# Small States and the Challenge of Intellectual Property Protection
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Whether a landlocked nation with a strong financial sector such as Luxembourg or an island nation dependent on fishing such as the Maldives, so-called "small states" tend to share certain economic realities that have a direct impact on their intellectual property needs. I am using the term "small states" to signify countries which are relatively small in land mass and population. Such small states include both relatively developed countries such as Luxembourg and least developed island states such as Haiti. This definition is somewhat broader than the standard 1.5 million population test of the World Bank and other international economic institutions, but, I believe, more accurately reflects the realities of "small stateness" which are not solely restricted by population or by least developed country status. As the World Bank itself has acknowledged on its website "[T]here is no special significance in the selection of a particular population threshold to define small states." Instead, small states share a variety of features in common which make their consideration as a unique group of countries with specialized intellectual property concerns important in assuring an equitable opportunity for full participation in today's global market.

Generally, small states have relatively small domestic markets. Economic efficiency, therefore, is usually obtained through endogenous policies which rely upon specialization. This in turn necessitates reliance upon an export market for prosperity. This dependence on international trade makes the trade liberalization policies of the WTO a two- edged sword for such countries. Small countries are particularly vulnerable to the vicissitudes of economic and political influences beyond their borders, yet such countries are singularly unable to effectively affect the course of such events. While many small countries are members of the WTO, few have permanent embassies in Geneva or the trained personnel to be able to participate effectively in rule making proceedings (or other multinational negotiations) even though the results of such proceedings may well fall heaviest on their limited domestic resources.

In the area of intellectual property protection, greater access for small states to potential export markets under the liberal trade policies of the WTO was traded for greater resource demands for intellectual property infrastructure. These infrastructure obligations, imposed under the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS"), included the duty to create legislative regimes that meet the minimum substantive standards for the protection of intellectual property rights ("IPR's"). Among the types of intellectual property which must be protected under TRIPS are traditional forms of intellectual property such as patents, trademarks, copyrights, trade secrets and industrial designs, along with the newly formulated geographic indications and topographies. (See generally TRIPS, Articles 9 through 39). In addition to imposing traditional legislative obligations, TRIPS for the first time also

imposed upon member countries the duty to create an enforcement infrastructure for IPR. This infrastructure includes mandated "fair and equitable" procedures to enforce IPR (Article 42) and the dedication of sufficient resources to provide "effective enforcement" of such rights, including, as a necessary adjunct, training of judges, police, prosecutors and other IPR enforcement personnel (Article 41).

Despite the significant infrastructure burdens imposed on countries that have relatively few resources to devote to IPR protection, small states received no apparent special consideration under TRIPS. While TRIPS has grace periods for developing countries (5 years, Article 66(1)), for least developed countries (10 years, Article 65(2)), and for transitioning centrally-planned economies (5years, Article 65(3)), it contains no similar grace period for small states per se. Some of this silence is no doubt due to a mistaken belief that special provisions governing "least developed countries" are sufficient to meet the needs of small states. Thus, in addition to general grace periods for meeting TRIPS substantive and enforcement measures, "least developed countries" were also granted extended grace periods for establishing domestic patent registration procedures for pharmaceuticals (Article 66(1)). These periods have recently been extended so that least developed countries now have until 2016 to provide such patent protection. While such special provisions are undoubtedly helpful in meeting the needs of small states, they are not nearly extensive enough to adequately address the problems of small states in meeting the challenge of intellectual property protection in the Digital Age. Moreover, as the participants in a recent conference in Malta organized by the Commonwealth Secretariat of the United Nations properly recognized, many small states no longer qualify as least developed countries. Hence, special protections provided "least developed countries" no longer apply to these states despite their continued need for special consideration.

One of the most critical issues that small states face in the IPR arena is the misperception that intellectual property protection provides benefits only for larger, more developed nations. Creativity and innovation are not constrained by the size of a country, its resources or even its economic or technological development status. To the contrary, the specialized economies of many small states assure that some level of innovation will occur as its citizens perfect the necessary techniques to produce their specialized goods and services. These techniques do not have to be technologically advanced to qualify for intellectual property protection. To the contrary, trade secret protection for know-how (which may protect such techniques) is not technologically specific. Even patents, which are generally perceived as an index of technological development, are often granted for so-called "low tech" inventions, including a barrette with interchangeable decorations (US Patent NO. 6,688,316) and a method for swinging from a tree (US Patent No. 6,368,227).

