

Framing Patent Laws to Advance Domestic Technology in Africa and Asia: The Case of Lesotho, Saudi Arabia and Vietnam

Assafa Endeshaw PhD LLM LLB

Lecturer in Law, Nanyang Business School, Singapore

ABSTRACT

This paper attempts to examine the nature of intellectual property (IP) laws of a number of countries in Asia, the Middle East and Africa: Saudi Arabia (1988), Viet Nam (1989) and Lesotho (1989), respectively. The selected countries are far apart in geographic terms and have no possibility of interaction among themselves. Apart from being non-industrial, each country possesses specific characteristics. The paper is divided into three parts: the general problems that the three countries will have to address in their IP laws; the contents of their patent laws; and the likely impact of TRIPs on their respective needs for development. It is concluded that the patent laws of the three countries present an anomaly: they were adopted in an attempt to appease the major industrial powers but they may not help indigenous technological development and the countries themselves may be the first to flout their own laws.

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Introduction

Over the past few years, there has been a noticeable increase in the making or revision of intellectual property (IP) laws by a large number of non-industrial countries (non-ICs).¹ These are countries which continue to be in a state of all-round economic and technological dependence on the industrialised countries (ICs) and in constant struggle to generate the economic resources for their survival and industrialisation. Most of them have come to realise that breaking out of the rigid relationship of dependence on ICs requires building an indigenous industrial and technological base assisted, wherever possible, by absorption of foreign technology and investments. IP laws are also considered to be essential to attain the same ends.

This article attempts to examine the nature of IP laws recently introduced in a selected number of non-ICs in Asia, the Middle East and Africa: Saudi Arabia (1988), Viet Nam (1989) and Lesotho (1989), respectively. The selection is premised on a desire to establish if there are divergent trends in IP law making in these countries because they are far apart in geographic terms and have no possibility of interaction among themselves. Apart from being non-ICs² themselves, each country possesses specific characteristics. Saudi Arabia is oil-rich and aspires to modernise its economy mainly through the acquisition of turn-key plants from ICs. Viet Nam still claims to be socialist although it has generally endorsed private enterprise, transfer of foreign technology and investment. Lesotho is a tiny land-locked country whose survival as a nation depends very much on South Africa. Except Saudi Arabia, the two struggle to bridge the gap between their imports and exports.

The investigation of the IP laws of these countries will show a close parallel with IP laws in ICs--testifying to the success of the ongoing campaign of ICs to have non-ICs adopt IP laws

identical to their own. However, it is necessary to determine the practical significance for both ICs and non-ICs of the latter's adoption of seemingly "universal" standards of IP (on a par with the TRIPs³ under GATT⁴) to appease ICs reproaching non-ICs generally for 'counterfeiting' or "infringement" of their IP. In countries that may not (probably also cannot) apply these laws but continue to innovate at home and borrow technologies from abroad, a further question remains of whether they may not be camouflaging the real use of other standards by leaving IP laws on their statute books.

It is concluded that such an anomaly of the coexistence, in non-ICs, of 'theoretical' IP laws with the use of surreptitious methods will multiply in so far as non-ICs persist in indigenous technological development and ICs seek to prevent it on the basis that such is only possible through 'piracy' of their technology. It is suggested that this might not necessarily be against the interests of ICs in the long run. An extension to international trade that ICs desperately seek through the GATT (now WTO) seems to be possible only with allowing non-ICs to come up with their own alternative forms of IP that suit their own development needs and, in the same process, create a market for the ICs too.

The article is divided into three parts. The first part will state the general problems that non-ICs will have to address in their IP laws. The second part will examine the contents of patent laws in the selected countries. The third part attempts to assess the likely impact of TRIPs on future patent laws of non-ICs and on their respective needs for development.

General Problems of Intellectual Property in Non-ICs⁵

Studies into the IP laws of many non-ICs have shown that such laws were introduced without any regard to their concrete rationale in the economic and social conditions of those countries.⁶ Being largely based on imitation or extension of such forms as have been in force in ICs, IP laws drawn up for non-ICs conveyed the impression that each country's economic or technological standing, internally or in relation to other countries, was of little significance.

As a by-product of the 'modernisation' thesis that influenced law making, on behalf of the ex-colonial countries in general and as part of the aid packages from capitalist ICs in the context of the Cold War, IP laws were forced on non-ICs with a minimum of debate. Besides, most of the non-ICs had been colonies of the major powers of the 19th century with the result that their laws were received from the metropolises. Thus any new legislation after independence only formalised the state of received laws. In IP too, this amounted to taking on board the forms in force in ICs.

