

Faculté de droit et de criminologie

International protection of industrial property rights in DRC: A comparative analysis

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Abbreviations

- I. TRIPS Agreement: Trade Related-aspects of Intellectual property
- II. CBD: Convention on the Biological Diversity
- III. IP: Industrial or Intellectual Property
- IV. TK: Traditional Knowledge
- V. UN: United Nations
- VI. ICSID: International Centre for Settlement of Investment Dispute
- VII. Op. or Art Cit.: Book or article cited

Summary

This work deals with principles of international law that govern the protection of industrial property rights. It makes a particular attention on rules regulating some patentable inventions that have used, in a way or another, traditional knowledge. More particularly, the review of international legal instruments related to industrial property rights and that have been ratified by DRC constitutes the cornerstone of this work. The aforesaid legal instruments, which are mainly the Paris Convention and TRIPS Agreement, work in a complementarity system and set principles and strategies useful in the protection of industrial property rights. Going deeply into them, it is better revealing that their implementation in respective national systems of contracting parties constitutes an obligation. Therefore, in the compliance with such obligation, DRC had adopted a law that addresses issues of industrial property rights. Despite the adoption of the law above-mentioned and the transitory period granted by the WIPO, DRC national legal system is still characterized by a serious lack of conformity with TRIPS Agreement requirements. Due to that, a majority of scholars have supported that DRC had not made major efforts to comply with its international obligation under TRIPS Agreement and claimed the application of reciprocity (even if prohibited by the Paris convention) to Congolese nationals living abroad. Besides, it is currently noticed in DRC that some inventions, internationally protected under industrial property law, have used traditional knowledge regardless of rules and principles of international law related to. This has been the object of a very interesting debate in doctrine that inspired the recent report of pharmacists in DRC. According to that report, the use of traditional knowledge in several pharmaceutical inventions has increased. Unfortunately, that increasing use of traditional knowledge in patentable inventions violates, by and large, the Convention on the biodiversity and the Nagoya protocol setting principles that should govern such activity. The convention on the biodiversity principles, have to be integrated by contracting parties in their respective national system. Surprisingly, today on, there is no a law that implements principles set in the convention and protocol above-mentioned in DRC. Consequently, Congolese indigenous or local communities whose traditional knowledge have been used in patentable inventions, especially drugs, have no effective legal framework to claim the violation of rights recognized by international law through the convention on the biodiversity and the Nagoya protocol.

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Introduction

I. Background to the study

Industrial property law, in the era of international trade and globalization, is at the heart of several issues¹. The last, mainly, refer to the protection of industrial property rights as intangible assets of companies. The aim of such protection is to create an opportunity for business to consciously manage their intangible assets and make profit from them as part of the capital². Unfortunately, in DRC, several businessmen do not much care about such an opportunity and seem to ignore it. According to Yav Katsung, the ignorance of industrial property law in DRC have led to a perpetual infringement of laws and regulations related to³. On our behalf, the aforesaid ignorance should not be considered on a national basis only. It entails important aspects of business law when considering the international dimension. The last plays a key role in import and export operations in DRC.

While some of them are realized through franchising contracts, a group of factories involves in the production of goods of different nature sold beyond Congolese borders. Considering that, it is of utmost value to inquire about the protection of such imported industrial properties by taking into consideration existing franchising contracts understood here as “*a method of distributing products or services involving a franchisor, who establishes the brand’s trademark or trade name and a business system, and a franchisee who pays a royalty and often an initial fee for the right to do business under the franchisor’s name and system*”⁴.”

By the same token, the presentation of how to make intangible assets profitable to Congolese businesses and to awake the national conscious on principles of international law that protect those assets, constitute the starting point of the present work. Legally speaking, it is a principle under industrial property law that an invention or other intangible asset needs legal protection. The last aims at granting a monopoly to the owner and allowing him to prevent any illegal temptation of using or slavish copying of his invention. Thus, Eastaway writes “*Being capable to stop copying is a desire of many businesses for the straight forward reason that it impels customers to look for the author for the product or service in need. Accordingly, intellectual*

¹Y. Katsung, « Droit de la propriété intellectuelle congolais » in *Revue de droit des affaires OHADA*, available on www.ohadata.com consulté le 7 Février 2022 en 20h30, p.4

²*Ibidem*

³*Ibidem*.p.5.