The precise relationship between the strength of domestic IPR regimes and the attraction of foreign direct investment remains hotly debated, largely due to the lack of sufficiently predictive econometric models for effectively testing such relationships. Most studies, however, recognize that intellectual property protection plays a role in economic growth, along with market size and competitive openness. As Kamil Idris, Director General of

WIPO, recognized in his recent work of the same name that intellectual property is a "power tool for economic growth" for all countries. He stated:

> Intellectual property is native to all peoples and relevant in all times and cultures, and has historically contributed to the progress of societies. It is a force that can be used to enrich the lives of individuals and the future of nations - materially, culturally and socially. (Kamil Idris, INTELLECTUAL PROPERTY: A POWER TOOL FOR ECONOMIC GROWTH (WIPO 2003))

Given the small size of their domestic markets, strong intellectual property rights may not play the same role in small states in attracting foreign direct investment that it plays for their larger cousins. Yet intellectual property protection can be used to grow domestic culture industries which in today's global age may provide further products for export.

While intellectual property protection is beneficial for small states, the one- size-fits-all standard of current international agreements may not be appropriate. These regimes tend to favor technological advancements over non-technological innovation. The use of Neem seed as a fertilizer, for example, gains no protection under traditional intellectual property regimes, while the derivation of its active ingredient (a technological process derived by larger, more developed countries) qualifies as a patentable invention.

The general lack of technological development of small states guarantees that in the technological sweepstakes of present IPR regimes, small states rarely gain the winning technology ticket. Technology based protection regimes such as patents, at least in the initial stages of industrial development, have little relevance for small state innovation. However, other forms of traditional protection, including industrial designs and trade secrets may provide a more profitable basis for encouraging indigenous innovation. Industrial design protection requires lesser levels of technological innovation than patents, yet provides commercial assets that can be leveraged to develop domestic industries. Where patent protection requires evidence that, *inter alia*, the invention in question is new, involve an inventive step (often referred to as "non-obviousness") and is capable of industrial application (TRIPS, Article 27), industrial design protection only requires evidence of novelty or originality (TRIPS, Article 25). Often referred to as "petty patents," industrial designs are granted protection for lesser periods of time, but still provide a level of exclusivity that can serve as a basis for licenses and other forms of commercial exploitation.

The homogenous culture of many small states suggests that traditional knowledge, including folk remedies, folk art and other forms of generation-based innovative and creative arts may also be a useful form of protectable domestic intellectual property. "Traditional knowledge" is currently a fluid term, but is generally defined to refer to tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. These creations, innovations and cultural expressions share three traits in common. They have generally been transmitted from generation to generation; they are generally regarded as pertaining to a particular people

or its territory; and, despite their basis in "tradition," they are constantly evolving. As Kamil Idris properly noted:

> Traditional knowledge assets are important sources of income, food and healthcare for large parts of populations, particularly, but not only, in developing countries…. [T]radition based creations, such as expressions of folklore, have also taken on new economic and cultural significance within a globalized information society, particularly as a result of the Internet. … Tradition-based innovations and creations, including expressions folklore, which are important parts of a community's heritage and cultural patrimony, can act as inputs into other markets, such as entertainment, art, tourism, architecture and fashion. (Idris, *ibid*)

Although its basis in generational innovation and creativity suggests that protection for traditional knowledge should be of longstanding recognition, in reality, protection for traditional knowledge as a form of intellectual property is a relatively new development internationally. Despite early efforts by UNESCO and WIPO in the 1970's to create a model code for copyright for developing countries that included the protection of folklore and other traditional cultural expressions, the issue did not receive sustained attention until the late 1990's when coalitions of developing countries succeeded in putting the study of cultural protection into the budget of WIPO. Diverse international organizations are now considering the issue, including WIPO, UNESCO, the Organization of African Unity, and the United Nations, through its Working Group on Indigenous Population, among others.

The protection of traditional knowledge provides a workable counterpoint for small states to the technology based regimes of the West. Domestic legislation, as well as eventual multinational regimes, may provide a basis for true wealth transfer as the economic value of indigenous innovation is given equal status with that of technological innovation. To date, however, international standards for such protection remain non-existent.

Small states remain particularly vulnerable to external pressures to join regional and multinational trade based intellectual property treaties that may not fully serve their needs. The resultant loss of practical control over domestic policies regarding such critical national issues as competition policy, innovation encouragement and sustainable development – all of which are effected by intellectual property rights -- may divert critical resources into policies modeled on developed countries needs and experiences that have little relevance to small state realities.

For example, debates over the merits and limitations of electronic filing which form a great deal of current debates internationally over patent protection have little relevance for countries with limited internet infrastructures. More relevant for small states is the issue of regional patent searching facilities which allow small states to share some of the financial benefits of patent search fees, while sharing the costs and labor of providing

such services. Yet such issues have yet to be addressed satisfactorily in present registration regimes.