The equation of 'modernisation' with possession of the latest laws published in London or Paris stifled the idea of domestic responses to domestic difficulties. The issue of making one's own IP laws never arose in non-ICs for a long time thereafter since this assumption stood in the way. Foreign legal experts who assisted in the setting up and running of new institutions in non-ICs were also predictably poised against any new drive to come up with their own solutions. Therefore the obvious choice seemed always to take up and adopt (with little or no change at all) the experiences of the foremost industrial countries in IP law.

On the other hand, the need of the new elite in power in most of the non-industrial countries for aid and capital investment from the capitalist ICs made them vulnerable to any suggestion that the donors or investors would be attracted by laws similar to those they experience in their home base. Consequently, a myth arose of the attractive force of laws that operate in ICs and of the need to ape them. This was particularly so in the field of patents and technology licensing. Notwithstanding the propensity of ICs *not* to patent or work their inventions in non-ICs, the existence of laws ready to provide protection for the interests of IC technology owners was

portrayed as indispensable. Abundant proof that even the existence of laws that were virtual copies of those being used in ICs did not bring about any technological progress in non-ICs or the applications of those foreign inventions which were given patent protection in them did not help reverse this thinking.⁷

An effect of the neglect of the specific economic and social problems in non-ICs that ought to have been the basis for the adopted IP laws has been further worsening of those problems in those countries. The adoption of IC laws by non-ICs may have helped foreign companies to have full access and familiarity with such laws but the benefit has always been one-sided. Indeed, the lack of any legal policies and rules that embrace the requirements of the rudimentary and basically stagnant technological situation bedevils most non-ICs to date.

Far from adopting policies and rules that take precisely this into account, the established trend has been introduction of the latest laws that ICs publish in consideration of their increasingly science-intensive technologies. This blatant contradiction of adoption by non-ICs of laws that foster technologies only available in ICs deprives those laws of any relevance to the indigenous capacity and demand for development. At a time when even the making of mechanical inventions that proliferated in the early period of the 18th century in England and France has not been possible in most non-ICs, the urge to make laws that protect more sophisticated technologies that do not exist in non-ICs or may not emerge in decades to come has no justification at all.

The awareness of plain irreconcilability of imposed or borrowed laws of ICs to the internal needs of non-ICs has prompted many of them to adopt two-pronged policies. On the one hand have been those who persisted in opposing total subservience. (Some proposed a half-way house solution along the line of the early 'utility model law' of Germany and Japan for local works but patents for foreigners.) Others resorted to camouflaging their real interests by taking on new IP laws soon after they were published in the ICs but continuing to flout them in practice. The latter practice is symptomatic of the Newly Industrialising Countries (NICs) which have been using

double standards for decades. Officially, IP laws were upheld but in practice there was no intervention against economic activities which aimed to exploit foreign technology unavailable locally; sometimes such actions sheltered behind domestic law.

The lesson from this is that IP laws should be conceived, just as during the period of emergence of technology in the 16th to 17th centuries, in light of their likely impact on technological development. The ICs have evolved forms of IP in consonance with their requirements for economic development and through the strong intervention of the state at all stages. This was true of the mercantilist, *laissez faire* or later periods. IP laws have developed as an expression of economic interests of individuals, groups or companies in furtherance of the state's concern with control of emerging trends and to cash in on a lucrative source of revenue. The recent US strategy of upgrading IP standards in the entire world at one go, through the issue of a single universal law, indicates in a graphic way the use of IP as a handmaiden for asserting technological power and competitiveness.

As far as the non-ICs are concerned, the forms of IP they have devised should have related very much to the path of development they charted for themselves. Since their general problems of socio-economic development differ from those that arise in ICs, it must have been axiomatic for them to abandon any pretence of using identical laws for their circumstances. If the problems of development should permeate political-legal solutions, then those adopted or proposed in non-ICs should have differed in all senses from those of ICs.

The fact of the matter is that the technological and economic conditions in non-ICs are not getting any better. In fact, it is generally agreed that technologies which have been around for centuries in those non-ICs still predominate. Such stagnant forms tend to be reinforced by a perception that any need for technology might be better met by imports from abroad than by attempting to create indigenous equivalents. IC governments and their various agencies perpetrate the notion, basing themselves on the classical theory of comparative advantage, that importing is

the only worthwhile alternative for non-ICs. The wholesale importation of foreign technologies and manpower in some of the oil-rich non-ICs (like Saudi Arabia) illustrates this perspective very well.

Moreover, the need to maintain the level of economic developments through preservation of their traditional exports of primary commodities (by staving off the potential damages of synthetic products) has led to importation of technology. The result has been an unstoppable importation of foreign technical expertise and hardware without any increased absorption for building up national capability. There is also the necessity for technological imports to supply agriculture with the implements for increased productivity so that the resulting surplus will bolster up the economy.

