From BRICS to MINT: Lessons in patent protection for Nigeria with focus on compulsory licensing under the WTO trade regime

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Master’s thesis
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Date: 28/04/2017
## Abstract

**UNIVERSITY OF EASTERN FINLAND**

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**Author**

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**Name of the Thesis**

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**Abstract**

Given the need for modern day states to foster innovation and the necessity of a general transition from a traditional economy to knowledge based economy, this study will highlight developmental challenges to be faced by large developing countries particularly in patent protection as well as innovation and how that affects the trajectory of the growth of the economy. The focal point of this study will be on the next bloc of heralded developing countries, nicknamed the MINT group, with emphasis on Nigeria. The focus on compulsory licenses sheds light for developing countries on how access to cheap medicines may be achieved by taking advantage of the discretions allowed by the Doha Declaration.

As result of this research, this study will show how developing countries such as Nigeria can through rule of law and tactical international economic diplomacy adopt a conservative IP regime which favors minimalism within the bounds of international obligations namely the WTO and TRIPS Agreement, until its national objectives are met. One of the key conclusions in this research based on WTO case law, affirms WTO member state’s latitude to legislate innovatively for patent protection provided that minimum standards are met. This would be an important tool in achieving an important component of Nigeria’s current national development plans in transitioning from a traditional economy to a knowledge based economy. Overall research conclusions will be formed via the application of lessons learned from fellow developing countries from the BRICS bloc of countries and learning experiences from the global South. Whereby adhering to the rule of law and skillful diplomacy can be a veritable tool in international trade negotiations and maximizing the benefits of belonging to an international trade regime such as the WTO.

**Key words:** TRIPS Agreement, developing countries, international trade, patent protection, MINT, BRICS
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21 U.S.C Section 355(j)


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<th>Full Form</th>
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<td>AEC</td>
<td>African Economic Community</td>
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<tr>
<td>ARIPO</td>
<td>African Regional Industrial Property Organization</td>
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<tr>
<td>BRICS</td>
<td>Brazil Russia, India, China, South Africa</td>
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<tr>
<td>DSB</td>
<td>Dispute Settlement Body</td>
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<td>DSU</td>
<td>Dispute Settlement Understanding</td>
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<td>ERGP</td>
<td>Economic Recovery and Growth Plan</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>GATT</td>
<td>General Agreement on Trade and Tariffs</td>
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<td>GI</td>
<td>Geographical Indications</td>
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<tr>
<td>HIV/AIDS</td>
<td>Human Immunodeficiency Virus and Acquired Immune Deficiency Virus</td>
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<tr>
<td>ICT</td>
<td>Information and Communications Technology</td>
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<tr>
<td>IP</td>
<td>Intellectual Property</td>
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<tr>
<td>MINT</td>
<td>Mexico, Indonesia, Nigeria, Turkey</td>
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<tr>
<td>RTA</td>
<td>Regional Trade Agreement</td>
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<td>TRIPS</td>
<td>Trade Related Aspects of Intellectual Property Rights</td>
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<tr>
<td>UNCSTD</td>
<td>The United Nations Commission on Science and Technology for Development</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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Chapter 1: Intellectual property issues in international trade for MINT economies

1.1 Introduction:

The tale of how economies in transition\(^1\), which are the subjects of our discourse, acquired their acronym began over a decade ago, in 2001, when an economist named Jim O’Neil working with the investment bank Goldman Sachs was credited with coining the term BRIC, which is an acronym for Brazil, Russia, India, and China. South Africa was later added to make the full acronym BRICS.\(^2\) These blocs of countries were heralded as potential powerhouses of the world economy, to join the United States and Japan as among the top ten economies in the world. It is important to note that the coinage for the acronym and its subsequent popularity in parlance is related to the need for investors in the financial investment world to take notice of future potentials of the chosen countries in the acronym. China for one, fulfilled this promise with double digit growth rates between 2003 and 2008.\(^3\)

In 2014, the same economist coined another term. This time, it was the MINT bloc of countries, and the acronym stood for Mexico, Indonesia, Nigeria, and Turkey. What these group of countries share in common apart from having very large populations, is also their inner demographics, as they have an increasing number of people eligible to work relative to those not working.\(^4\) In addition, what attributes these blocs of countries share in common is their geographical location, which can have a positive impact on a nation’s trade. Indonesia is situated in the heart of southeast Asia right next door to economic powerhouse China, then Mexico benefits from its proximity to the USA, Turkey is planted firmly between West and East Europe, and Nigeria is the economic giant of Africa in addition to being a buoyant illustration of a rising African continent\(^5\).

\(^1\) Consisting of the BRICS and MINT countries
\(^2\) Online Forbes source (Available at) http://www.forbes.com/sites/chriswright/2014/01/06/after-the-brics-the-mints-catchy-acronym-but-can-you-make-any-money-from-it/#51a833ea4ba9 accessed on 12/11/16 at 12:30pm
\(^3\) Online BBC source (Available at) http://www.bbc.com/news/magazine-25548060 accessed on 12/11/16 at 12:44pm
\(^4\) Ibid
\(^5\) Ibid
Although generic groupings of countries are not always ideal when the countries in question are intrinsically different, they can prove useful. Long term ramifications for these groupings are important as they can serve as a renewed boost to spark the bloc’s various national government’s impetus to further develop their economies. At the time of Nigeria’s inclusion in the MINT bloc in 2014, it was undergoing a rebasing of its economy, and subsequently overtook South Africa as Africa’s largest economy. There was also an expectation that the association with the bloc would spur Nigeria into joining the G20. That hasn’t happened yet, but Nigeria is firmly on the track towards further developing its economy and fulfilling its potential as a member of the MINT if it learns its lessons from the travails of the BRICS. This is especially pertaining to patent protection and intellectual property rights which is the focus of this thesis.

The TRIPS agreement has proven to be one of the major issues in the WTO amongst developing countries and developed countries. The BRICS and the MINT are currently categorized as developing countries. To an extent, the BRICS especially China and India, have had to face more trade dispute settlement relating to patent protection and copyright piracy. Nigeria would have to take primers on what awaits them on their quest to further industrialize their economy and adopt the tag ‘developed country’.

1.2 Gradual Transition from a Traditional Economy to a Knowledge-Based Economy

A knowledge based economy is basically an economy whereby knowledge and ideas is a key factor of prosperity and economic growth. Finland is an example of a knowledge-based economy. For this reason, patent protection is important in a developing country so that innovation and technologies developed in a country can be protected and benefitted from. Therefore, the utility in developing minimum standard of patent protection requirements is in actuality of important advantage to a developing country.

Since the advent of the internet, along with the diffusion of modern and efficient information and communication technologies, the world economy has become more competitive as well as interdependent. Consequently, due to globalization, the battle for economic survival has made it essential to stimulate innovation and to have knowledge creation and use as a focal point in long-
term developmental strategies with the end goal of reducing dependence on human resources and finite natural resources.

Knowledge-based economies have been arguably differentiated from Traditional economies by the following key differences:

- The economics is not of scarcity, but rather of abundance. Unlike most resources that deplete when used, information and knowledge can be shared and grow through application.
- The effect of location is diminished. Using appropriate technology and methods, virtual marketplaces and virtual organizations can be created that offer benefits of speed and agility, of round the clock operation and of global reach.
- Laws, barriers and taxes are difficult to apply on a solely national basis. Knowledge and information ‘leak’ to where demand is highest and the barriers are lowest.
- Knowledge enhanced products or services can command price premiums over comparable products with low embedded or knowledge intensity.
- Pricing and value depends heavily on context. Thus, the same information or knowledge can have vastly different value to different people at different times.
- Knowledge when locked into systems or processes has higher inherent value that when it can ‘walk out of the door’ in people’s heads.
- Human capital competencies are a key component of value in a knowledge based company, yet few companies report competency levels in annual reports. In contrast, downsizing is often seen as a positive ‘cost cutting’ measure.  

The United Nations Commission on Science and Technology for Development report (UNCSTD, 1997) concluded that for developing countries to successfully integrate ICTS and sustainable development in order to participate in the knowledge economy, they need to create national strategies and then intervene collectively and strategically. Ideally, such collective

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intervention suggested would be in the development of effective national ICT policies that support the new regulatory framework, promote the selected knowledge production, and use of ICTs and harness their organizational changes to be in line with Millennium Development Goals.\(^8\)

All in all, an active strategy must be implemented to midwife the gradual transition from a traditional economy to a knowledge-based economy, although the optimum economic environment and legal protection must be fostered for the innovation that drives this transition to be completed.

1.3 **WTO and TRIPS:**

Upon joining the WTO, members are bound and have agreed to its agreements\(^9\) and accompanied annexures namely the TRIPS Agreement and the Dispute Settlement Understanding (DSU) amongst others. WTO members have agreed that if they believe fellow members are in violation of trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally and this means abiding by agreed procedures (DSU) and respecting judgements, essentially of the Dispute Settlement Board (DSB)\(^10\), which is the WTO organ responsible for adjudication of disputes.\(^11\)

Basically, a dispute arises when one member country adopts a trade policy measure or takes some action that one or more fellow-WTO members considers to be breaking the WTO Agreements, or to be a failure to live up to obligations.\(^12\) Finally, a third group of countries not being party to the initial complaint can declare that they have an interest in the case and can enjoy some rights. This process makes the WTO more cohesive because it follows clearly defined rules. After going through the dispute settlement process, the Dispute Settlement Board adopts the final report of the panel on a certain case, and the DSB is also in charge of compliance

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\(^8\) Ibid UNCSTD

\(^9\) The General Agreements on Tariffs and Trade (the GATT)

\(^10\) Article 2.1 of the Dispute Settlement Understanding, WTO annexure

\(^11\) Settling Disputes: A Unique Contribution, World Trade Organization website (Available at) https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm accessed 4pm on 26th February 2017

\(^12\) Ibid 12 Settling Disputes
and implementation.\textsuperscript{13} If the target of complaint violates the terms of the judgement as per implementing the final judgement of the Body, then the complaining side may approach the DSB to seek retaliation for example raising import duties on goods from the other country in order for them to comply. Ideally, the sector to be retaliated against should be the sector from which the original claim originated from. However, if this is deemed ineffective, then it could be from a different sector. Nonetheless, the goal of the dispute settlement process is to settle the case, and the DSB monitors the adopted rulings until it is implemented and/or the parties reach an agreement which can be monitored.

Looking at the WTO database of dispute settlement adjudications\textsuperscript{14}, a glance at the list of countries that have engaged in dispute settlement under the BRICS and MINT acronym is very telling:

Figure 1: The BRICS bloc

<table>
<thead>
<tr>
<th>Country</th>
<th>TOTAL NUMBER OF CASES PARTICIPATED IN</th>
<th>CASES AS A COMPLAINANT</th>
<th>CASES AS A RESPONDE NT</th>
<th>CASES AS A THIRD PARTY/OBSERV ER</th>
<th>INTELLECTUAL PROPERTY CASES</th>
</tr>
</thead>
<tbody>
<tr>
<td>BRAZIL</td>
<td>148</td>
<td>29</td>
<td>16</td>
<td>103</td>
<td>3</td>
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<tr>
<td>RUSSIA</td>
<td>40</td>
<td>4</td>
<td>7</td>
<td>29</td>
<td>0</td>
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<tr>
<td>INDIA</td>
<td>165</td>
<td>23</td>
<td>23</td>
<td>119</td>
<td>3</td>
</tr>
<tr>
<td>CHINA</td>
<td>183</td>
<td>13</td>
<td>37</td>
<td>133</td>
<td>3</td>
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<tr>
<td>SOUTH AFRICA</td>
<td>12</td>
<td>0</td>
<td>5</td>
<td>7</td>
<td>0</td>
</tr>
</tbody>
</table>

\textsuperscript{13} Article 21 of the Dispute Settlement Understanding. WTO annexure
\textsuperscript{14} (Available at) https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm accessed on 11/11/16 at 10:00 am on 11/11/16
Studying the States in the BRICS bloc, it is apparent that all the States have engaged in many trade disputes at the WTO, with China having engaged in the most trade disputes, followed by India. This shows how actively they have been in trading with other nations and the conflicts that arise when a nation’s attempts to boost its economy, industry, and provide essential goods for its citizens is tested by divergent interests from other nations.

On the other side of the fence is the MINT bloc countries, an appraisal of their trade dispute cases:

Figure 2: The MINT bloc

<table>
<thead>
<tr>
<th>Country</th>
<th>TOTAL NUMBER OF CASES PARTICIPATED IN</th>
<th>CASES AS A COMPLAINANT</th>
<th>CASES AS A RESPONDENT</th>
<th>CASES AS A THIRD PARTY/OBSERVER</th>
<th>INTELLECTUAL PROPERTY CASES</th>
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<td>TURKEY</td>
<td>83</td>
<td>3</td>
<td>9</td>
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</tbody>
</table>
Contrasting the two blocs, it is evident that the BRICS bloc of countries have been more active in resolving trade disputes, with China and India leading the way. MINTS bloc of countries has engaged in significantly fewer trade disputes, with Mexico having engaged in a significant amount of trade dispute settlement, followed by Indonesia, and then Turkey which has engaged more as an observer than as a litigant. Nigeria has participated in zero trade disputes as a litigant and in six cases as third party/observer. Now this should not mean that Nigeria does not have burgeoning trade with other countries, rather it signifies the lack of innovation in Nigeria as a technological manufacturing hub in Sub-Saharan Africa.

