed on 28th June 2008 (after deducting 30% Administrative costs and 20% Social and cultural Funds)
6	Total collection by agents from 1st June, 2008 to 31st Dec,2008	88,880,000	Distributed on 28th January 2009 (after deducting 30% Administrative costs and 20% Social and cultural Funds)
7	Total collection by agents from 1st January, 2009 to 30 June ,2009	54,956,353	Distributed on 16th Aug 2009 (after deducting 30% Administrative costs and 20% Social and cultural Funds)
8	Total collection by agents from 1st July, 2009 to 31st Dec,2009	109,345,000	Distributed on 12th Feb 2010 (after deducting 30% Administrative costs and 20% Social and cultural Funds)
9	Total collection by agents from 1st January, 2010 to 30 June,2010	22,509,930	Distributed on 20th Aug 2010 (after deducting 30% Administrative costs and 20% Social and cultural Funds)
10	Total collection by agents and field officers July 2010 to Dec 2010	116,725,000	Distributed on 7th Feb 2011 (after deducting 30% Administrative costs and 20% Social and cultural Funds)
	GRAND TOTAL	**610,159,133**	

Table Four: Showing collected and distributed royalties for the years 2004 to 2006. Source: COSOTA Head Office Dar es Salaam, as of 25th March, 2011