In order that non-ICs manage to fulfil these goals, they should transcend the false conception that similar IP laws are indispensable features of all countries. If at all any similarity in IP can exist, it must relate only to general principles of IP. Moreover, since the path of imitative, linear development or chasing after the successful ICs has become a near impossibility for the majority of non-ICs (because they cannot even remain in a vicious circle but have to grapple with a down-ward spiralling tendency), they cannot afford to ape the laws being applied in ICs directly.

Otherwise, the acceptance by non-ICs of assumed similar interests with ICs in IP will only serve to hoodwink them into believing that their future is secure while in fact the contrary is the case. If non-ICs do not realise this and find means of countering it, the IP laws they borrow from ICs or enact themselves but are not meant to be used in them nor to be applicable to them will serve as a suitable weapon to dominate them and keep them shackled. The self-deception of non-ICs will operate even more effectively and gravely (against their aspirations for development) than the imposition of legal forms from outside might possibly achieve.

Specific questions in IP relating to forms and limits of exclusivity in protection, the manner of enforcement of rights and the recognition of foreign interests need to be worked out in the context of the concrete circumstances obtaining in each country. There can be no general solutions

for all sorts of questions in as much as countries differ in many aspects. The extent to which such countries may be able to frame their internal rules in deference to foreign interests which might seek to block such a move may also differ from country to country. In the following section, we attempt to discover how the non-ICs we have selected fare in this regard.

Current Patent Laws in Saudi Arabia, Viet Nam and Lesotho

Patentability

Laws protecting inventive or creative ideas lay down specific requirements that must be met before protection is accorded these ideas. The patentability of ideas is primarily dependent on novelty and inventive step. Saudi law, for example, defines as new anything which has not been disclosed “in any part of the world”. (Art.5) The law of Viet Nam takes the same view by requiring “worldwide novelty” (Art.4-1). Lesotho law acquiesces similarly in s.5(2) and (3) to what has emerged in all ICs as a ‘universal novelty’ standard.

Regarding description, Saudi law expects the applicant to disclose the best method of use known to or “contemplated by” him, according to Art.14(3). It also requires that the description be “sufficiently full and clear for a person skilled in the art to be able to carry out the invention.” The two requirements are joined by the word “and”. This amounts to reducing the invention to one that is obvious to the skilled person. Art.6 makes it clear that an inventive step exists if the invention “*is not* obvious to a person skilled in the field corresponding to the subject matter of the patent applications.” Therefore, the contradictory requirements of clarity in description and obviousness of the working of the invention seem to have resulted in an ill-conceived combination in Art.14(3).

Lesotho law also requires, in s.7(4), sufficiency and completeness of descriptions, first, for the purpose of evaluating the invention and secondly for later application. The requirement of

indicating “at least one mode” of application appears to point in that direction. The combination in Saudi law seems to be kept apart in the Lesotho version leaving the obviousness test intact. By contrast, Vietnamese law does not require disclosures to be made in any form.

In general, all three countries seek to protect inventions of a world standard. Contrary to the prevalent view that these countries may be able, if at all, to produce small inventions only or mostly, they operate under the assumption that they too can produce major inventions like the rest of the ICs and must therefore provide means of protecting those inventions. Although Saudi and Lesotho law seem to recognise the difficulty this poses for them and attempt to make exceptions for their circumstances (see below), the general impact of their existing law on their technological situation cannot be positive.

Exempted Use

In most countries, unauthorised use of inventions may be permitted when such is in the public interest. Saudi law contains usual provisions covering secret inventions but does not make it clear nor say whether the inventor affected by such a move will be compensated. Lacking any other explanation, it might be suggested that this was a lapse in drafting (better said, perhaps, in copying). In one case, though, where a public authority requests to have an invention worked (because “public interest dictates”--Art.42), it does so subject to “equitable remuneration” to the patentee. By contract, the compulsory licensee is expected to remunerate the patentee. (Art.36)

The public use exemption in Saudi Arabia (Art.10) goes beyond the usual because it refers to “certain goods or processes for the manufacture of certain goods.” This is done by *suspending the grant of patent* “in view of considerations of public interest” for an initial 10 years but can be extended for successive periods of 5 years without any indication of when it will stop. It is not clear how the inventor might be able to exploit his invention either profitably or exclusively after the government has been using it for a long period of time but later withdraws its decision to suspend

the grant of the patent. The fact that the government may have used the invention in manufacturing implies that a potential market for the ideas of the inventor may not be any longer available when the inventor finally resumes control. This would suggest that the appropriate policy might be not to grant the patent after its possible market has been presumably satisfied but to compensate the inventor and release the invention into the public domain.