Manufacturing prowess is linked to patent innovation, and unfortunately in the Nigerian environment the right ingredients are not optimal for inventors and technocrats to thrive. It is very important for there to be a coherent national strategy towards keying into intellectual property development of industries. One of the few industries that has been nurtured over the years by private entrepreneurs, is Nollywood. The third largest film industry in the world has thrived over the years to reach this apex and Nigerian regulators would do well to enhance the intellectual property of its industry, and adapt the successful trends it unleashed to other sectors. The Nollywood scene would be further discussed in subsequent chapters.

In my view, once a country has begun to innovate and become a noticeable player in the patent and technological advancement of their industries, other countries begin to pay attention and may seek to curtail any gains that would be against the aggrieved country’s interest. The MINT bloc of countries and especially Nigeria can take for example, India’s efforts in providing for the health of its citizens.

1.4 US-India WTO Panel

India in the mid 90’s went through a tough dispute settlement with the U.S.A. The importance of US-India WTO Panel15 case relates to the fact that prior to the ratification of the TRIPS Agreement, India’s domestic pharmaceutical market flourished in the absence of patents. Therefore, the accession to the Agreement brought upon India a responsibility to codify minimum patent protection. The case relays how India given the final unfavorable judgement
handed to them, was able reconstruct their national laws using the discretion allowed under the WTO framework.

The U.S.A was the complainant while India was the respondent and the case was launched in 1996. Interpretation of the TRIPS agreement was unclear in the early days of the establishment of the WTO and this case was one of the early tests of the efficacy of the TRIPS agreement. At issue was India’s patent protection for pharmaceutical and agricultural chemical products, as provided under TRIPS Art 27.

Article 27.1 of the TRIPS Agreement provides generally:

‘Subject to the provisions of paragraph 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.’

What triggered the complaint was India’s measure where a mailbox rule was instituted under which patent applications for pharmaceutical and agricultural chemical products could be filed and secondly, the mechanism for granting exclusive marketing rights to such products. Basically, the U.S was contending that India’s patent registration mechanism did not conform with the specifications of the TRIPS Agreement, while India asserted that its laws adequately provided for filing of such patents. India further argued that the sole function of Article 70.8(a) of the TRIPS Agreement is to ensure that the Member concerned receives patent applications as from 1 January 1995 and maintains a record of them on the basis of which patent protection can be granted as from 2005.

The Dispute Settlement Body, which is the final body of adjudication in the WTO, in this case adopted the Appellate Body report and the panel report as modified by the Appellate Body report. The Appellate Body report upheld the Panel’s conclusions that India has not complied with its obligations under Article 70.8(a) to establish “a means” that adequately preserves

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16 Establishment of the World Trade Organization
17 India - Patent Protection for Pharmaceutical and Agricultural Chemical Products WT/DS50/AB/R (page 3, paragraph 5)
novelty and priority in respect of applications for product patents in respect of pharmaceutical and agricultural chemical inventions during the transitional periods provided for in Article 65 of the TRIPS Agreement. The Appellate Body concluded that India’s “administrative instructions” do not provide a sound legal basis to preserve novelty of inventions and priority of applications as of the relevant filing and priority dates. The Appellate Body agreed with the Panel’s conclusion that India’s “administrative instructions” for receiving mailbox applications are inconsistent with Article 70.8(a) of the TRIPS Agreement.18

On the issue of exclusive marketing rights, the Appellate Body also ruled against India. Given the fact that India had conceded the need to enact legislation to conform with Article 70.9 of the TRIPS Agreement, which it had failed to do. As such, a ready mechanism for the grant of exclusive marketing rights effective as from the date of entry into force of the WTO Agreement was lacking, therefore constituting a violation of Article 70.9 of the TRIPS Agreement.19

The Appellate Body’s final conclusions requested that India brings its legal regime for patent protection of pharmaceutical and agricultural products into conformity with India’s obligations under Articles 70.8 (filing of patent application) and 70.9 (exclusive marketing rights) of the TRIPS Agreement.20

Implications of the ruling were far reaching. The WTO Appellate Body’s decision in the India-Mailbox case was a critical step in affirming the WTO-consistency of pursuing national and regional policies which take advantage of the absence of strict harmonization of IPRs standards at the worldwide level.21 It has been suggested by scholars such as Reichman22 that the India-Mailbox decision suggests that the WTO will accord substantial deference to national and regional rules which manifest good faith compliance with the basic standards of the TRIPS Agreement. Which strengthens my premise that Nigeria through minimum compliance with the TRIPS Agreement could develop and foster an enabling environment for technological inventions and industrial growth.

18 Ibid page 26 paragraph 71
19 Ibid page 30 paragraph 83
20 Ibid page 34 paragraph 98
22 Ibid Reichman (1998)
This illustrates how a country could rejig its laws and implement the basic provisions of the TRIPS Agreement. This is how India has managed to become the largest generic drug maker in the world. Indian law has a provision that fosters regulatory review of generic applications during the patent term to ensure generics can quickly enter the market upon expiry.\textsuperscript{23}

1.5 The Bolar Exemption

Under patent law, there exists a research exemption to the rights conferred by patent, which is especially correlated to drugs, meaning that tests and research conducted in preparation for regulatory approval do not constitute infringement of patent rights. This is exemption is especially provided for in the international framework under the WTO, where Article 30 of the TRIPS Agreements states:

\textit{\'Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties\'}

Furthermore, this exemption gained more judicial recognition in the Ibandronic acid/Hoffmann-La Roche\textsuperscript{24} case, where the Board of Appeal of the European Patent Office made a decision stating that “The principle behind the Bolar exemption is that generic companies should be in a position to take the necessary preparatory measures in order to be able to enter the market without delay once patent protection expires”. This exemption is also statutory in the United States under the Hatch-Waxman Act\textsuperscript{25}, a United States of America Federal Law and is informally called the Hatch-Waxman exemption. In Canada, this exemption is known as the Bolar Provision, and it was named after the United States case, \textit{Roche Products v. Bolar}


\textsuperscript{24} Decision T 0223/11 dated 22 May 2012 of the Board of Appeal 3.3.02 of the European Patent Office, reasons 2, fifth paragraph.

\textsuperscript{25} 21 U.S.C Section 355(j) see also https://www.fda.gov/NewsEvents/Testimony/ucm115033.htm

In 2002, the Indian government amended its Patent Act and a new section 107A was introduced as an effort by the Government to continue the supply of life saving drugs at a reasonable price.

This amendment is popularly known as the Bolar Exemption in India. This was in response to various pressures from a variety of stakeholders, including domestic generic medicine producers, domestic research and development community, foreign multinational pharmaceutical companies, civil society groups concerned with access to medicines and intellectual property lawyers. The bill was passed by the Government to meet the mandates posed by ratification of TRIPS, and also it essentially helped the generic manufacturers, who were exploring all possible means to help mitigate the consequences of an adverse pharmaceutical patent regime.

Section 107A:

‘Certain Acts not to be considered as infringement- For purposes of this Act:

a) any act of making, constructing, using or selling a patented invention solely for uses reasonably relating to the development and submission of information required under any law for the time being in force, in India, or in a country other than India that regulates the manufacture, construction, use or sale of any product.’

In other words, an activity is exempt from infringement if it is relevant to obtain regulatory approval to sell a drug not only in India, but in any other country. Crucially, the inclusion of other countries permits Indian companies to continue to be exempt from infringement when

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27 Section 107A of the Indian Patents Act, 1970 (Patents Act)
28 (Available at) [http://lawmantra.co.in/critical-evaluation-of-bolar-exemption-in-indian-patent-law/#_ftn26](http://lawmantra.co.in/critical-evaluation-of-bolar-exemption-in-indian-patent-law/#_ftn26) accessed 21/1/17 at 9.15am
preparing an application for approval in the US market where their products comprise a substantial proportion of generic drugs.\textsuperscript{31}

This Bolar Exemption under Indian Law is one of the many exceptions to a patentee’s exclusive rights provided under Article 30 of the TRIPS. The Bolar Exemption thus then is in consonance with TRIPS by Article 30 which allows the member nations to impose certain restrictions on exclusive patent right of a patentee.\textsuperscript{32} The section served as an effective way to tackle the need for cheap medicines and later on, the 2005 Act expanded this provision to bring even the act of ‘importing’ within its ambit\textsuperscript{33}. Since then the Act has not been amended.

The Indian law is like the Canadian law providing for Bolar exemption or perhaps the Indian law is borrowed from Canada,\textsuperscript{34} apart from the fact that the Canadian law did not create an exception for imports. The Canadian law was challenged by the European Union through a complaint with the WTO and the WTO dispute panel upheld the use of the Bolar exception conforming to TRIPS.\textsuperscript{35} Although India’s provision is slightly broader, the overall similarity and strong support for a regulatory exception suggests this provision is consistent with TRIPS. Indeed, the Panel noted that whether an exception was limited was not a function of how many of the patent owner’s usual rights were impacted, but rather the exception was limited in that the activity was confined to conduct necessary to comply with regulatory approval process.\textsuperscript{36} This also applies to the Indian law.\textsuperscript{37}

However, a contrast could be made regarding this provision when the issue of commercial purposes versus public health or research purposes is made. In this regard, the idea can be borrowed from the United States decision where Court disallowed the defense of Bolar exemption where the sole motive was to earn profit and not to satisfy curiosity or intellectual

\textsuperscript{33} The Patents (Amendment) Act, 2005 (India)
\textsuperscript{34} Ibid lawmantra web page
\textsuperscript{35} Canada – Patent Protection of Pharmaceutical Products WT/DS114/R
\textsuperscript{36} Ibid
\textsuperscript{37} Ibid Ho, Cynthia M. (2011)
demand,\textsuperscript{38} meaning that public health, and other measures necessary for public protection taken by the National government are exceptions to the patentee laws under Section 30 of the TRIPS.

The Doha Declaration\textsuperscript{39} unequivocally states at the outset that TRIPS Agreement does not and should not, prevent Members from taking measures to protect public health. India being one of the developing countries and the highest producer of generic drugs around the world, the law of Bolar exemption can be largely justified by way of the Doha Declaration and the persistent need for providing cheaper medicines,\textsuperscript{40} which leads us to a closer examination of the history of the Doha Declaration and its importance for socio-economic development for a developing country such as Nigeria.

1.6 The Doha Declaration

The Doha Declarations are decisions in a document issued at the end of the WTO Ministerial Conference in Doha, Qatar, on November 21, 2001. One of the declarations was the Doha Ministerial Declaration mandate for Agriculture which called for comprehensive talks on market access, export subsidies and domestic support. The other declaration which is rather well known is the Doha Declaration on the TRIPS Agreement and Public Health, which gave member state governments flexibility in using the discretion allowed under the WTO framework for better access to medicines for their respective citizens. The declaration ensured that Member States could prioritize public health beyond all other exigencies.

The history of the document emanated from the difficulties raised particularly by developing countries about the implementation of the current WTO Agreements. The Ministerial Conference in Doha sought to clarify these issues and agreed to undertake new rounds of multilateral negotiations.

\textsuperscript{38} Madey v. Duke University, 307 F.3d 1351
\textsuperscript{39} The Doha Declaration on TRIPS Agreement and Public Health, November 2001 (Available at): https://www.wto.org/english/tratop_e/minist_e/min01_e/mindecl_trips_e.pdf
\textsuperscript{40} Ibid lawmantra web page
With the authority given to the Ministerial Conference by the WTO Agreement it can be argued that decisions reached at the Ministerial Conference carry political power, coercive power and diplomatic power, because it was a document negotiated by all Member States of the WTO. Therefore, decisions reached at the Ministerial Conferences and the subsequent Declarations though not a legal document, sets a framework on how implementation of the WTO Agreements are to be met by the various Member states. Going by previous Ministerial Conferences in Singapore and Geneva, Declarations were always the outcome. From the history of the Ministerial Conferences, it can be argued that this organ of the WTO is one of the most powerful as it sets agenda for the WTO organization to follow and because of the consensus decision making design, its Declarations have coercive powers.

The main purpose of the Doha Declaration centered on settling the various issues Member States had on the interpretation and on the implementation of the TRIPS Agreement. On one part, the developing countries bloc led the charge insisting that the TRIPS Agreement does not limit their sovereignty to address crisis such as HIV/AIDS. They view compulsory and parallel licensing as permissible objectives that do not violate the TRIPS Agreement. On the other hand, the developed countries, particularly United States and Switzerland, have argued that the only flexibility in the TRIPS Agreement is the staggered implementation periods developing countries enjoy under the Agreement. Under this staggered implementation schedule, developing countries have five years and least developed countries have ten years from January 1, 1996, to fully implement the Agreement.