Technical assistance remains a critical policy issue for small states. Although Article 8 of TRIPS requires developed countries to provide "technical assistance," to developing and least developed countries, the nature, timing and type of such assistance remains in the discretion of the donor nation. In order for such assistance to be truly effective, small states must develop a national training policy that establishes for each on a country by country basis what types of training most effectively meet their present development needs. For example, one country, which has fairly compliant IPR legislation, may need specialized training for its enforcement personnel. Another might need training for the employees in its state intellectual property registration office. A third may need assistance in creating judicial enforcement procedures. While the old adage "any training is better than none" may have some merit, it is in the interest of both donor and recipient countries to more closely match needs with assistance. In order to be aware of such needs, each nation needs to conduct a training/technical assistance inventory to establish which areas of training should be conducted first. If a country is spending its limited resources in developing a stronger judicial system, training for customs officials in spotting counterfeit or pirated imports may be useful, but the country would be better served by technical assistance that trains prosecutors and judges in rule of law issues under TRIPS.

There has been a growing movement toward regional and bilateral trade agreements, some of which have included small states, including CAFTA and the FTAA. Like their multilateral cousins, TRIPS, the WIPO Internet Treaties, and the diverse registration and classification treaties established in the latter decades of the 20th Century, these regional agreements lack specialized provisions for small states. Despite the facial homogeneity that regional treaties may offer, small states continue to lack the political clout to seek specialized protection for their needs. Small states are rarely significant actors in multinational negotiations. To the contrary, such negotiations are dominated by the larger and more powerful nations. Inevitably, any resulting agreement reflects their interests and objectives. Of even greater concern, however, is the fact that many small states lack the resources to participate effectively even in multinational negotiations in which they are active participants. Over 2/3's of the least developed country members of the WTO cannot afford to sustain permanent representation at WTO headquarters in Geneva. As Dermot McCann emphasized: "In short, the expanding role of global governance regimes is not matched by an expanding capacity of small states to influence significantly either the terms of the regimes or their day-to-day operations." Fortunately, the situation is slowly improving as international organizations begin to expand financial assistance in this area.

One of the greatest challenges facing the developing world, including small states, is the provision of adequate health care for its citizens in the face of such global pandemics as AIDS, malaria and tuberculosis. One of the most controversial changes in TRIPS was the requirement that signatories provide patent protection for inventions "in all fields of technology," including, most significantly, patent protection for pharmaceuticals. Article

31 of TRIPS mitigated the potential harm in increased drug costs due to rent seeking behavior by patent owners by authorizing the grant of compulsory licenses provided certain procedural guarantees of fairness were followed, and "adequate remuneration" for the patent owner was provided. Unfortunately for small states, such licenses were further limited to providing products "predominantly for the supply of the domestic market." Since a majority of small states lack the capacity to manufacture pharmaceuticals domestically, the practical effect of this limitation was to eliminate any ability for small states to secure its drug needs through compulsory licenses.

Last August, in a "Decision" by the General Council of TRIPS, these limitations were set aside. Least developed members who are presumed to lack sufficient domestic manufacturing capacities in the pharmaceutical sector, and developing countries who provide sufficient evidence of lack of manufacturing capacity, upon notification to the Council, may import patented pharmaceutical products under a compulsory license for domestic consumption. The "Decision" further allows eligible exporting member countries, upon notification, to export patented pharmaceuticals under a compulsory license to meet the domestic needs of such notified countries. In order to ensure that imported products are used for the public health purposes underlying their importation, and are not diverted to other countries or used for other purposes, the Decision obligates members to provide "effective legal means to prevent the importation into, and sale in, their territories of products produced under the system set out in [the] Decision and diverted to the their markets inconsistently with its provisions." Among the techniques required to be employed are special packaging, labeling and other methods for distinguishing products produced under a compulsory license under the provisions of the Decision. The Decision still requires that the patent owner receive adequate remuneration for such products, although such remuneration can be made either by the exporting or importing country. It also states that "Members recognize the desirability of promoting the transfer of technology and capacity building in the pharmaceutical sector. … Members undertake to cooperate in paying special attention to the transfer of technology and capacity building in the pharmaceutical sector…"

The elimination of the Article 31 limitation on compulsory licenses for the sole purpose of meeting the needs of the domestic market certainly responds to the needs of small states to obtain more readily affordable pharmaceuticals. The "Decision" however does not go far enough in addressing the capacity building issues for these states, not merely in the pharmaceutical sector, but in all technological sectors. Its "recognition" of the need for technology transfer continues the hortatory nature of technology transfer obligations under TRIPS while providing little incentive for developed countries to assist in such transfer. Since to date no importing or exporting country is listed by the Council on their notification website, it is too soon to tell how effective this proposed "solution" will be in combating the high cost of pharmaceuticals for developing countries, including small states. The Decision, however can be seen as part of a broader trend toward a recognition that the interests of less developed countries must be dealt with in a more even handed manner.

In order for small states to take advantage of the opportunities for commercial and industrial growth and development which intellectual property protection may offer, both they and the rest of the international community must reject old truisms about small states. As small states begin more consistently to approach intellectual property protection from a proactive position, they will be able to better advocate for the international standards they need to meet their own special needs and expectations. Such developments can only help bring the reality of a more equitable trading system closer to fruition.

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