The exemption granted in Viet Nam is utilisation “for non-commercial purposes” (Art.12.2a) which indicates something wider than in Saudi law (“scientific research” per Art.24). Indeed, Viet Nam appears to embrace an element of exhaustion of rights by considering as non-infringement the circulation of products originally put in the market by rightful owners. (Art.12.2b) The same is true of Lesotho; see s.13(3a). Otherwise, Viet Nam allows compensation for a patentee against whom compulsory licence has been imposed (Art.14.2).

Viet Nam also recognises secret inventions (specifically referred to as relating “to defense and security of state”) but the inventor is required to keep such secret while using them.(Art.26). It is difficult to envisage how this obligation is to be honoured by an individual who will have to market his product to the public to gain anything in return. Ordinarily, the state would acquire use of such inventions and compensate the inventor. In Viet Nam, there are no public use exemptions like in Saudi Arabia or Lesotho. Placing inventions at the disposal of state organisations is undertaken only through the issue of compulsory licence for such organisations or for individuals where they show that the inventor has not met his legal obligations (to utilise the invention...) set out in Art.13 or that they had tried to obtain the invention on contractual terms but without success.

Lesotho law permits that substantive examinations of “certain categories of inventions” (s.11.7) may not cover the requirements of novelty and inventive step. However, s.26 of the Regulations affirms that no such exception shall be allowed and that the examination shall cover novelty and inventive step “in respect of all categories of inventions.” It is unclear why the

permissive provision of the Lesotho Act was later superseded by the Regulations; however, it emerges that the exceptions that might be extended to local inventions that would otherwise not reach world standards cannot find legal protection.

Lesotho law creates a general public use exemption in favour of “national security, nutrition, health or the development of other vital sectors of the national economy” without having to request the consent of the owner of the invention. (s.13.5) While the specific circumstances in which such use may be permitted are not set out in the law, the reference to economic development reflects the awareness in the possible impact of patent law. Nevertheless, the general nature of the provision does not help identify the type of inventions for which public use exemptions may be available. Indeed, Lesotho law does not seem any different from the law of Viet Nam, a supposedly socialist country, where until recently, inventions were open only to public ownership.

There is an obvious incongruity of solutions adopted in the patent laws of the three countries in relation to exemptions for public use. Saudi law appears to provide the widest latitude for exemptions while Lesotho law seems the least inclined, with Viet Nam offering no solution at all. The permitted use of inventions for research purposes by all three suggests that perhaps they were all keen about letting non-patentees use inventions with relative ease (Saudi Arabia) or at the earliest opportunity (Lesotho) or both (Viet Nam --through default).

However ill-defined (Saudi and Lesotho) or undefined (Viet Nam) the limits to unauthorised use of another’s invention may be, it is not possible to dismiss the indicative value of existing provisions on the type of problems that such countries face. While such countries cannot be said to be unaware of the existence of properly written and perfectly designed patent laws in other non-ICs that they might copy from, had they the desire to do so, the loopholes and ambiguities that obtain in the laws they have made themselves indicate an attempt to adapt the laws to their internal situations and needs.

Exercise of Rights

In Saudi law, just as in Lesotho law, licences are non-exclusive (Art.32) sublicensing being prohibited unless allowed by the patentee (Art.33). By contrast, Vietnamese law does not preclude further sublicensing by the transferee or licensee. (Art.16.1) Lesotho law also allows non-exclusive compulsory licence (s.15.4) which does not limit the patentee from further contracting to exploit the invention.

A peculiar provision in Saudi law is the restriction imposed on a salaried inventor who leaves his job. He is prohibited from applying for patent for 2 years after he leaves. (Art.12) This is an unjustifiable rule because an employee inventor should be free to apply not only during out of work hours but also while on his job, provided his application does not relate to things he has been employed to carry out. But Saudi law takes the draconian measure of disallowing anything done even beyond termination of employment, until 2 years pass !

Saudi law provides for expiry of a patent if (1) fees have not been paid even after the allowed period of extension (Art.28); (2) the term lapses; (3) it has not been in use for 2-4 years (Art.34). The duration of a patent may be extended for a further five years by supplying a “statement of reason” (Art.27) but it is unclear what the reason should be (inability to exploit the invention or not to do so sufficiently).

The corresponding causes for expiry of a patent in Viet Nam are (1) surrender of an invention (Art.24.1a); (2) non-payment of annual fees (Art.24.1b) and nothing else. Prolonged non-use does not lead to expiry. Indeed, Vietnam has no detailed rules for non-working aside from a general requirement that the inventor must utilise the invention “to the extent required to meet the needs of the socio-economic development of the country” (Art.13.1) There is no time requirement beyond which it could be considered that the inventor has not met the requirements for “development”.

In Lesotho a patent expires on (1) the full term having passed; (2) the non-payment of annual fees even after the grace period of six months (s.14.5). However, the full term of the patent (20 years) may be available to patentees who prove that they are still working the invention. Importation does not become an excuse for such extension. (s.14.2) But it is impossible to say why such a belated requirement was imposed on patentees who may have been using the patent for the previous 15 years for importing only (as allowed). Surely, if non-working should be part of the grounds for loss of patents at the final stage, it could be so initially too.