Currently as of 23 January 2017, the TRIPS protocol for amendment of the TRIPS Agreement has been ratified, thereby formalizing an existing waiver aimed at allowing the organization’s poorest members to have easier access to cheaper, generic versions of medicines produced abroad. This protocol was conclusively confirmed after the required amount of WTO Members had tendered their ratifications, and under WTO rules, this threshold requires two-thirds of the

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42 Ibid
43 Ibid
44 International Centre for Trade and Sustainable Development (Available at) http://www.ictsd.org/bridges-news/bridges-news/wto-members-make-permanent-ip-rule-upgrade-to-improve-access-to-medicines accessed on 18 March 2017 at 9pm
organization’s membership. The development of this waiver was set up as from 2003, with WTO Members working to transform this waiver into the above mentioned permanent amendment as from 2005 and was named after the Paragraph 6 decision of the Doha Declaration. This TRIPS protocol is meant to ensure that poorer countries which may lack the capabilities to produce their own medicines themselves can buy these generics from foreign markets, rather than being limited only to what can be manufactured domestically.

In retrospect, the November 2001 Doha Declaration on TRIPS and Public Health (“the Doha Declaration”) was, in part, necessitated by these conflicting broad views of the TRIPS Agreement. The WTO’s dispute settlement bodies at that point had not addressed these divergent viewpoints, because in the Japan-Taxes Alcoholic Beverages case, the WTO Appellate Body Report stated that WTO panel or appellate body reports “are not binding, except with respect to resolving the particular dispute between the parties to that dispute”, although such reports could provide guidance to the WTO. In addition, the legal effect of a unilateral interpretation of a treaty made by one of the contracting states is not binding upon other contracting states.

At this juncture, given the diverging viewpoints, it must be pointed out that at the time the Doha Declaration was crucial in Member States reaching a consensus on modalities for interpreting the TRIPS Agreement. Some authors are of the viewpoint that the Doha Declaration should now be regarded as an interpretive element in the interpretation of the TRIPS Agreement under customary international law.

The most important part of the Doha Declaration relates with the affirmation of the flexibility of TRIPS Member States to use the discretion allowed under the WTO framework patent rights for better access to medicines for their respective citizens:

In Paragraph 2 of the Doha Declaration it states, ‘we stress the need for the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to be part of the wider national and international action to address these problems.’

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45 Ibid ICTSD
46 Ibid ICTSD
47 Ibid Gathi
49 Ibid Gathii, James Thuo, 2002
In Paragraph 4 of the Doha Declaration it states ‘the TRIPS Agreement does not and should not prevent Members from taking measure to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Member’s right to protect public health and, in particular, to promote access to medicines for all.

In this connection, we affirm the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.’

In Paragraph 5 of the Doha Declaration it states ‘Accordingly and in light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include:

a. In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, its objectives and principles.

b. Each Member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted.

c. Each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.

d. The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such EXHAUSTION WITHOUT CHALLENGE (emphasis added), subject to the MFN and national treatment provisions of Articles 3 and 4.’

In Paragraph 6 of the Doha Declaration it states ‘We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.’
From the foregoing lifted paragraphs from the Doha Declaration it is apparent that Member State
governments are given framework option on the manner that steps could be taken to protect
public health of their citizens and access cheaper medicine. What makes it so important is that
the Member states managed to reach a consensus on how they could best counteract the
pandemic raging at the time which was HIV/AIDS and provide Member States mechanisms to
develop or acquire medicines to treat citizens of their respective states. Looking back, crucially
with the Doha Declaration, groundwork was laid on how important the Ministerial Conference
was to the WTO Organization because they displayed their constitutional authority to set agenda
for how the global trade functions both formally and informally.

Problems that arose with the Doha Declaration, start from the basis of whether the document is a
legal instrument, thereby bringing another discussion on whether the obligations are binding or
non-binding. Some States including United States have had the opinion that the Doha
Declaration was a political declaration with no legal authority. From this point of view, it was
not yet uhuru for countries seeking to facilitate easier and cheaper medicine. This denial by
mostly western governments results from the conceptualization of certain claims as political,
social, or public, so as a result they fall outside and cannot disturb the private commercial or
contractual character of trade, financial, or banking regimes.\textsuperscript{50} These kinds of issues are typical
where issues between developed and developing countries are examined through a commercial
lens.

On the other side of the argument of putting the Doha Declaration on the spectrum of legal
obligation, it should be considered that Article 31(3a) of the Vienna Convention on the Law of
the Treaties states that “any subsequent agreement between the parties regarding the
interpretation of the treaty or the application of its provisions” shall be considered together with
its context in the interpretation of a treaty.\textsuperscript{51} Article 31 (3a) is useful to establish the intent of the
parties to a treaty where the text, context, object and purpose, and good faith are incapable of
resolving ambiguities.\textsuperscript{52} Subsequent agreements reflect the intent of the parties and can be used
to interpret the actual terms of the treaty.\textsuperscript{53}

\textsuperscript{50} Ibid
\textsuperscript{51} Ibid
\textsuperscript{52} Ibid
\textsuperscript{53} Ibid
Fortunately for developing countries, the waiver has been made permanent with the ratification of the TRIPS protocol. This permanently gives legal clarity to poorer developing countries of WTO seeking alternative access to cheaper medicines for its citizens.

Conclusively, the Doha Declaration succeeded in reaching a consensus for Member States to use the discretion allowed on patent rights to be able to manufacture or access medicine to address their public health crises. Article 7 and 8 of the TRIPS Agreement give due consideration to issues like protection of public health and nutrition and do not merely serve the interests of the owners of intellectual property.\(^{54}\)

All in all, these examples serve to illustrate that Nigeria can learn from the travails of India when they seek to accelerate their rapid rise to becoming an industrial giant of Africa and fulfill the potential heralded as being part of the MINT bloc of countries. Devising investor and local entrepreneur friendly patent law regime, which are necessary for the various industries to prosper is a must. Taking advantage of the Doha Declaration and enacting legislation that are TRIPS minimum standard, would be optimum in achieving the kind of success India has had especially in the pharmaceutical field. Developing countries like Nigeria, that adopt pro-competitive intellectual property related strategies may move faster along the developmental technology curve than countries that follow a more static script.

Chapter 2: Present day intellectual property protection in Nigeria

2.1 History

The history of intellectual property law in Nigeria just like majority of Nigeria’s laws, finds its roots in the received English Laws and practices in Nigeria. Patents and Design Law like Copyrights Law developed from two sources, the first was Common Law of England and The Doctrines of Equity. The second was statutes of the British parliament generally known as Statutes of General Application enacted as at 1st January 1900. The other statutes enacted after that date could be extended to apply in Nigeria by an enabling Order-in-Council.55

The amalgamation of the Northern and Southern Protectorate in 1914 by the British colonialists gave rise to the patent enactment for the whole country of Nigeria through the Patent Ordinance of 1916. This enactment was later renamed Registration of United Kingdom Patents Ordinance Cap. 182 of 1958, then the Registration of United Kingdom Patents Act and the Patents Rights (limitation) Decree 1968 in which the patent protection was obtainable only by registration for a United Kingdom Patent before such a registration can become valid. The United Kingdom Designs (Protection) Act Cap 204 provided for Designs duly registered in the United Kingdom, conferring rights and privileges to any proprietor of a design registered in Nigeria as obtained in the United Kingdom before 197156.

By 1971, the Patents and Designs Act Cap. 344 was enacted for the Country, 11 years post-independence. Through the Act, the government established a Registry in the commercial law division of the then Federal Ministry of Commerce and Tourism in Lagos, vesting the patent Registrar with wide powers about applications for grants of patents and the administration of the patents law generally.57

55 Ocheme, P (2000), Law and Practice of Copyright in Nigeria, ABU press, Zaria. Pg 8-9
2.2 Present day

Today in Nigeria, the patent law is governed by the Patents and Designs Act 1990 (PDA), Chapter 344, Laws of the Federation of Nigeria 1990. This Patents and Design Act has about thirty-three sections which are almost evenly divided. The first part of the Patents and Design Act contains sections 1 to 11 which contends with patents; the second part consists of sections 12 to 22 and deals with designs; while sections 23 to 33 focuses on issues general to both patents and designs and the technical details applicable to both; then the first schedule deals with compulsory licenses and use of patents for service of government agencies; finally, the second schedule deals with transitional and saving provisions.

An invention or design must, in general, fulfill the following conditions to be protected by law: It must be of practical use or relate to manufacture; it must show an element of novelty, that is, some new characteristic which is not known in the body of existing knowledge in its technical field and its subject matter must be accepted as “patentable” under the law.\(^{58}\) Important to note as well is that the Patent and Designs Act places more emphasis on the first to file rather than ascertaining who the true inventor is unlike other patent laws in other climes.\(^{59}\)

A patent is granted by a national patent office such as the patent office at the Ministry of Commerce in Abuja or by a regional office that does the required work for a number of countries, such as the European Patent Office (EPO) and the African Regional Industrial Property Organization (ARIPO). Under these regional systems, an applicant requests protection for the invention in one or more countries which are signatory to agreement, and each country decides as to whether to offer protection within its borders. The WIPO-administered Patent Cooperation Treaty provides for the filing of a single international patent application which has the same effect as national applications filed in the designated countries, so then an applicant seeking protection may file one application and request protection in as many signatory states as needed.\(^{60}\) Rights conferred by Patents and Designs Law extend only to industrial and commercial

\(^{58}\) Ibid Waziri (2011)
\(^{59}\) Sections 2(1) and 14 (1) Patents and Designs Act. Cap. 344 Laws of the Federation of Nigeria 1990
activity on patentable inventions. Although the Act appears to protect and confer extensive rights on the holder of a patent, it concedes certain rights to persons who are not holders of patents, but who, if their right to a particular process or invention is curtailed, would cause untold hardship to them especially in cases with foreign priority element.\textsuperscript{61}

Statistics for a ten-year period (1998-2007) show that local patents constitute 11.7\% of patent applications filed in Nigeria whilst foreign patents accounted for the remaining 88.3\%.\textsuperscript{62}

Emblematic of this disparity is that the IPR practice isn’t as vigorous as it ought to be, and the law practice consists of running errands for foreign and domestic clients in submission of readymade application on behalf of major international corporations. This limits the law practice to just clerical duties, discarding the discourse to deepen advancement in national patent initiatives to just rote concerns. Interests in patents jurisprudence can only be fully engaged when the merits of improving the national interests are keyed into by the national government.

For the most part, the trademarks, patents and design registry (The Registry) is constrained to the clerical responsibilities of overseeing the filing, registration and documentation of both domestic and foreign or convention patents, designs and trademarks with little or no technical expertise, for example, in the areas of patent examination and domain name administration.\textsuperscript{63} Compared to their counterparts elsewhere, the quality of service and professionalism at the Registry leaves a lot to be desired.\textsuperscript{64} A bulk of the Registry’s clientele and registrations (especially those dealing with patents) are foreign priority patents which are processed through the agency of local lawyers.\textsuperscript{65} Partly because of the underdeveloped nature of IP laws and administration, the Registry is hardly proactive in regard to broader issues of IP policy direction for Nigeria.\textsuperscript{66}

\textsuperscript{61} Sections 6(4) and Sections 19 (20) PDA. Cap. 344
\textsuperscript{64} Ibid Oguamanam (2011)
\textsuperscript{65} Ibid Oguamanam (2011)
\textsuperscript{66} Ibid Oguamanam (2011)
2.3 Compulsory licensing in Nigeria

Compulsory licensing is a practical way to prevent abuse of patent rights under the TRIPS Agreement, and it allows governments to authorize the use of patented products without the consent of the holder of the patent right.67 Usually, such an authority may be granted to an agent of the government or to an independent third party. Compulsory patent licenses may be issued to meet the demand for a patented product in a domestic market, to enhance competition by aiding the growth of domestic competitors, or to facilitate the development or establishment of a domestic market.68 Compulsory licensing may also be used to protect the public interest, especially during the public health emergencies, or to act as a safeguard against abuses that might arise from the monopoly rights conferred by patents.69

Compulsory licensing is provided for under the Patents and Design Act in Nigeria, and is geared towards limiting the monopoly of the patent holder in the public’s interest.

Under paragraph 15, schedule 1 of the Patents and Design Act of Nigeria it states:

‘Notwithstanding anything in this Act, where a Minister is satisfied that is in the public interest to do so, he may authorize any person to purchase, make, exercise or vend any patented article or invention for the service of a government agency in the Federal Republic.’

Paragraph 16 goes on to say:

‘The authority of a Minister under Paragraph 15 of this Schedule may be given-

a. Before or after the relevant patent has been granted;

b. Before or after the doing of the acts in respect of which the authority is given;

and

68 Ibid Hestermeyer (2007)
c. To any person whether or not he is authorized directly or indirectly by the patentee to make, use, exercise or vend the relevant article or invention.’

Paragraph 17 concludes in this vein stating:

‘Paragraph 15 and 16 of this Schedule shall have effect so as to exempt-

a. The Government;
b. Any person authorized under those paragraphs;
c. Any supplier of the Government or of any such person; and
d. Any person of any such supplier, from liability for the infringement off any patent relating to the relevant article or invention and from liability to make any payment to the patentee by way of royalty or otherwise.’