⁴N. Binctin, *Droit de la propriété intellectuelle : Droit d’auteur, brevet, droits voisins, marques, dessins et modèles*, 3^{ème} édition, LGDJ, 2014, p.30.

*property law has a major impact on the actual conduct of business across a very wide range of human endeavor. Therefore, it implies legal protection at different levels of products' accessibility*⁵”.

Going in the same position that supports the protection of intangible assets as quoted by Eastaway, the CJEU in Mechana case 24 March 2022 C-433/20 (Austro-) said: “*Technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation*”. By and large, there is no a country, in the modern World, “*that can expect to adequately satisfy and protect its nationals' interests without securing for them the protection in the other countries. This is in regard to the multiple aspects of industrial and commercial activity which are known under the name of industrial property*”.⁶ The last describes a product of mind or of intellect that can bear the form of invention, trademark, original design, etc. It can also be the application of an idea that confers rights to the owner. These rights are very valuable in business and enable customers to distinguish the author's business from competitor's ones. As intangible assets, they often form “*an essential part of business and play a key role in the construction of a complex and successful business plan*”⁷.

In the same line of ideas, during the World Intellectual property organization national workshop for judges organized by the WIPO in cooperation with the government of the Kingdom of Saudi Arabia in December 2004, it was demonstrated that “*Intellectual property rights have a considerable economic value. Non-respecting them on commercial scale leads to multi-billion-dollar problem estimated in 5-7 % of world trade and causes the non-payment of royalties to inventors, a loss of taxes for governments, impedes the establishment of domestic markets and constitutes a serious danger for public safety and health*”⁸. Josef Drexel and Nari Lee write that “*the protection of the exclusive patent right, which refers to inventions, is one of the core measures to incentivize investment in research, development and disclosure. However, patent law as an incentive for innovation and, may be, in interaction with competition law, as a mean*

⁵N. Eastaway et alii, *Intellectual property law and taxation*, 7th edition, Thomson Reuters, 2008, p.19

⁶ST.P. LADAS, *The international protection of industrial property*, Cambridge, Harvard University press, 1930, p.3

⁷Sam Ricketson, *The Paris convention for the protection of industrial property; A commentary*, Oxford University Press, 2015, p.6

⁸WIPO national workshop for judges organized by the WIPO in collaboration with the Saudi Arabia, December 2004.

to promote follow-on research have to be coordinated and balanced with the interest in fostering public health, product safety and access to medicine"⁹. The same balance needs to be considered for other kinds of products destined to public for consumption. In other words, protecting industrial properties in internal markets as well as international ones plays a key role in the promotion of research, development and disclosure, things that are of important contributing impacts on the economic development of States. In the same direction, the CJEU, in the Ferrari case of 2021, said: "International legal instruments such the Paris convention and TRIPS Agreement (...) enhanced *protection for industrial design (properties) encouraging innovation and development of new products and investment in their production*". The same idea was expressed by the same court in Top System case of 2021 saying: "Whereas *the exclusive rights of the author to prevent the unauthorized reproduction of his work (...) grants the right holder the exclusive right to make or authorize the translation, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof*¹⁰".

Briefly speaking, the connection between case law and doctrinal views related to the protection of industrial properties is focused on the boosting effects of industrial properties on economic development. However, when dealing with that connection, it should be kept in mind that inventions that have been using traditional knowledge deserve a particular attention. The last is justified by internationally recognized rights owned by local communities on their traditional knowledge linked with genetic resources. According to F.Leila Ghassemi, patentable inventions using traditional knowledge, should comply with rules settled under the Convention on the biodiversity and the Nagoya protocol that address issues of genetic resources linked with traditional knowledge¹¹. As a commentary, better is to write that the aforesaid doctrinal position does not mean that traditional knowledge is protected by industrial property law. It refers to an existing international legal requirement under the convention on biodiversity and its Nagoya protocol. The interest of invoking such a particularity is that some inventions protected by industrial law have been using know-how, process and other resources legally and traditionally owned by local communities. The same interest is expressed by the World Intellectual property Organization in its different publications that say: "*Traditional knowledge is a current matter*

⁹J. Drexel et alii, *Pharmaceutical innovation, competition and patent law*, Edward Elgar Publishing Limited, UK, 2013, p.1.