The variations in the provisions of the three countries regarding accessibility of inventions for 'public use' are reflected again in the manner of exercise of rights. The absence of strict rules for making patentees exploit their inventions or else face compulsory licences or cancellation of the right suggests that the three countries do not recognise the essential reason for granting such a right in the first place. This falls far short even of the Paris convention which provides a solution for such a situation.

Thus Viet Nam does not set any time limit beyond which a patentee could be considered not to have worked his invention (Art.13); nor does Lesotho require full working. Only Saudi Arabia does so (2-4 years: Art.25) although it remains a mystery how such a requirement could be imposed on patentees while they are allowed (in all three countries) to consider importation as use of the invention. The contradictory situation of allowing imports to pass as working the invention in the respective country can only accentuate the difficulties of each country in economic development. The obvious method of making inventions become available at the earliest opportunity to the public who might start to exploit them in the country concerned seems to have been lost on the three. Lacking such a critical weapon used by nearly all industrialising countries (demanding inventions to be worked in the country within a given short period of time or forfeiting any rights to them), the patent laws of the three countries effectively become instruments of exporter countries (that is, more often than not, ICs).

Rights of Foreigners

All three countries have been members of the WIPO but Viet Nam and Lesotho joined the Paris Convention in 1949 and 1989 respectively. None of them is a member of the Berne convention. The rights to be accorded by Viet Nam to foreigners are conditional on the existence of some treaty to which it and the country of the claimant adhere or on the basis of reciprocity. (Art.3) Saudi law does not address the issue while Lesotho law provides for the right to apply under the priority arrangements of the Paris convention.

Enforcement of Rights

The enforcement mechanism set up in Saudi law is a Commission of five people (3 lawyers and 2 technical experts) who hear civil and criminal disputes (per Art.48-49). Infringement disputes will not give rise to damages unless the inventor had stated the number and date of issue of the patent on the goods protected by it. (Art.46) In Viet Nam, any appeals against decisions by the granting mechanism and the like are made, first, to the Director of National Office of Inventions, and then to the State Committee for Science and Technology whose decisions are final. (Art.28) However, disputes (civil or criminal) are subject matter for the courts (Art.29-30) which have to determine whether there is infringement, defined in Art.12.1 as use “without agreement” or any such question. Courts are also to be involved in enforcement in Viet Nam both for civil (Art.9.3) and criminal (Art.31) matters. In Lesotho, enforcement is undertaken similarly by instituting court proceedings.

In general, patent laws in Saudi Arabia and Viet Nam are replete with confusions and gaps that betray either little awareness of the functions of such laws or a conscious decision to let things

remain ambiguous. Lesotho law closely follows the United Kingdom Patents Act 1977 and encounters difficulties only when it departs from the latter in a seeming attempt to adapt some provisions to the situation of Lesotho. The curious thing, however, is not how little changes have been inserted into the current borrowed law of Lesotho, but how the legislators decided upon issuing a patent law similar to the one operating in the UK (and the EEC) for such a tiny enclave possessing no significant economic clout at all.

Of the three, Vietnamese law stands incomplete and is full of ambiguities. On the one hand, it has not abandoned everything in the old 'socialist' law where the state had the major share of the inventions with little or no patents issued to anyone; on the other hand, it has not accepted everything in the 'capitalist' patent law. Since conceptual distinctions between certificates and patents have not been clearly made and the implications of granting exclusive patents to individuals not sufficiently grasped, the use of the term "title of protection" rather than patent (in Art.9.1 for example) creates an uncertainty. It states: "In the case of an invention...the owner of a title of protection shall be entitled to possess the projected object".

Similarly, the nature of the examination for granting patents is not spelt out in Vietnamese law while examination is mentioned (Art.22). Indeed, such critical issues as the requirements for an application for grant of a title (reference is made in Art.20.1 only to "the necessary documents" for application), the number of years that must pass before an invention could be subject to compulsory license have been declared a matter for the Council of Ministers to decide (through regulations). As the basic law stands, therefore, there are confusions in all directions.