Basically, these provisions under the Nigerian allow compulsory licenses to be granted without meeting the negotiation requirement or paying remuneration to the patent holder. That in itself is inconsistent with TRIPS Agreement Article 31. Article 31(b) TRIPS sets reasonable period of time to negotiate a license with the right holder on the basis of reasonable commercial terms, but these conditions can be waived in the event of a national emergency. Then Article 31(f) of TRIPS goes on to stipulates that generic drugs produced under compulsory licensing “must be authorized predominantly for the supply of the domestic market of the Member authorizing such use”. The importance of Paragraph 6 of the Doha Declaration comes to the fore again as it states that WTO members with insufficient or no manufacturing capabilities could face difficulties in making effective use off compulsory licensing under TRIPS. So, then WTO Decision\textsuperscript{70} to set a temporary waiver of Article 31(f) so countries with no existing or weak manufacturing abilities can grant compulsory licensing for export or import of generic drugs is very important. With the recent ratification of the Amendment, this gives legal certainty.

2.3.1 Compulsory licensing in Sub-Saharan Africa and pharmaceutical manufacturing capacity

Importantly, most African Countries lack the necessary pharmaceutical manufacturing capacity to take advantage of this legal mechanism and make effective use of compulsory licensing.\(^{71}\) Among sub-Saharan countries, only South Africa a BRICS member, has a limited primary manufacturing capacity (i.e. it can produce active pharmaceutical ingredients).\(^{72}\) Notably as well is that existing frameworks for compulsory licensing in several African countries are not fully compliant with TRIPS Agreement, but exceptions include countries like Ghana\(^{73}\) and Rwanda\(^{74}\), which have fully implemented into their national law the provisions of international conventions on intellectual property law to which they are signatories.\(^{75}\)

However, multinational pharmaceutical corporations have raised minimal objections to the lack of compliance with the TRIPS Agreement because the necessary infrastructure for aggressive use of compulsory license does not exist in Africa.\(^{76}\) As recently as 2008, 90% of the medicines available in sub-Saharan African countries are imported from outside Africa and 80% of the drugs used to treat human immunodeficiency virus (HIV) infection across the continent were imported.\(^{77}\) Also in 2011, China and India, two BRICS members accounted for over 20% of pharmaceutical imports into Africa.\(^{78}\) Simply put, Nigeria and other sub-Saharan African

\(^{76}\) Ibid Owoeye (2014)
countries are severely dependent on importation of foreign drugs and lack the manufacturing infrastructure nor the political will to begin to utilize the compulsory license, a mechanism, legally available to use for their individual national needs.

2.3.2 Continental or Regional Cooperation in Patent Protection

There are quite a few choices to be had in designating the appropriate strategy for fermenting national manufacturing development. Nigeria could choose to go at it alone by spurring its local manufacturers with enabling environment to incentivize patent innovation, or Nigeria could partner up with regional or continental nation states to pool resources.

Some writers, such as Olasupo Ayodeji Owoeye, have advocated for such an economic alliance believing that it would give Africa a stronger voice in international politics, better economic leverage in international trade and the ability to harness the resources of WTO member states to substantially advance socioeconomic development in the continent. He further states that substantial manufacturing capacity can thus be built in Africa by using the platform of an African Regional Trade Agreement (RTA) to harness existing resources and establish an industry that is owned jointly by the community and managed by an umbrella body, such as the African Union. I would agree with this premise and another option for Nigeria would be to become a full member of African Regional Industrial Property Organization (ARIPO). Bearing in mind that currently, Nigeria only has an observer status at the ARIPO, it would be more beneficial to explore the option of acceding to its protocols and becoming a full member. The benefits would include complementing the national industrial property system of its Member States, and acceding to such protocols\textsuperscript{79} under ARIPO whose benefits aim towards greater protection of traditional knowledge and expressions of folklore and the protection of their rights to those intellectual properties as well as ensuring an equitable balance between the owners and users of the items so protected.

\textsuperscript{79} The Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore was adopted by a diplomatic conference of ARIPO on August 9, 2010, held in Swakopmund, Namibia
With Africa’s strong economic growth in recent years, belief that Africa’s developmental issues would restrict it from increasing manufacturing capacity is a fallacy. According to the International Monetary Fund’s world economic outlook for 2012, Africa is recording strong economic growth compared with other parts of the world.\(^{80}\) Capitalizing on the growth of the continent, Nigeria, in joining the African Union can make utilization of this kind of economic coalition through creation of a Regional Trade Agreement (RTA), thereby bringing African countries together to build a strong manufacturing capacity in the pharmaceutical sector for starters. This would ensure that the pooling of resources is geared towards stimulating other areas of the manufacturing in each nation state’s economy.

Theoretically, the development of significant manufacturing capacity in the pharmaceutical sector, coupled with the transitional provisions in the TRIPS Agreement that enable the least developed countries to derogate from obligations under the agreement until 2021, will enable Africa to take full advantage of compulsory licensing and generic manufacturing on the continent, pending the expiration of the transitional arrangement.\(^{81}\) This is the advantage in having countries pool resources together because under the WTO trade regime, RTA’s have the authority to set trading and regulatory arrangements for its members.

A patent pool is constituted when two or more patent owners put their patents together in such a way that authorization for use can be granted for all patents in the pool as a single package.\(^{82}\) For the jurist, Olasupo Ayodeji Owoeye, the formation of an African RTA presently will not only facilitate the eventual birthing of an African Economic Community (AEC) but can also enable the continent to obtain compulsory licenses from patent pools to meet its public health demands. He further opines that through a regional collaborative arrangement, African countries can obtain licenses from the pool to meet the health needs of their populations, especially in relation to the epidemic of HIV infection, and so because the TRIPS Agreement requires parties to seek voluntary licenses before they resort to seeking compulsory licensing, an African RTA can also provide a stronger platform for negotiating the terms of voluntary licenses. So theoretically, once

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\(^{80}\) International Monetary Fund [Internet]. World economic outlook: growth resuming, dangers remain. IMF; 2012. (Available at): http://www.imf.org/external/pubs/ft/weo/2012/01/ [accessed 2 January 2014]

\(^{81}\) Ibid Owoeye (2014)

a voluntary license cannot be obtained, an African RTA can enable a single African country to issue a compulsory license for local production or importation to meet its internal needs and the needs of other countries that are party to the RTA.\textsuperscript{83}

Although developing regional developmental strategies through the instrumentality of an African RTA would be ideal, practical concerns could weigh down the possibility of such an outcome being feasible. As an institution, the African Union has not done anything developmental or radical as the proposed African RTA. Instead what the African Union, and countries like Nigeria is known for is over reliance on foreign aid. That singular weakness is one of the reasons why Nigeria fails to spark its dormant innovative base. Aside from over reliance on foreign aid, corruption and nepotism would be another important factor that would hinder Nigeria together with the African Union from executing an African RTA. Unfortunately, the greed for short term gains by a few often clouds the overall aspirations of the group resulting in the project goals being unfulfilled. Corruption and nepotism is a problem in African government’s circle. Whereby even putting someone who is unqualified in a post just because of the person’s connections defeats the purpose of program initiated. Another practical concern would be the activities of the powerful international pharmaceutical corporations who would engage in a campaign to discourage such a venture because it would reduce their bottom-line. Those are political and legal concerns that must have strategy in place to be dealt with it as the potential fight ensues. These practical concerns will not go away and must be dealt with if an African RTA will succeed.

Whichever way Nigeria choses to exercise its rights with compulsory licensing under its own laws and also using the rights allowed by the TRIPS Agreement in furtherance of infrastructural and industrial developmental agenda, the choice to be had includes going at it alone by issuing compulsory licenses for patents so that local industries would have an enabling industry to thrive. The other option geared around compulsory licensing, is pooling of resources with regional governments in form of an African RTA under the auspices of the African Union which

would grant such a vehicle tremendous power and latitude to grant compulsory license for local production so its production would serve as a cheaper alternative for the continent at large.

Both strategies for utilizing the tool of compulsory licensing would suffice, but the time to act is now before the transition period under the WTO for the under-developed countries extinguishes, and a possible sea of change sweeps the prevailing sentiment regarding the practicality of the current TRIPS Agreement and the Doha Declaration sours. Then a new trend might emerge that may not be favorable to Nigeria as a MINT bloc member and a developing country. Auspiciously, the recent permanence of the waiver for WTO Members with insufficient manufacturing capacity to acquire cheap medicine augurs well for the future of sustainable development.

2.4 The importance of protecting Nollywood’s success and a model to be replicated across industries

The need to elevate the discourse around intellectual property law discussion is key in designing the key features of intellectual property as the driver of a knowledge economy order that spurs growth in intellectual property and patent-centric industries in Nigeria. Intellectual property law is an important conceptual and practical public policy tool in a knowledge-based economy, and like other developing and even developed countries, Nigeria’s policy approach towards intellectual property will determine how best it performs in the new knowledge economy.84

All the countries of the BRICS bloc have shared in remarkable political and economic transformations since the last several decades and notably, a significant part of that transformation which presently accounts for their strong and growing economic power and leverage, is their active participation in the new technologies and their ability to adapt and critically exploit intellectual property for their national interests.85 Even more impressively is

85 Ibid Oguamanam
that as a bloc, the BRICS now represent a strategic and growing counter force to American-led neo-liberal economic order, especially in regards to knowledge governance.\textsuperscript{86}

Hence the ability of countries to optimize the benefits of these technologies and exploit the information revolution is largely dependent on their intellectual property law and overall knowledge governance strategy.\textsuperscript{87} Nigeria’s intellectual property laws must harness the developing industries, and provide the right legal framework to patent the technologies that it produces so that its successes maybe replicated across industries. Case in point being the successful Nollywood movie industry in Nigeria. According to a global cinema survey conducted by the UNESCO Institute for Statistics, India remains the world’s leading film producer but Nigeria had overtaken United States for second place.\textsuperscript{88} Meaning Nigeria is amongst the top 3 movie industries in the world.

The need for protection of the copyrightable works that emanate from the Nollywood film industry is vital for its continual growth because copyright is the remunerative spine of creative industries. Copyright gives the owner of a creative work ability to decide what others can do with it and enjoy benefits deriving from its usage. Copyright was first established amongst sovereign nations under the 1886 Berne Convention for the Protection of Literary and Artistic Works\textsuperscript{89}, and is incorporated into the TRIPS Agreement. Nigeria is a party to the Berne Convention by being a member of WTO, additionally by virtue of its colonial history with Great Britain, given that the afore mentioned laws transposed during colonial administration were not repealed at independence.

Relating to Nollywood, Article 2.1 of the Berne Convention as incorporated into the TRIPS Agreement obliges Member to protect “literary & artistic works”. Article 2.1 also provides a non-exhaustive list of such works. In copyright, the TRIPS Agreement confines itself to clarifying or adding obligations on a few specific points. Article 9.1 of TRIPS obliges Members to comply with the substantive provisions of the Berne Convention.\textsuperscript{90} The lone exception being that TRIPS does not create rights or obligations in respect of moral rights conferred under Article

\textsuperscript{86} Ibid Oguamanam 2011
\textsuperscript{87} Ibid Oguamanam 2011
\textsuperscript{89} Last amended September 28, 1979
\textsuperscript{90} namely Articles 1 through to 21 of the Berne Convention and its appendix
6bis of that Convention, however this does not affect the obligations of those Members that are also parties to the Berne Convention to protect moral rights.\textsuperscript{91} Overall, due to the long history of international cooperation on copyright matters, the national laws in this area are often harmonized, hence the provisions of the TRIPS Agreement stipulate the minimum level of protection that Members must provide to nationals of other Members regarding copyright.\textsuperscript{92}

Under the Berne Convention, copyrights for creative works do not have to be asserted or declared, as they are automatically in force at creation; Therefore, an author need not apply for or register for a copyright in countries that adhere to the Berne Convention.\textsuperscript{93} This convention facilitates the compensation for artists for their works, however since national laws govern the enforcement of such rights, the scourge of piracy may continue unabated if Members under the TRIPS Agreement fail to do a better job of enforcement of copyrights. For Nigeria, economically, the solidifying and building up of enforcement mechanism for copyrights would achieve the goal of building and expanding the growth of the Nollywood film industry.