¹⁰ CJEU, Top System case of 2021

¹¹L. Gh. Farreras, *Utilisation of traditional Medicinal Knowledge in the Industry: Legal aspects and protection in international law*, Ph.D. dissertation in Law of the Neuchatel University, defended on March, the 14th 2017, p.85.

linked with a lot of patentable invention¹²”. As an explanation, Traditional knowledge in the strict sense refers to *“knowledge as such, in particular that resulting from intellectual activity carried out in a traditional context and includes know-how, practices, techniques and innovations”¹³*.

Considering the increasing use of traditional knowledge in patentable inventions in DRC as reported by pharmacists and the WIPO in its recent publication that prioritizes the protection of traditional knowledge, as a lawyer interested in industrial property issues, I found more than important to focus on those industrial properties and rights related to by checking whether the local communities can, on the basis of legal principles and other rules of international law, benefit to the use of their traditional know-how in modern drug industries. However, it should be kept in mind that we are not talking about traditional knowledge as patentable subject matter. It is a particular attention on patentable inventions that have been obtained from traditional knowledge in the violation of the convention on the biodiversity and the Nagoya protocol.

II. Research question

As emerges from the extensive literature, in respect to the international protection of both industrial property and derived rights, two questions are commonly asked by authors. It is all about the acquisition of an industrial property right by foreigners and the recognition and enforcement of a right acquired abroad¹⁴. The rights above-referred to, *“are commonly protected by patents, registration of trademarks and trade names, utility models and designs; a process that goes from national legal basis”¹⁵*.

For Nigel Eastaway, there is a verified conclusion that granting a patent consists of *“a right of exclusive use of the invention for a limited time and involves a curtailment of the freedom of industry and commerce. During the term for which the patent is granted, no one except the patentee is allowed to manufacture, use or sell the new article or the new machine”¹⁶*. Thinking in the same sense, we came to a question: *“is such a protection automatically recognized beyond borders of the issuing patent authority”*? Despite conventions and agreements on the international protection of industrial property rights and different initiatives of the World Intellectual property Organization to which DRC is a State-party, it is worth bearing in mind

¹²WIPO IGC, “Recognition of traditional knowledge within patent system” 13-17 October 2008, WIPO/GRTF/IC/13/13/7

¹³ *Ibidem*.

¹⁴ST.P. Ladas, *Op.Cit.*, p.14

¹⁵*Ibidem*, p.15

¹⁶*Ibidem*

that, on the one hand, foreigners met with great and, sometimes, insurmountable obstacles to get the protection of their inventions in DRC and on the other hand, Congolese nationals face hardships in getting protection of their inventions abroad.

According to Yav Katsung, such a drastic situation in DRC is due to lack of knowledge of intellectual property law by a great number of Congolese including some administrative authorities and becomes a nightmare when international legal aspects involved in¹⁷. On the Congolese law front, it reveals more than important to check out the way its legal system organizes the protection of industrial property at the international scale and propose a broadcasting mode of the scope of such protection by taking into consideration the fact that some industrial properties have integrated traditional know-how or process recognized to Congolese local communities. In others words, it is asked: **how does the Congolese law organizes the international protection of industrial property rights. And what are specificities of industrial properties that contain traditional aspects of local communities?**

III. Literature review and theory framework

The emergence of legal protection and legal remedies of industrial property sets limits between what may legitimately be done and what is illegitimate between “*the areas of new development which are, for longer or shorter periods fenced off and what then passes into the pool of common knowledge from which all may freely take*”¹⁸.

Using a comparative approach, Leila Ghassemi Farreras writes that despite its gaps and deficiencies, the Paris convention for the protection of industrial property rights is a successful achievement in the field of intellectual property law at the international level and provides the principal international vector of the union between States. She demonstrated that before the Paris union, the situation was more than complicated to obtain protection in foreign countries due to the fact that an invention patentable under the law of their country might be non-patentable in other countries. Even the filing of the application describing the inventions or the advertisement of the “*invention by administration was considered destroying the novelty of the invention in many countries*”¹⁹.

On his side, using an exegetic-casuistic approach, Sam Ricketson opines that the contribution of the Paris convention to the international protection of industrial property tries to make a

¹⁷Y. Katsung, « Droit de la propriété intellectuelle congolais » in *Revue de droit des affaires OHADA*, disponible sur www.ohadata.com consulté le 7 Février 2022 en 20h30.

¹⁸N. Eastway, *Op.Cit.*, p.19

¹⁹L. Gh. Farreras *Op.Cit.*, p.85.