Table 1. Comparative Features of Patent Laws

| Features | Saudi Arabia | Viet Nam | Lesotho |
|-------------------------------------|-----------------|------------------|---------------|
| World wide novelty | 5 | 4(1) | 5(2)and 5(3) |
| Inventive step: skilled person test | 6 | 4(1) no test | 5(5) |
| Usual exclusions | 8 & 9 | Art.4(6) | 4, 5(8) |
| Description sufficiency | 14 | none | 7(4) |
| Ownership | 11 | 9(1) | 6(1) 6(4) |
| Importation=use of invention ? | 22 | 11 (1) | 2(a)(i) |
| Research use exempted ? | 24 | 12 (2) | 13(3c) |
| Public interest exemption | 10 | none | 13(5) |
| Moral right | none(12) | 17(1) | 6(10) |
| Full working required | in 2-4 years 25 | no time limit 13 | ? |
| Compulsory licence | 34 | 14(1) | 15 |
| Infringement | 22 | 12(1), 31 | 13 |
| Duration | 15+5 yrs 27 | 15yrs 23(2.a) | 15+5yrs 14 |
| Enforcement | 48 | 9(3) | 13(2) |

The Future of IP Laws in Saudi Arabia, Viet Nam and Lesotho

The major ICs, particularly those with net technology exports, claim that weaknesses of the patent or copyright system in non-ICs allow counterfeiting or piracy⁸ to flourish while the strength of the respective systems in ICs prevents it. Yet, piracy is not a recent phenomenon. Indeed, it is one of the oldest forms of the dissemination of technological knowledge and an instrument for the emergence of the ICs in the past⁹ and of the NICs recently.

Today's industrial powers would not like to admit that counterfeiting was an element in their past drive to catch up with English or French industrial supremacy in the 18th and 19th

centuries. Instead, they often portray the occurrence of counterfeiting in modern times among non-ICs as being a deviation from normal (legal) practice. The point is that wherever countries lagging in industrialisation strove to imitate those ahead of them, they inadvertently ended up copying all.

Counterfeiting has been used by traders in non-ICs as a means of entry into developed markets which would otherwise remain outside their bounds. The financial gains and skills learnt in packaging and marketing of goods would enable them to put on the market competing products with their own marks and brands. Thus, it was only through time that an appreciation for the creation of an own market niche emerged and own marks or brand names developed. The confidence needed to take on the brand leaders arose from such an outcome. This has been the general trend in all countries that sought to catch up with their forerunners. The Japanese experience attests to this.

Consequently, the assertion that non-ICs resort to counterfeiting because they have no IP laws or that they do not enforce them appears irrelevant. Piracy was and still is a favoured channel for absorbing foreign technology among all aspirants of industrialisation and even among the ICs. Distinct developments have emerged in the means for and circumstances of piracy that were not existent in previous times. The fact of the matter is that the problem of counterfeiting has not been limited to a small number of non-ICs, as happened in the 19th century and in the first half of the 20th.

Today innovators and imitators in all countries engaged in economic resurgence or expansion resort, wherever possible, to all forms of piracy. The means for such have been available and increasingly revolutionised since the industrial revolution. The attractions of proven trade marks for late-comers in business or for those still unable to take on established competitors have increased over the years and across boundaries, in spite of laws and means of enforcement. Carratu asserts that, today, a whole group of countries engage in “producing a growing volume of

counterfeit products, and in some like Columbia, Brazil, Nigeria and India, counterfeiting has become the national industrial development strategy.”¹⁰

The alarming nature of counterfeiting is demonstrated by the fact that trade in such goods is not confined to apparel, toys, electronics and gadgetry but to drugs, medicines and spare parts to aircraft engines.¹¹ Great risks are presented to the life and property of people, particularly in non-ICs where capability to inspect, spot and take out of circulation the deficient and dangerous is lacking.¹² Finally, counterfeiting is being taken up by organised crime.¹³

The ICs possessing technological power attribute such mushrooming of piracy to the non-existence of IP laws or their lack of enforcement by the authorities who issued them. As the foremost power and net exporter of technology, the US is in particular determined to halt this. It has used diplomatic and trade pressures as well as threats of economic character against countries it deemed to be guilty of either not possessing the same kind of IP laws as itself or not implementing them to its satisfaction. The 80s saw many countries in south east Asia, the EEC and Japan face one kind of pressure after another from the US to streamline their IP laws and practices to those considered permissible by the US.

As a result a large number of countries rushed through IP laws they thought were similar to or, at least, acceptable to the ICs and the US. The NICs were particularly busy responding to the US pressure because the threat of trade sanctions would have had devastating consequences on their export market niches in the US. Yet, the US was adamant about enforcement when it saw that the IP laws were there. The continuous wrangles between the various countries have been cause for a spate of legislation that closely imitate IC laws. This process became even more acute with the involvement of the GATT (now WTO) in IP matters and the relative speed of agreement reached on TRIPs as opposed to others.

At the start of the recently completed Uruguay Round of GATT negotiations initiated in 1986,¹⁴ the US initiated and devised the creation of a global IP framework instead of bilateral

measures that it had previously applied against numerous countries. US proposals amounted to introducing for all countries, ICs or non-ICs, uniform standards and principles of IP and means for enforcement of such rights as well as the means of combating international trade in counterfeit goods. They aimed in general to add new or higher commitments to those provided for in existing IP conventions. Imbued with a perception that the institutional arrangements in non-ICs do not resemble those in ICs, the US proposition sought to reproduce procedures well known and rehearsed in ICs.