2.4.1 A Profile of Nigeria

A bit of context is needed to describe the environment in which the Nollywood film industry in Nigeria draws its drive and creativity. In a study of Nigeria by Jeremy de Beer and Chidi Oguamanam, an apt profile was developed stating as follows\textsuperscript{94}:

\begin{quote}
'\textit{With an official population of 150 million people, Nigeria is Africa's most populous country. It represents 50\% of the West African population... Comprised of an estimated 250 nationalities with a corresponding number of languages and cultural grouping, Nigeria represents the cultural hub of Africa and African Diaspora by extension. Nigeria is well known for its vast oil reserves and its rich cultural heritage, which transverses...}'
\end{quote}

\textsuperscript{91} WTO module on Copyrights (Available at) https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/modules2_e.pdf accessed on March 17, 2017 at 8.05 pm
\textsuperscript{92} Ibid. Also see the principle of National Treatment
\textsuperscript{93} Article 5 (Rights Guaranteed) of the 1886 Berne Convention (Available at): http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P109_16834
\textsuperscript{94} Jeremy de Beer and Chidi Oguamanam, (2010) IP Education and Training: A Development Perspective, ICTSD, IP and Sustainable Development Series Issue Paper No. 31,
diverse art forms, including languages, literature, crafts, music, drama, and other forms of creativity. Nigeria is also endowed with rich biological diversity, genetic resources, and associated traditional medicinal and agricultural knowledge... Nigeria’s expansive creative activity is perhaps best symbolized in the recent phenomenal growth of its movie industry, which produces an estimated 1000 low-cost movies annually. The industry, known as “Nollywood”, is propelled by creative adaption of digital and video technologies to make low-budget Nigerian-themed movies.\(^9\) For the average Nigerian, talk about intellectual property centers on ‘war against piracy’ due to the prevalence of illegal DVD/VCD copies of Nollywood movies being made both in Nigeria and other neighboring African countries, which leaves a lack of understanding of all the complexities that such appropriation fosters. As a result of this, the intellectual policy space is dominated by the copyright regime, which is regulated by the National Copyright Commission (NCC), which is the direct legal nest for the protection of copyright holders to Nollywood movies, the music and other creative industries.\(^9\) Nonetheless, the underpinnings of the structural development and quirks of how Nollywood emerged as among the top three movie industries bear examination because the history of how this creative industry was nurtured into a behemoth in the international entertainment world, is instructive of the creative force and resilience resident in the Nigerian landscape despite the lack of enabling infrastructure.

### 2.4.2 Nollywood’s Evolution

Nollywood phenomenon began with the release of the 1992 movie “Living in Bondage”, a low budget movie that turned into a national blockbuster. Writer Ana Santos Rutschman has examined the industry and has written an extensive piece on the mechanics that has made

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\(^9\) Statistics posted here for population are not current, Nigeria’s population has increased exponentially since the last official census in 2005.  
\(^9\) Ibid Oguamanam & de Beer (2010)
Nollywood so successful. An excerpt from her writeup\(^9\) captures the grass to grace rise of the Nollywood phenomenon:

‘Nollywood, as it is often referred to, started with the emergence of a cult phenomenon surrounding a low-budget movie shot by an amateur in the early 1990’s. From there it has evolved into an informal system of distribution of cheap, low-quality physical copies of videocassettes and DVD’s, to a massive industry attracting millions of dollars in foreign investment, to a well-oiled machine that is now beginning to tap into digital-based forms of monetization. Nollywood’s initial development is largely attributable to the lack of enforcement of intellectual property rights, an environment that allowed the Nigerian film industry to grow at an astonishing pace, deriving almost all of its profit from the sale of hard copies, while thousands of pirated versions circulated throughout Nigeria, and later throughout sub-Saharan Africa. This parallel circuit, rather than acting as a deterrent agent in the expansion of the emerging industry, catapulted it to unprecedented levels of popularity, thereby increasing demand for both legitimate and illegitimate copies. Eventually, Nollywood reached such a plateau of profitability that investors from countries with large diasporic Nigerian communities began co-financing high quality productions, aimed at international release. This new stage in the development of Nollywood has introduced significant changes at aesthetical and economic levels, accelerating the formalization of Nollywood’s distribution chains. Intellectual property now plays a structural role in enabling monetization of Nigerian cinema. The originality and economic success of Nollywood are translatable into other creative industries in the global South, with some of the African music industries being the natural candidates for future monetization experience.’

One of the lessons to learnt from the Nollywood phenomenon is the need to have an enabling environment for entrepreneurs to create industries with some support from the government. To extrapolate the synthesis of what made the Nollywood industry boom early on is recognizing that early on that both legal and illegal copies of movies where been made, and that created a kind of soft landing for the manufacturers to increase the base of their industry. A similar tactic could be

employed in other industries with other creative entrepreneurs to create sufficient market awareness, before building up distribution networks that leverage the patent rights of the creators and consolidate a more translucent structure that allows outside investors to come in and provide funds that increases the value of the business. The music industry in Nigeria is currently dominating the market in Africa and waves are being made in western music charts so that industry is well on its way and its rise has been built on an intellectual property based distribution scheme.

Industries currently in Nigeria that could benefit from such large-scale distribution are the retail textile industries, retail shoe industries. One of the issues that the plagues these kinds of industries is that it isn’t centralized, only pockets of dominance in certain markets. That can be attributable to the fact that Nigeria is such a large and multicultural country hence that certain parts have varying tastes for a particular product. Nevertheless, with encouragement of the entrepreneurs by the government and with more enlightenment of populace of the nuances of protection of intellectual property, a stabiling environment can be curated.

Some may see the explosion of Nollywood as a lighting in a bottle that can’t be recreated across all industries. However, given the fact of Nigeria’s multiethnic and large population is a ripe market for exploring, it would be disastrous not to tap into such a market. Due to its complex market structure and diverse entrenched entities, Nigeria’s potential is fulfilled by mining ideas that have worked and adapting it to another situation. The end-goal being able to develop an industry that has systems of production that are well protected by intellectual property rights. The underlying truth being that strict intellectual property rights is not crucial at the beginning stages of a nascent industry what is sufficient is by adhering to minimum standards, which can be built upon as the industry matures.
Chapter 3: Global trend of intellectual property protection under the WTO regime

3.1 North-South dichotomy:

The North-South divide is generally treated as a socio-economic and political divide. The importance of examining this concern is that it improves the capacity for an economy in transition like Nigeria to spot the ebbs and flows of intellectual property protection. This is crucial because picking out these global trends, this enables a country to fulfill minimum requirements by using the discretion allowed in the given framework to make policies or initiate actions that benefits it national interests without violating the norms of WTO. The North/South divide is at the heart of major policy initiatives at the TRIPS Council, therefore emerging trends in policy are frequently viewed through the spectrum of which side got the better of the other. There is a multilayered approach to analyzing this divide that spans different areas, therefore for our discussion we shall limit ourselves to the North-South dichotomy dealing with issues involving intellectual property under the TRIPS.

A history of the appellation explains the groupings. In the days of the Cold War, the predominant axis was an East-West one, with the Soviet Union and China representing the East, and the United States and its more developed allies constituting the West.\(^98\) An analogue for this divide was the categorization of First (the West) and Second (the East) Worlds. The rest of the world was allocated to a Third World of less competitive and less developed States.\(^99\) Following the end of the Cold War and the collapse of the Soviet Union, the Second World appellation became less useful. A different set of groupings was needed to illustrate the new socio-economic and political order of countries of the world. Given that some of the Second World joined the First World, whereas Russia dropped temporarily into the Third World as did other parts of the former Second World perhaps less temporarily.\(^100\) The time was ripe for a new simplifying categorization. The First World became the North and the Third World became the South.\(^101\)

\(^98\) Ibid Reuveny (2007)
\(^99\) Ibid Reuveny (2007)
\(^100\) Ibid Reuveny (2007)
\(^101\) Ibid Reuveny (2007)
This construct features the Global North consisting of the developed countries which includes United States, Canada, Western Europe, some developed parts of Asia like Japan, Singapore, as well as Australia and New Zealand. The geographical appropriateness, is arguable because even though Australia and New Zealand do not share a geographical location with the rest of the North, it does share similar socioeconomic and cultural characteristics. The Global South on the other hand is made up of Africa, Latin America, and developing parts of Asia including the Middle East. The grouping follows a model which pits the developed countries on one side --The North, and then the developing countries on the other side -- The South.

Under the WTO TRIPS Agreement, the division is socio-economical with the North attributed as being richer, more developed and industrialized, so then consequently as nations tagged developed countries, they had to implement the protocols of the TRIPS agreement as soon as possible upon joining the WTO, while the South, poorer, less developed, and less industrialized countries are tagged as developing countries and least developing countries (LDCs). These latter group of countries benefit from a staggered implementation schedule of the protocols of the TRIPS Agreement. Generally, LDCs are regarded as a subset group of the developing countries, and are grouped under the Global South.

Importantly, the BRICS alliance, and the MINT group both belong to the Global South. That better explains the drive by these blocs of nations consisting of economies in transition to align and synchronize a counter weight force that pushes the agenda of the developing countries against the policies of the developed countries. Hence the North/South dichotomy.

In deliberating the issues involved with the North/South dichotomy on intellectual property under the TRIPS, it is pertinent to look back at the negotiations for forming the WTO and drafting the terms of the protection of intellectual property rights under TRIPS. Thus, these competing blocs of interests then form a narrative for how emerging trends are analyzed. According to Peter K. Yu, there exists at least four dominant narratives that exists: 1. Bargain; 2.

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102 Articles 65.2 and 65.3 delayed the implementation of the TRIPS Agreement in less developed and transition countries for four years. Article 66.1 granted least developed countries a transitional period of ten years, which then was then extended to seventeen years by virtue of the Hong Kong Ministerial Conference.

103 For this discussion, LDCs and developing countries will be regarded as the Global South unless otherwise specified.
Coercion; 3. Ignorance; and 4. Self-interest. He further postulates that the most widely used is the bargain narrative, which considers the TRIPS Agreement the product of a compromise between developed and less developed countries. In this narrative, developed countries received stronger protection for intellectual property rights and a reduction in restrictions against foreign direct investment. In return, less developed countries obtained lower tariffs on textiles and agriculture and protection via the mandatory WTO dispute settlement process against unilateral sanctions imposed by the United States and other developed countries. Essentially as from January 1st 1995 when the WTO came into effect, intellectual property norms from developed countries was transferred to developing countries.

These four dominant narratives arguably give a more nuanced view of the transactional negotiations that can happen in international trade deals. From the point of view of Nigeria, considering the poor state of development and lack of technical know-how of the various developing countries at the time of consummating the WTO trade agreement, especially in Nigeria given its unstable state at that time, the bargain narrative fits the picture for how Nigerians may view the trading regime. Though it is still important to get a better understanding of current trends by acknowledging the role of the other three narratives in shaping the picture.

Nonetheless, the other three narratives also influence the way emerging trends deriving from economic data relating to intellectual property rights protection are portrayed. Even though contrasting the dominant bargain narrative with the other three narratives, the other three narrative downplay, or even question, the existence of a “grand bargain” between developed and less developed countries. The coercion narrative portrays the TRIPS Agreement as an unfair trade instrument that developed countries imposed upon their less developed counterparts. The ignorance narrative emphasizes the inability of less developed countries to understand, during the TRIPS negotiations, the importance of intellectual property protection--- and, by extension,

\[\text{Ibid Yu (2011)}\]
\[\text{Ibid Yu (2011)}\]
\[\text{Ibid Yu (2011)}\]
\[\text{In 1994/95, Nigeria was in the midst of military dictatorship, complicated by civil unrest and severe international sanctions for human rights abuses}\]
\[\text{Ibid Yu}\]
\[\text{Ibid Yu}\]
the impact of the TRIPS Agreement. The self-interest narrative postulates that less developed countries agreed to stronger intellectual property protection because they considered such protection in their self-interest.

Notwithstanding that these four narratives does not depict a full picture of the origins of the TRIPS Agreement without mentioning the role played by none-state actors in its formation, the narratives do provide a prism through which to view the impact of the TRIPS Agreement. The four narratives intersect one another and complement one another depending on the case matter at hand. For instance, the prevailing mood in the early 2000’s that the TRIPS Agreement’s provisions would prevent access to medicines for developing countries going through healthcare crisis in addition to the AIDS epidemic at that time, led to the Doha Declaration on Public Health in 2001 at the Ministerial Conference in Doha. This declaration affirmed that developing countries could use the discretion granted by the TRIPS agreement to provide better access for medicine for their respective citizens. At that time, it was extensively portrayed as a big win for the developing countries i.e. the Global South because of the coercion narrative which implies that the developed countries imposed the unfair intellectual stipulations on patents in medicine that would end up adversely affecting the Global South which had less technological knowhow to manufacture its own drugs. This ignores the fact that developing countries did have legally the discretion under the TRIPS Agreement going by the self-interest narrative, but the Doha declaration was a political move at the WTO stage to affirm that discretion to forestall potential friction from state actors and non-state actors opposed to developing countries using that discretion. For example, drug companies regardless would have complained whenever their drug patents in developing countries end up getting compulsorily licensed for local manufacturers in developing countries.

\[111\] Ibid Yu
\[112\] Ibid Yu
\[113\] Ibid Yu
3.2 North/South Alliance

The North-South dichotomy does not fully detail the North-South relationship and occasional shifting bargaining interests. For the reason that as matters go, alliances may shift on certain issues. Case in point, the EU aligning with developing countries in regard to geographical interpretation. Given that the EU has had a sui generis system of indications of origin throughout the common market since 1992, in order to protect and encourage local farmers, also to grow local markets, it would seem logical for the EU to advocate for the extension of higher level of products given currently under Article 23 of the TRIPS for wines and spirits — to other products. The EU has advocated for this position in alliance with some other developing countries and did submit in 2005 a proposal that calls for the TRIPS Agreement to be amended so that all products would be eligible for higher level of protection in Article 23, and the exceptions in Article 24, together with the multilateral registration system currently being negotiated. These proposals are opposed by a consortium of nations led by the United States who feel that the protection already provided is enough. So, this has led to a stalemate at the TRIPS Council. The EU has responded by becoming a frontrunner in promoting geographical indications through with different TRIPS Plus initiatives, as for example with China as part of Free Trade Agreements. Presently, the EU has concluded a series of Free Trade Agreements which contain important levels of protection for geographical indications.

In this context, then the North-South dichotomy isn’t always clear cut, as different interests may move a country or a bloc to make compromises and take contrary positions during patent rights negotiation. The important aspect for Nigeria is to be able to prepare an adequate national strategy in place that places a priority on proactively monitoring emerging trends in the grand scheme of intellectual protection rights useful for the national government to fulfill its goals. Albeit, the process does take time for the effects to take shape.

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114 Regulation No. 2081 of 1992 EC
3.2 South-South alliance

The South-South alliance is intrinsic to our discussions being that Nigeria is a developing country, therefore the available forums through which other developing countries align their interest is very important. The United Nations Development Program (UNDP) currently runs an office called United Nations Office for South-South Cooperation (UNOSSC). This office is conceived as a platform for collaboration among countries of the South in the political, economic, social, cultural, environmental or technical domains. While involving two or more developing countries, it can take place on a bilateral, regional, sub regional or interregional basis.\textsuperscript{116} This platform is an emblem of a necessary platform required for developing countries to strategize and strengthen the voice and bargaining power of developing countries in multilateral organizations. As presently constituted, it remains to be seen how truly effective as a platform it has been in advancing the South/South alliance’s development agendas.

Over time massive positive economic and developmental gains in the BRICS countries have raised questions about whether the TRIPS bargain has been as unfair as developing countries have claimed. Take for example China. According to the latest WIPO statistics, China had the third largest volume of applications under the Patent Cooperation Treaty in 2014, behind only United States and Japan. Professor Peter Yu opines that without the TRIPS Agreement and the market access the WTO membership provides, China is unlikely to develop its economic and technological capabilities as quickly as it has. Also, that the same can be said of Brazil, India and other large developing countries whose fast-growing intellectual property industries have clearly benefitted from greater protection and enforcement of intellectual property rights.\textsuperscript{117}

If countries are to develop new and effective norms in the international trade and intellectual property arenas, they will need to appreciate a deeper understanding of the changing international negotiation landscape.\textsuperscript{118} Hitherto it remains unclear whether this landscape will tilt

\textsuperscript{116} South-South Cooperation (Available at): http://ssc.undp.org/content/ssc/about/what_is_ssc.html accessed at 9.18pm on 8/3/2017
\textsuperscript{117} Yu, Peter K. (2015), Intellectual Property Negotiations, the BRICS Factor and the Changing North-South Debate International Negotiations, Vol. 21. Texas A&M University School of Law Legal Studies No. 17-05
\textsuperscript{118} Ibid Yu (2015)
the negotiations toward the developed world or the developing world, because after all large developing countries align their interests with the former sometimes and with the latter at other times.\textsuperscript{119} Even so, the developing countries coalition is necessary to present a counterforce at the international negotiating table.

This coalition of developing countries to form one voice in multilateral intellectual property treaty forum to get the best deals for the South/South is very necessary being that historically, many countries in the South did not have sufficient knowledge about intellectual property at the beginning of negotiations for the TRIPS Agreement. Therefore, a common front to negotiate international norms favorable to the growth of the South is vital.

Brazil and India led the negotiating charge for the developing countries during the negotiations for the TRIPS Agreement, submitting multiple proposals to advocating the cause of the developing countries. At that time, China and Russia had yet to join the WTO. China joined in 2001 and Russia acceded much later in 2011. With the rise of the BRICS, it provides a new dynamic in the international norm setting environment. The BRICS because of their successes, size and capabilities are now perceived as leaders amongst the South. However, the ever-changing dynamics of countries interests means that sometimes their interests align with the developed world sometimes and with the developing world at other times. With the eminent rise of the MINT, they too would have to face some very tough choices. Every country’s capabilities and interests are unique but what unites countries are shared common goals which can be achieved by supporting shared interest.

\section*{3.4 South/South divide}

Considering the conflicting objectives, disposition changes and resulting uncertainties, it is increasingly difficult for leaders from poorer and weaker developing countries to decide whether

\footnote{\textsuperscript{119} Ibid Yu (2015)}
they should team up with these emerging powers\textsuperscript{120}, in this case the BRICS and to a lesser extent the MINT. Understandably, the leaders of the former will become concerned about the attempt by large developing countries to dominate any bargaining coalition they establish with the latter, thus instead of big brothers, the larger and more powerful developing countries could easily behave like bullies.\textsuperscript{121} Therefore, it is then possible given the complex dynamic, that the recent emergence of large developing countries may alter the alliances or bargaining coalitions developing countries set up in the past and this unfolding could weaken the united front these countries have put up previously.\textsuperscript{122} 

For some of these large developing countries like China, the road is inevitable. Due to their emergence as the second largest economy in the world, their shift towards being a developed country is shifting ever closer more, since they share some similarities with developed countries and some with developing countries. Therefore, their positions would shift on certain issues, oscillating between the North/South divide. In effect China, could side with developed countries regarding stricter enforcement of intellectual property rights. For example, looking at the dimension of trade between the developing world and China reflected in the composition of trade flows, resembles the old North-South pattern of trade, in so far as Chinese imports from the developing world consists largely of primary commodities, while Chinese exports to the developing world are largely manufactured goods.\textsuperscript{123} This phenomenon is more acute with China’s trade with African countries. 

Such trade without possibilities of structural transformation would lead to dependencies by the African countries, and on a wider scale China would be pushed further along to developed status by aligning with more dynamic positions on intellectual property protection leaving behind positions advocated by the developing world. This trend would hasten if developing countries fail to implement national strategies towards development. Even though it takes time for the effects to take shape, visible progress can be monitored by economic indices and the end-product


\textsuperscript{121} Ibid Yu (2015)

\textsuperscript{122} Ibid Yu (2015)

\textsuperscript{123} Deepak, Nayyar. (2016) BRICS, Developing Countries and Global Governance. \textit{Third World Quarterly} Vol. 37, Issue.4
of treaties being agreed to at the multilateral and bilateral level which would show increased awareness of the stakes involved in the negotiation.

Achieving sustained growth will require developing African countries, particularly in sub-Saharan Africa, to diversify exports and move from being pure exporters of raw materials to processing or otherwise adding value to those raw materials.\textsuperscript{124} The partnership between African and Chinese firms may facilitate technology transfer, add value to African exports, and help African firms position themselves to benefit from world markets that way the south-south divide may be bridged and future disputes with the alliance would be averted.\textsuperscript{125}

It must be noted that China has an important role to play in ensuring that its economic partnership with African countries is mutually beneficial, after all China’s spectacular growth has made it an increasingly important player in global commerce and finance, and responsibilities come with influence.\textsuperscript{126} Even though at the same time, developing countries in Africa have a responsibility to maximize the benefits of its economic relationship with China and other nations.\textsuperscript{127}

For Nigeria, the path towards being a developed country must be a more calculated one. The raison d’être for the intellectual property development of the country must be a more nationalistic one. Therefore, for instance certain decisions must be made regarding the benefits of advocating for tougher enforcement of copyrights laws to protect the huge film and music industry in Nigeria from pirates. That most definitely will involve more intensified crackdown on local pirates that hold sway. This also may involve prosecuting cases against fellow African countries that aid this illegal act at the WTO dispute settlement. However, it could end being a very complicated venture due to political reasons on how Nigeria is viewed as the big brother of African countries. That ideology is restrictive and must change if stated goals for development must be reached. Nonetheless, amicable settlement and diplomacy would be ideal in dealing with that situation.

\textsuperscript{125} Ibid Wang 2008
\textsuperscript{126} Ibid Wang 2008
\textsuperscript{127} Ibid Wang 2008
All in all, for economies in transition like Nigeria the goal in developing its industries is a transformative one. Meaning that new ideas and its enforcement must be followed especially pertaining to protection of the patent rights of local manufacturers, but also protection of internationally registered patents. Research has shown that as the most successful countries from the BRICS, specifically China, transition their economies to a more developed status, their policy positions vary per their nation’s interest. This shift moves closer to the developed countries policy positions on some issues especially on patent protection. Therefore, Nigeria must strive to mandate stricter protection of intellectual property to protect and nurture its innovative industries, which in turn invites investment into its development.
Chapter 4: Active resistance, Passive resistance or Active strategy?

4.1 Adopting an IP-based strategy

Going from evidence seen in Figure 2 above, Nigeria’s record at the WTO dispute settlement is one of passive resistance. Having involved itself in no contentious dispute cases at the WTO either as claimant or defendant, but rather six (6) as a 3rd party. That indeed is an indictment of Nigeria adopting the path of passive resistance at the WTO trading system. Although it must be said that Nigeria has somewhat produced some successes in the country adopting passive resistance as a strategy. Following April 2014 statistical rebasing of its economy, Nigeria ranked as Africa’s largest economy, with 2015 GDP estimated at (US)$1.1 trillion. Nigeria overtook South Africa which was previously Africa’s largest economy. This can be explained by Nigeria being a mixed market economy with heavy dependence on oil exports driving growth.

Consequently, with high oil earnings, the government can fund itself and drive the economy. Conversely, with low oil earnings, the economic output will decrease. Fortunately, the growth of the economy which prompted the move to rebase the economy had to do more with increased diversification driven by growth in the agricultural, telecommunications, services, and entertainment industries than just simply increased oil earnings.

That being said, the aspirations of Nigeria as a member of the MINT bloc requires the government to take a more proactive stance in the WTO trading regime. That means adopting an active strategy to continue to drive the economy forward. The path of passive resistance has its shortcomings with features that ensures that policies are not challenged and innovation is not encouraged because legislation is not evolving to better meet local demands. That is why passive resistance will not translate to the lofty economic ambitions Nigeria has carved out for its self by belonging to the MINTS economic bloc. By simply not evolving and generating an attractive environment through which local entrepreneurs can be assured of the sustainability of their

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128 GDP data (Available at): https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html accessed on 17/4/17 at 5.00pm
nascent industries by better protection of the intellectual property rights of its products, Nigeria then can possible fail to emulate some of the success stories of the BRICS economic bloc.

4.1.1 A Brief History of National Development Plans in Nigeria

It wouldn’t be sufficient to plan an avenue towards the economic success and maintain that path through the proceeds of oil wealth. The Nigerian government does realize this and have had endless development agendas which have not achieved the maximum desired effect through the years. Beginning firstly with:

i) Pre-Independence Plans: Nigeria’s planning experience commenced with the Ten-Year Plan of Development and welfare for Nigeria which was introduced in 1946 by the colonial government (1945-1956) sequel to a circular from the Secretary of State for Colonies to all British colonies, directing the setting up of a Central Development Board. The Ten-Year Plan of Development and Welfare for Nigeria wasn’t much of a plan in the real sense and listed uncoordinated projects in various regions. The primary interest of the plan was to meet the perceived interests of the colonial government through production of agricultural produce such as groundnuts, palm oil, and cocoa that were required by British factories. Irrespective of the weakness of the plan, it served as a launching pad to subsequent development plans in Nigeria.

ii) First National Development Plan (1962-1968): After the attainment of independence for Nigeria in 1960, the first National Development Plan was launched. The objectives of the plan were: to bring about equal distributions of national income; to speed up the rate of economic growth; to generate savings for investments to reduce its dependence on external capital for the development of the nation; to obtain enough

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131 Ibid Iheanacho 2014
132 Ibid Iheanacho 2014
capital for the development of manpower; to increase the standards of living of the masses particularly in respect of food, housing, health and clothing and to develop the infrastructure of the nation.¹³³ Though the plan had impressive attributes, it became impractical to fully implement due to the 30-month civil war that engulfed the country. Following the political upheavals, the plan became out of tune with the dictates of the time. Despite the weakness of the plan, some major projects were executed during that time, this include the Nigerian Security and Minting Plant, the Jebba Paper Mill, the Sugar Mill, Niger Dam, the Niger Bridge, Onitsha, Kainji Dam and Port Harcourt Refinery.¹³⁴

iii) The Second National Plan (1970-1975): Following the end of the civil war in Nigeria in 1970, national reconstruction and rehabilitation were the focus of attention of the federal government.¹³⁵ “Thus, in order to fasten the growth of national economy and ensure equitable distribution of national income, it became imperative to launch the Second National Development Plan; the plan contained five national objectives, a united, strong and self-reliant nation, a just and egalitarian society, a land of bright and full opportunities for all citizens, and a free and democratic society.”¹³⁶ One of the main emphasis on this plan was indigenization. The indigenization policy was designed to encourage Nigerians to fully participate in the commercial, industrial and financial activities of the Nigerian economy.¹³⁷ Indeed, several indigenization decrees of companies, especially oil companies were made during that time to realize this goal. Despite those efforts, multinational companies still held sway over many of the local companies in Nigeria. Another interesting feature of the National Development Plan was the objective of creating a free and democratic society.¹³⁸ Unfortunately, the rule of the military in Nigeria deterred the development of that objective. Despite the inadequacies of the plan it still recorded major improvements, including the rehabilitation of the war affected areas.¹³⁹