Finally, the US proposition amounted to a superimposition of IP issues on trade issues. Although some countries, notably India and Brazil,¹⁵ initially protested against such an unprecedented move of reducing any IP issues to trade disputes and that any supposed violation of the proposed IP code would be treated as violation of ordinary GATT (now WTO) rules, the combined weight of the ICs¹⁶ was enough to push it through without a great deal of fuss.

As far as the ICs are concerned, the institution of such global laws and mechanisms will ensure that *all countries* will play by the same rules and any deviation will be punished through economic and trade means. For the non-ICs which are by definition dependent on ICs this will entail a total submission to principles drawn up in light of the existing economic and technological advances and future needs of the ICs. Not only will non-ICs NOT be able to legislate independently, any hopes of imitating foreign technologies for their renaissance will be under permanent threat from the possibility of trade sanctions by the ICs.

The irony is that even the non-ICs (including those selected for the study) which have recently launched new IP laws imitated from the ICs will not escape this fate. Indeed, they will be expected to accept further concessions to ICs represented by TRIPS while there are still outstanding GATT (now WTO) issues not resolved in their favour.¹⁷ These relate to tariff reductions on their manufactured goods, the lifting of quantitative or other restrictions on clothing

and textiles, withdrawal of subsidies in agriculture and tariffs on tropical products that the ICs are expected to undertake according to the GATT (now WTO) but emphatically do not.

Faced with the IC demand for complete acquiescence, it does not seem odd that non-ICs such as Saudi Arabia and Viet Nam comply. The ambiguities and ill-defined provisions in the current laws which reflect in a dubious way the indigenous demand for more technology will be cleared up in favour of the TRIPs version and against relatively better access. Yet, no matter how loyal any non-IC government may be to laws introduced by the national legislature (on the basis of TRIPs), it will always be hard for it to enforce it to the letter. Since the new set of laws will become an enormous hindrance to the technological prospects of the non-IC concerned, it will not seem rational for such a government to chase around and lock up citizens whose only 'crime' may be to come up with the goods that are lacking in the domestic market and generate employment and revenue to the state.

It will be impossible to perceive a situation where governments will be totally oblivious to the key question of how they might satisfy their countries' need for indigenous technological development and for a cheaper access to foreign technology. Inevitably, this will breed discontent and the normalisation of double standards of play in non-ICs intent on breaking through the formidable barrier.

Conclusion

The current patent laws of Saudi Arabia, Viet Nam and Lesotho provide a good instance of deficiency in meeting the internal requirements of those countries for technology. However, any possibility of overcoming such defects through better laws, as might appear on the surface, must face up to international developments in recent years, particularly since the signing of the GATT arrangement in December 1993. One must also take note of the constant drift in IP law making by non-ICs towards complete unanimity with corresponding laws in ICs.

First of all, there is an evident haste to roll back restrictions previously imposed on foreign, particularly IC, interests under the guise of protecting the national economy or “sovereignty”. Non-ICs are increasingly making a desperate bid to return to the fold of the major ICs which might be important trade partners or aid donors of the respective non-IC. Countries which considered it necessary to keep out foreign IP or technology to prevent perceived disadvantages to their economies are now vying with each other as to how fast and best to repudiate past positions and attract foreign technology and business. The watchword of the new period appears to be: Give any favours and advantages that would ordinarily have been castigated as treacherous in the past. Acquiescence to all demands and pressures from the major ICs is becoming standard policy. Consequently, the problem of what type of law and standards to introduce in a non-IC is vanishing without much debate; little is being left of previous posturing about national interests, the demands of development and so on. The major question, until recently, of whether all countries big and small, endowed with resources or not, strategically vital to western interests or of little significance, should adopt the same policies and laws appears to have lost any relevance. However, until modifications are made to previous non-IC recalcitrance on a uniform basis such as through acceptance of the positions of the major ICs (just as the TRIPs under the GATT Round), confusions may persist as to the exact nature of non-IC policies and practices in IP.

Secondly, regional blocs (such as the Andean Pact) that were established by non-ICs to consolidate their demands on the ICs and to curb international pressure by and alleged disadvantages in technological transactions with ICs have been watering down their former stance. Such volte-face on the vital issues has effectively put an end to their original *raison d’être* (although this was more theoretical than practical even then). In the event, international attempts such as the embattled Draft Code of Conduct of Transfer of Technology appear to be left on the back burner for good.