¹³³ Ibid Iheanacho 2014
¹³⁴ Ibid Iheanacho 2014
¹³⁵ Ibid Iheanacho 2014
¹³⁶ Ibid Iheanacho 2014
¹³⁷ Ibid Iheanacho 2014
¹³⁸ Ibid Iheanacho 2014
¹³⁹ Ibid Iheanacho 2014
iv) The Third National Development Plan (1975-1980): The Third National Development Plan was considered more ambitious than the Second national plan. It represented 10 times that of the Second Plan and about 15 times that of the First plan.\textsuperscript{140} The objectives of the plan were: increase in per capita income; more even distribution of income; reduction in the level of employment; increase in the supply of higher level manpower; diversification of the economy; balanced development and indigenization of economic activities.\textsuperscript{141} Despite being welfare-centered in nature as a plan, the implementation failed to sift carefully through the allotting criteria therefore didn’t achieve its principle objectives.\textsuperscript{142}

v) The Fourth National Development Plan (1981-1985): This was the first plan to be initiated by a civilian government since military dictatorship first broke out in 1966. The plan set out as its main strategy the use of resources generated from oil to ensure all round expansion in production capacity of the economy and to lay a foundation for self-sustaining growth.\textsuperscript{143} It was anticipated that this plan, the exports led by petroleum products would generate enough funds to actualize the plan that had been formulated, but unfortunately only 66.4\% of the projected figure was earned.\textsuperscript{144} As a result, national debts began to rise and inflation rose.

vi) The Fifth National Development Plan: Due to the poor implementation of the Fourth National Development Plan, machinery was put into place to design the Fifth one. However, the Fifth National Development plan failed to materialize and it was later incorporated into the Structural Adjustment Program (SAP). The two-year SAP brought an end to the five-year planning model in Nigeria, and subsequently the Federal Government changed the two-year model to three year rolling plans.

vii) Rolling Plans Era (1990-1998): The Babangida military government started the three-year rolling plan which was became operational from 1990 with the introduction of the First National Rolling Plan (1990-1992). The primary objective of the rolling plan

\textsuperscript{140} Ibid Iheanacho 2014
\textsuperscript{141} Ibid Iheanacho 2014
\textsuperscript{142} Ibid Onah 2010
\textsuperscript{143} Ibid Iheanacho 2014
\textsuperscript{144} Ibid Iheanacho 2014
was to afford the country the opportunity of revision in the midst of increasing socio-
political and economic uncertainties.  

reelection of Obasanjo’s government in 2003 reinvigorated the need for a
comprehensive socio-political reform of the country since the previous plans did not
put the Nigerian economy on sound footings.  

It was in these context that the
National Economic Empowerment and Development Strategy (NEEDS) was formed
to be a road map to address the development challenges in Nigeria. The focus of
NEEDS was on: empowerment, wealth creation, electricity, employment generation
and poverty reduction as well as value reorientation. As a development plan, the
NEEDS failed to achieve its main objectives especially on electricity as the country
witnessed regression in electricity generation.

ix) Vision 20:2020: Beginning from General Sani Abacha’s administration, Nigerian
leaders have subscribed to the plan to establish a strategic framework of on the
premise of realizing Nigeria’s Vision of becoming one of the twenty largest
economies by the year 2020. The rural areas have been envisioned to be transformed
from age-long poverty centers to urban status of world class standards. This vision
2020 plan was later supported by President Umar Yar’Adua’s Seven Point Agenda,
also The Transformation Agenda under immediate past President Goodluck Jonathan.
Finally, the present administration of President Muhammadu Buhari has launched the
Economic Recovery and Growth Plan (ERGP) (2017-2020). This current plan has
been developed for restoring economic growth while leveraging the ingenuity and
resilience of the Nigerian people – the nation’s most priceless assets. The Plan
articulates the understanding that the role of government in the 21st century must
evolve from that of being an omnibus provider of citizen’s needs into a force for
eliminating the bottlenecks that impedes innovation and market based solutions.

145 Ibid Iheanacho 2014
146 Ibid Iheanacho 2014
147 Ibid Iheanacho 2014
148 Nigerian National Planning Commission (Available at):
24/04/17 at 12:39am
149 Ibid nationalplanning website
150 Ibid nationalplanning website
The Plan also recognizes the need to leverage science, technology and innovation and build a knowledge-based economy.\textsuperscript{151}

None of these prior and subsequent development plans had the desired effect because either there was not disciplined implementation, because of corruption, lack of commitment, or even decaying social infrastructure. Nevertheless, adopting an intellectual property based active strategy towards building the industries would ensure fairness, competition, and accountability among the local regulators, local entrepreneurs, and foreign investors and businesses. Just as the recent boom in revenue and development in the Nollywood industry demands more attention from the government to enact better laws to enforce and protect its movies and content, the same would occur if the same success translates to other industries. Hoping for similar successes in other industries without planning for it or how to maintain it, is like catching lightning in a bottle twice. Wishing for success with creating the enabling environment for it is false hope. First with mega success of Nollywood, then the potential of the growth of the Nigerian music industry. Other sectors that would need better protection would be the textile and manufacturing industries. These industries need better protection from the damage and loss of profits piracy would portend for the viability of their industries.

Nonetheless, with the unveiling of the present administration’s Economic Recovery and Growth Plan (2017-2020) there is hope that more attention would paid to the transition of government from a hinderer of innovation to a facilitator of innovation, and this is evident in the executive summary and the motivations for the Plan, and is articulated therein. It is important therefore to do things differently and learn lessons from the more advanced developing countries in the BRICS economy.

It can be surmised that, that due to the lack of active participation in the protection of intellectual property rights and the passive resistance at the WTO dispute settlement system, the global trading community has looked on the activities in Nigeria as being unsustainable. Increased participation or featuring as a litigant in cases at the WTO dispute settlement system would mean that the government is activating some measure which is perceived as to be unfairly or fairly

\textsuperscript{151} Ibid nationalplanning website
benefitting the local industries. Right now, the problem of piracy has hindered the healthy growth of the viable industries, particularly the creative arts and technological innovative ones.

Ironically, though the industries may indeed grow someway from the harsh environment but there will be limits to how much because challenges from other WTO member States will come surely if it is perceived that an unfair advantage has been created for local industries through piracy or inadequate enforcement of intellectual property rights.

Piracy in Nigeria is not as pervasive as it is in China, hence the active strategy China employed to regulate and evolve the enforcement of its TRIPS obligated protection of intellectual property rights in face of challenges from the United States at the WTO dispute settlement system in the US-China WTO Panel case, can be learned from. By reason that this would be challenges that would be coming Nigeria’s way when its nascent industries are successful.

4.2 US-China WTO Panel Case

Due to apparent weak enforcement of its intellectual property laws and the growth of piracy in Nigeria, in spite of the growing need to enforce said laws in order to protect and nurture growing industries especially the Nollywood movie industry, eventually the local industry will start demanding for more protection. Ironically, if the Nollywood movie industry and other nascent small and medium enterprises production capacity continues to grow despite the lack of support given to them by the Nigerian government, it could also be foreign government that demand that Nigeria fulfill its WTO treaty obligations regarding protection of protected works or could be possibly foreign companies that demand this increased intellectual property rights enforcement protection from the Nigerian government.

Important cues can be taken from the US-China WTO Panel case on intellectual property rights protection (piracy). Although China’s piracy problem is more endemic than the situation in Nigeria, China’s rise as a BRICS country owes more to structural adjustments and stronger
protection of intellectual property rights in China which led to increased economic boom for the industry in China. Notably, passive enforcement of protection of copyright works despite the economic boom in China led to WTO dispute cases (see Figure 1), a similar trajectory maybe charted for the future of Nigeria in its lackluster combat against piracy.

In the *US-China WTO Panel* case,\(^\text{152}\) the measures at issue were China’s Criminal law and related Supreme People’s Court Interpretations which established thresholds for criminal procedures and penalties for infringements of intellectual property rights; Also in contention was China’s Regulations for Customs Protection of Intellectual Property Rights and Related Implementing Measures that govern the disposal of infringing goods confiscated by customs authorities; and the last measure at issue was Art 4 of China’s Copyright Law which denies protection and enforcement to works that have not been authorized for publication or distribution within China.\(^\text{153}\)

The result of the panel report was a mixed bag for China the respondent and USA the applicant. For the dispute panel settlement had some decisions go one way for the USA while some other decisions went the way of China.

For the thresholds for criminal procedures and penalties, under the TRIPS Agreement, each WTO member is required to apply criminal procedures and penalties to case involving “willful trademark counterfeiting or copyright piracy on a commercial scale”.\(^\text{154}\) The US claimed that China failed to honor its TRIPS commitments by including in its IP laws high thresholds for criminal procedures and penalties and the said thresholds, the US argued, provided a safe harbor for pirates and counterfeiters to avoid criminal prosecution.\(^\text{155}\) China denied the charge by pointing out that country had in place a parallel enforcement system that subjects all infringements to enforcement and due to limited resources and a different socio-legal tradition, criminal enforcement handles serious cases, while administrative enforcement deals with low-scale infringements.\(^\text{156}\) As China successfully pointed out, the calculation of thresholds is rather complicated because unlike the simple thresholds alleged by the US, the thresholds at issue are

\(^{152}\) Ibid China (DS362)
\(^{153}\) Ibid Yu US-China WTO Cases Explained
\(^{154}\) See also Article 61 of the TRIPS Agreement
\(^{155}\) Ibid Yu US-China WTO Cases Explained
\(^{156}\) Ibid Yu US-China WTO Cases Explained
calculated over a prolonged period of time. The Panel found that China’s criminal measure excluded some copyright and trademark infringements from criminal liability where the infringement falls below numerical thresholds fixed in terms of the amount of turnover, profit, sales or copies of infringing goods, this fact alone was not enough to find a violation because Art.61 does not require Members to criminalize all copyright and trademark infringement.

The term “commercial scale” in Art 61 means the magnitude or extent of typical or usual commercial activity with respect to given product in each market. Thus, the Panel concluded that it did not endorse China’s thresholds, but that factual evidence presented by the United States was inadequate to show whether the cases excluded from the criminal liability met the TRIPS standard of “commercial scale” when that standard is applied to China’s marketplace.

For the disposal of infringing goods measure, it concerned Chinese Customs ability to dispose of confiscated infringing goods properly. The US claimed that the Authorities could not destroy the infringing goods unless they found it inappropriate to donate the goods to charities, sell them back to the rights holders or auction them off after eradicating the infringing features. The Chinese countered that those measures are simply a flexible way of disposing of these kinds of goods.

Under the TRIPS, each member State is required to empower its judicial authorities to order the uncompensated destruction or disposal of infringing goods. The Panel noted the flexibility of a member State to apply additional measures not mentioned by the Agreement, and upheld the use of donations and sales, however the Panel concluded that the way in which China’s Customs auctions these goods was inconsistent with Art. 59, because it permits the sale of goods after the simple removal of the trademark in more than just exceptional cases. This fact, in the Panel’s view did not provide an effective deterrent to piracy and counterfeiting.

The last measure of dispute in this US-China WTO Panel case concerns the copyright protection for censored works. Article 4 of the Chinese Copyright Law denies copyright protection to works that have been banned for publication, distribution or both. The US claimed that China had failed

157 Ibid Yu US-China WTO Cases Explained
158 Ibid China (DS362)
159 Ibid China (DS362)
160 Ibid Yu US-China WTO Cases Explained
161 Ibid China (DS362)
to offer protection to copyright holders as required by the Berne Convention and TRIPS, also the US contended that the said Chinese Copyright provision also contravened the Convention by subjecting copyrighted works to the formalities of a successful conclusion of content review.\footnote{\textit{Ibid Yu US-China WTO Cases Explained}} China responded to this claim by stating that the Berne Convention did not affect a country’s sovereign right “to permit, to control, or to prohibit … the circulation, presentation, or exhibition of any work or production”.\footnote{\textit{Ibid Yu US-China WTO Cases Explained}} China also asserted that the censorship laws offered more secure protection than copyright.

The WTO Panel found that while China has the right to prohibit the circulation and exhibition of works, as acknowledged in Article 17 of the Berne Convention, this does not justify the denial of all copyright protection in any work.\footnote{\textit{Ibid China (DS362)}} Moreover, the Panel found that China failed to provide sufficient evidence that the rights holders will obtain greater protection through censorship regulations than copyrights. Thus, China’s failure to protect copyright in prohibited works is therefore inconsistent with Article 5.1 of the Berne Convention as incorporated in Article 9.1, as well as with Article 41.1, as the copyright in such prohibited works cannot be enforced.\footnote{\textit{Ibid China (DS362)}} The Panel also stated that an alternative form of protection did not diminish a country’s TRIPS obligations.