Thirdly, the emergence of issues considered to be of great concern to the public in ICs, such as environmental standards and enforcement of human rights in non-ICs, is diminishing further what remains of the clout of the non-ICs to make or revise their own IP laws. In so far as these latest issues are going to be used by the ICs to make non-ICs conform to their thinking and practices on the environment and human rights, the potential costs to the non-ICs of any defiance will be sufficient to restrain any inclination to push through the national legislatures of non-ICs a national system of IP.

Fourthly, the economic and technological setting in which the underdeveloped countries, first as colonies then as ‘independent’ states, were made to adopt or introduce IP regimes in the past remains the same. Consequently, any investigation into existing IP laws which does not take these into account will remain hollow because it must rest content with the underlying premises whatever they may be and attempt only to fill any gaps found or modify certain rules. Above all, the reality of double standards in IP law of non-ICs will continue to baffle those who find it easy to label the phenomenon as ‘piracy’ or ‘counterfeiting’. In any event, any critique of the existing situation in non-ICs will not be worth the trouble unless it helps non-ICs erect a parallel framework of IP for their renaissance.

NOTES

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1. These are usually referred to as “less developed”, “Third World” or “developing” countries. It is proposed to use the designation “non-industrial” instead because the latter minimizes ideological connotations.
 2. The share of industrial production in the economies of Saudi Arabia, Viet Nam and Lesotho is, respectively, 45%, about 50% and 30% of the Gross Domestic Product. Source: *Human Development Report 1993*.
 3. Short for “Trade-Related Aspects of Intellectual Property Rights”.
 4. It is to be noted that GATT has given way, from 1 January 1995, to the World Trade Organization, WTO.
 5. For an in-depth exposition of this problem, see Assafa Endeshaw, *Intellectual Property Policy for Non-Industrial Countries* (Dartmouth, 1996) especially Chapter Four, pp.98-142.
 6. See Murdoch at 85; Grundmann at 1-2; Värynen at 36.
 7. See the economic side of the argument in Penrose (1951) for all non-ICs and Mandeville (1982) for Australia. The arguments in IP are set out in Economic Council of Canada (1971), Ayyangar (1959) for India; Yankey (1987) for Ghana and Nigeria; Juma and Ojwang (1989) for Kenya; Nijar (1989) for Malaysia; and Vaistos (1972) for Latin America.

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8. We use piracy and counterfeiting indiscriminately to mean illegitimate use of others' intellectual property rights. In the US, there is a tendency to confuse piracy with what are called 'gray market imports' or 'parallel imports'. These differ from counterfeit goods in that they refer to goods carrying genuine trade marks forbidden from being re-exported into the US market because of restrictions imposed by the US trademark owner on a licensee.
 9. Spying and pirating were practiced by the industrializing countries of the 18-19th centuries, England, France, Germany and the USA. See David Landes, *The Prometheus Unbound: Technological Change 1750 to the Present*, Cambridge University Press, 1969.
 10. Vincent Carratu, "Commercial Counterfeiting", (1986) 12(1) *Droit et Pratique du Commerce International/International Trade Law and Practice* 232.
 11. Carratu cites (at page 234) that in 1976 counterfeit transistors were found in the US Space Shuttle, and in 1977 counterfeit Boeing engine fire detectors and control systems. Also counterfeit spare parts were found fitted into fighter training aircraft of Singapore.
 12. Freemantle states that "Kenya faced economic disaster when its coffee crop was destroyed by the use of a fake fungicide." See Brian Freemantle, *The Steal: Counterfeiting and Industrial Espionage*, Micheal Joseph, London, 1986, at 5.
 13. See Carratu at 234.
 14. This is the eighth Round since the establishment of the GATT in 1949. Earlier Rounds concentrated on reducing tariffs and eliminating quantitative restrictions; trade in services and intellectual property were taken up from the seventh Tokyo Round (1973-79) onwards.
 15. The non-ICs sought to bring into the discussion the flexibility required to "attune the level of protection accorded to intellectual property rights to their stage of development and to take action called for by national public interest, developmental and technological considerations." They also called for a balancing of rights accorded by society to intellectual creators against their obligations to society. See page 64 of *GATT Activities 1989*, General Agreement On Tariffs And Trade, Geneva, June 1990.
 16. Nevertheless, there was no complete agreement among the ICs. Indeed, the diversity of interests in the Uruguay Round may be inferred from the fact that five draft legal texts (from EEC, Japan, Switzerland, the US and 14 non-ICs) were presented. The ICs themselves were in disarray as to what form of global law was desirable: a mandatory one or a general guideline ? See, Beir and Schricker (1989)
 17. It has been a common practice in ICs that tariff on goods imported from non-ICs rose with the "degree of fabrication" so that unprocessed goods might be imported at a small rate but, if the goods were processed, the rate would rise sharply. In addition, non-tariff barriers persist. (McNamara, 1973:84-5)