Ultimately, the two sides decided not to appeal the panel report adopted by the Dispute Settlement Body. This is translated as both sides feeling that they got something out of the litigation. For the US, it got the WTO to adjudge the practices of China in its enforcement procedures, and compel it to bring its enforcement procedures and protection of copyrighted works within its obligations under the TRIPS Agreement. On the other hand, China also won some issues on its favor, most importantly the panel report affirmed China’s right to legislate on its own procedures for prosecuting copyright and trademark infringement, the Dispute Settlement Body ruling that establishing thresholds and separating prosecutable offences from being processed by the criminal procedures and the administrative procedures is not failing in compliance with its obligations under the TRIPS Agreement. Accordingly, China reported to the DSB that it would need time to implement the recommendations and rulings and would need a
reasonable time to do so. By 2010, China had reported to the DSB that its Standing Committee of the 11th National People’s Congress had approved the amendments of the Chinese Copyright Law and that the State Council had adopted the decision to revise the Regulations for Customs Protection of Intellectual Property Rights.\(^{166}\) Thereby China had fulfilled all necessary domestic legislative procedures for implementing the DSB recommendations.

Importantly, it can be said that this very important case helped China adjust its laws and improve its WTO strategy. Thereby enabling it to provoke increased reform in the country, spurred by the knowledge it has gained from learning from its intellectual property challenges with the US. This knowledge strengthened its game and strategy in legislating for intellectual property rules in its country. While at the same time asserting developing countries and importantly any country’s ability, to legislate while complying with the minimum requirements of the TRIPS Agreement, and the decision of the DSB in this case reaffirming the Body’s inclination to respect member state’s national legislative process.

Nigeria can learn a lot from adopting some of the strategies employed by China in this piracy case. China has made use of active strategy to formulate a response to the increased focus and the rising tide of displeasure to the measures it has employed to combat piracy on its shores. Also, China has also actively resisting foreign incursions into its internal administrative process. Tellingly, the Dispute Settlement Body held that China criminal threshold procedure did not run afoul of it TRIPS Agreement obligations. This particular ruling maybe the most important for China because it affirms that member States of TRIPS need not criminalize every intellectual property right infringement, allowing latitude for countries to legislate as they deem fit. This is where Nigeria must learn, if its aspirations as a MINT country are to be achieved.

The road to economic boom will be layered with challenges especially pertaining to intellectual property because countries will be looking to ascertain that a country is playing fairly at the WTO system. In any case, cases at the WTO dispute settlement system are usually a very long and detailed process, sometimes taking years to resolve, ensuring that the WTO covers both sides of a dispute. The resultant effect of this painstaking process is that WTO settlement system usually awards points for both sides of the dispute. As seen in Chapter 2’s *US-India WTO Panel*

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\(^{166}\) Ibid China (DS362)
case and in this *US-China WTO Panel* case, the Court will err on the side of caution and both sides of the dispute can score points. At the end the WTO dispute settlement system is configured and concludes its ad judiciary process to ensure that member States complies with its obligations under the WTO trading regime. This is essentially a feature of the Dispute Settlement Body refusing to be drawn in into the debating either the merits or process of legislation, or even adopted measures in a member State, only what is paramount is if such actions subject to the dispute abrogate or diminish said member State’s treaty obligations under the WTO TRIPS Agreement.

Therefore, the need for an active strategy to accommodate the nuanced path an industrial emergence would demand. A bottoms-up approach in ensuring increased protection and awareness for the intellectual property of the emerging local industries in Nigeria would ensure that a system is in place to protect the expected growth of the industry and knowing that its potential regional and global success path will be tested by foreign governments or entities seeking to compete and ensure that the local business environment is fair and the government is complying with its WTO and TRIPS treaty obligations in creating the enabling environment for growth.

4.3 **Partnership with a developing country**

As part of an active strategy towards spurring growth in the nascent industries, Nigeria could partner with another developing country in trade deals, also as previously discussed under compulsory licensing, regional and continental partnership with other African countries would be beneficial for the country’s goals. All the same, a closer partnership with a more prosperous developing country for example China would create avenues for growth stimulus for industries via transfer of technology and bilateral trade agreements that emphasize on training and manufacturing techniques or methods.

A south-south alliance with China has provided stimulus for the Nigerian economy based on China’s voracious appetite for oil supply to power its industries and raw materials for example cotton also the need to have Nigeria’s large market to export its cheaply manufactured goods.
The trade volume between the two countries grew nearly 300 percent since 2004 and reached $7.3 billion and $7.7 billion respectively, hence with that level of trade Nigeria is now the second biggest China trade partner in Africa, after South Africa.\textsuperscript{167} Unfortunately, when this partnership is examined closely using economic metrics, this trend has contributed to Nigeria being an import dependent economy especially for commodities. Worst of all due to persistent corruption, a lot of these cheap commodities are smuggled in through the porous Nigerian borders.

A cursory observation is that in most of Nigeria just to name a few examples of items such as, household utensils, textile materials, office equipment, are imported from China. Hence, this phenomenon has continually contributed to Nigeria’s manufacturing sector which should be the driving force of a developing country’s economy, to have been sinking to a state of comatose. Consequently, in the last two decades, Nigeria has experienced a momentous decline in manufacturing, losing approximately 8,707 manufacturing jobs due to collapse and relocation of manufacturing companies in submission to the insurmountable competition with cheaply manufactured Chinese goods worsened by poor infrastructural facilities.\textsuperscript{168}

As previously discussed, this pro-typical south-south alliance with China can turn into a neocolonial one, thus then morphing into a north-south relationship. That is if all Nigeria does is send raw materials to China and then imports finished products. The trade imbalance between the two trading partners must be fixed on Nigeria’s initiative.

A look at the trade deficit reveals how severe the situation is:

Figure 3: Nigeria-China trade statistics from 2009-2012 (in Naira value).\textsuperscript{169}

<table>
<thead>
<tr>
<th>YEAR</th>
<th>EXPORTS</th>
<th>IMPORTS</th>
<th>VOLUME OF TRADE</th>
<th>TRADE BALANCE</th>
</tr>
</thead>
</table>


\textsuperscript{169} Sourced from the Federal Ministry of Industry, Trade and Investment, Nigeria, 2014
The table shows the negative trade imbalance that has existed, even though the volume of trade and the exports from Nigeria, likewise same can be said for imports from China and the overall increase of the trade imbalance.

Efforts have been made by the current Nigerian administration led by President Buhari to address this imbalance. In a 2016 state visit to China, the Nigerian President bemoaned the large trade imbalance between the two countries and committed to exploring avenues for trade to flourish in Nigeria by creating enabling environment to transform Nigeria not only as a consumer market alone, but as an investment destination where goods can be manufactured and consumed locally.\textsuperscript{170}

Certainly, encouraging signs have emerged recently with numerous news of development deals being struck with Chinese firms to locally manufacture goods. In 2014, a consortium of companies in Nigeria sealed a Memorandum of Understanding with some Chinese investor for the assembling and manufacturing of prepaid power meters, and oil and gas pipes.\textsuperscript{171} The objective of the agreement according to statement at the signing is to facilitate financing, procurement and operation of independent power plant projects.

In addition, China was involved in the launch of NIGCOMSAT-1, a Nigerian initiative to maintain a satellite in space, though the satellite was later deorbited without any explanation.

\begin{table}
\centering
\begin{tabular}{|c|c|c|c|c|}
\hline
Year & Imports & Exports & Trade Balance & Notes \\
\hline
2011 & 392,574,877,537 & 1,460,988,039,990 & 1,853,562,917,527 & -1,068,413,162,453 \\
2012 & 933,306,451,356 & 1,209,774,086,424 & 2,143,080,537,780 & -276,467,635,068 \\
\hline
\end{tabular}
\end{table}


China Nexim Bank also was involved in the funding of five thermal stations in Nigeria. Crucially, China’s Chinese Civil Engineering Construction Company has been engaged with the reconstruction and rehabilitation of Nigeria rail tract authority, and in 2006 Nigeria signed a $2.5 billion-dollar loan with China, with substantial part of that money is to be used in the refurbishment of the railway system.\textsuperscript{172} A criticism of these deals has been China’s insistence on utilizing only its own equipment, bringing in their own staff from China to man the projects and poor working conditions for the local Nigerian employees.

For the short term, these features of China’s investment into Nigeria is not good for development and growth of the wider industry except for the feeder communities hosting these projects. Longer term, the fruits of these investment would manifest itself with better local infrastructure to create an improved environment for industries to grow and more local content produced.

All in all, there is need for Nigeria to continuously engage in the process of diversifying exports to China and other developing nations by increasing exports of processed materials rather than raw materials. This is important to hasten the technological development in Nigeria. Thus trade strategy and patent innovation are linked. An analysis of IP protection from the BRIC countries show that the IP protection they have is considerably weaker than that of developed countries such as the United States. For example, China and Brazil have minimalist protection but are thriving economically, thus it is reasonable to conclude that a strong IPR protection system is only of marginal importance to a developing country’s economic development.\textsuperscript{173}

Taking advantage of the multiple bilateral agreement by orchestrating more investment deals between the two countries would create more industries and the technological nous provided by Chinese businesses will provide a model for the local industries to pattern. Tactical use of economic diplomacy is necessary to ensure that the trade imbalance is addressed sufficiently, ensuring that Nigeria shields her market from becoming a dumping ground for cheap and at times substandard Chinese products. That would strengthen the south-south alliance, ensuring that an unequal partnership is avoided. The drive to accelerate the growth of the manufacturing

\textsuperscript{172} Ibid Ibrahim Abu Akoh (2014)
industries and other local industries in Nigeria must be accompanied by increased intellectual property protection for the produced goods.

4.4 Final Remarks

Altogether, this paper has assessed the potential challenges for Nigeria as a MINT economy seeking to emulate the success stories of BRICS economy countries like China and India. The development and subsequent explosion of industries in China and India has transformed said countries into manufacturing hubs. This growth has been nurtured through reform and an active strategy by their governments to constantly create a sound environment so that patent innovation may thrive. This strategy has involved creating legislation that has complied with the minimum protection of patents as part of requirements of their TRIPS obligations.

For Nigeria's aspirations as a MINT economy, successes recorded in creative industries such as Nollywood must be better protected and replicated in other dormant industries as well, in addition effort must be made to learn the lessons of the difficult challenges in patent protection faced by the examined model BRICS economies, China and India.

The focus on compulsory licensing illustrates how using the discretion allowed by the TRIPS Agreement, Nigeria can enact laws that encourage the patenting and manufacturing of cheap medicines for the citizens while also creating jobs for the country and at the same time safeguarding the health of its citizens. This can also serve as a platform to cater for the sub region and other developing countries as an exporter of generic drugs.

The Doha Declaration as a legal document enforces many of these discretions a developing country may indulge in and its historical importance has also been highlighted in this paper. US-India WTO Panel case and aftermath of the reforms adopted by India provides a blueprint for how compulsory licensing can be an effective tool in spurring patent innovation in Nigeria. Similarly, US-China WTO Panel case is useful because of the piracy problem Nigeria and China
share. Therefore, the strategy through which China’s reforms were implemented to conform with its TRIPS obligation is important to take note of.

The new knowledge economy demands for nations in the WTO trading regime to constantly push for patent innovation and protection to the minimum standards of TRIPS and how Nigeria performs subsequently will impact the sustainability of the growth they have witnessed over the decade. Examination of patent law in Nigeria reveals that there is already a law for minimum protection for patents with a feature for compulsory licensing. However, for development agendas to be met, there has to be proactive use of legislations already made. An active strategy would demand that necessary new legislations should also be enacted and implemented to support the preexisting ones. The end point of the active strategy is the realization of increased patent innovation also development of the manufacturing industries and expanding of the creative industries.

Nonetheless, in formulating an active strategy for the nation to achieve its development agenda, there is major importance in Nigeria taking cognizance of emerging trends, so its national interests are always met. Also in implementing this strategy, while supporting the south-south alliance is important, it is important to discern that conflicting objectives and changing national interests mean that the major developing countries especially the BRICS may side with the global north on some other issues.

In summary, this study does not examine a finite set of lessons or issues that can affect the aspirations of Nigeria's development into a MINT global trading power. This paper has highlighted lessons and issues that illustrate how best to take advantage of the discretion offered to developing countries under the TRIPS Agreement.

On a final note, this dissertation was written without foreknowledge of the calculations by the present Nigerian administration in recalibrating National Development Plans which then birthed the Economic Recovery and Growth Plan (2017-2020). Coincidentally one of its major agendas is towards transitioning the national economy into a more knowledge-based economy.

This research has certainly outlined methods that can be adopted in furthering the current Economic Recovery and Growth Plan (2017-2020), and actualizing the Vision 2020. I sincerely hope that the arguments that has been made here on learning from successes in patent protection
from the BRICS economic bloc can assist Nigeria through its path towards development so that the challenges to be faced in the road ahead would be adequately prepared for.