*“convergence and harmonization between legal systems of different States even if in some continents like Europe, the bar has reached a very high level of union and the protection granted to industrial property is getting more and more effective”.*²⁰ This was confirmed in case law by the Court of Justice of the European Union in “Consten et Grundig vs Commission, joint-cases 56-64 and 58-64 of 13th July 1966” and in the “Deutsche Grammophon” cases when supporting that, on the TFEU basis, a unique and community market in the field of intellectual property is an essential need of the EU.

At the African level, there is an organization between west African countries that deals with intellectual property law issues and grants a more effective protection to nationals of its State members. A significant number of Congolese from different sectors especially business, politics and law unceasingly support that there is a huge need for DRC as a State-party to “‘Organization for Harmonization of Business Law in Africa’ comprising, almost all west African countries” to sign its membership to the African organization of intellectual property (AOIP). According to them, *“Such a membership will broaden the scope of protection of intellectual property between members and effectively contribute to its implementation and recognition at a larger scale”.*²¹

Comparing to the European protection of industrial property rights and considering the fundamental role played by national laws of States in the implementation of the Paris convention, the present work supports that DRC enters the OAPI community. However, it should not be forgotten that the European market of industrial property works in connection with several agreements to which DRC is not a contracting party. Such a weakness can justify the low level of legal protection it grants to industrial property rights at different levels. For instance, the Paris convention (188) is accompanied by other legal instruments of international scope such as the Madrid Agreement Concerning the International registration of Trademarks (1891) and Protocol Relating to the Madrid Agreement (1989), Hague Agreement Concerning the International Deposit of Industrial Designs (1925) and Geneva Act (1999), Trademark Law Treaty (1954), Lisbon Agreement for the Protection and Registration of Appellations of Origin and their International Registration (1958), Nairobi Treaty on the Protection of the Olympic Symbol (1981), Washington Treaty on Intellectual Property in Respect of Integrated Circuits (1989), Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS

²⁰S.Ricketson, *Op.Cit.*p.25

²¹Y. Katsung, *Art.Cit.*, p.5

Agreement) (1994) and so on. And DRC ratified only the TRIPS Agreement, as member to the WTO.

With such a low participation to international agreements on industrial property, it is still unrealistic to expect a broaden protection. For Yav Katsung, the matter boils when principles and rules settled under few agreements ratified by DRC are known and respected by a small group of persons. According to him, the international protection of industrial property in Congolese law is still an undiscovered domain which requires deep research from lawyers²². Concerning specificities of industrial properties that contains traditional aspects of local communities, BOKEDER writes that *“Despite the fact that TRIPS agreement, as an efficient international source of industrial property protection, makes no reference to traditional knowledge, there are some provisions that are of relevance for the issue of traditional knowledge whether for its protection or for its appropriation”*²³.

A recent WIPO consultation paper reports that: *“Significant number of patent applications concern inventions which are in some way related to traditional knowledge”*²⁴. Thus, Leila Ghassemi Farreras opines that, “in most of the cases, the patented-claimed invention may have only been very remotely influenced by traditional knowledge or, on the contrary, may be directly based on traditional knowledge”. She pursues *“for some communities the grant of patents that encompass traditional knowledge within their scope constitutes an offence to their laws and customs”*²⁵.

By the same token, without saying that traditional knowledge is patentable like an original invention, the WIPO intergovernmental committee drafts a series of articles that give a definition of traditional knowledge. This refers, *stricto sensu*, *“to the content or substance of knowledge resulting from intellectual activity in a traditional context and include know-how, skills, innovations, practices and traditional lifestyle of indigenous and local communities or contained in codified knowledge system passed between generations. It is not limited to any technical field and may include medicinal, agricultural, environmental knowledge and knowledge associated with genetic resource”*²⁶.

²²Y. Katsung, *Art.Cit.*, p.4

²³ Bokeder, *A public health agenda for traditional complementarity and alternative medicine*, 2002, p.1586

²⁴ WIPO IGC, « Recognition of traditional knowledge within patent system », 13-17 October 2008, WIPO/GRTF/IC/13/13/7

²⁵F. L Ghassemi, *Op.Cit.*, p.87

²⁶*Ibidem*, p.246

IV. Hypothesis

For this research to begin, an inquiry plays a key role in the appraisal of different kinds of solutions to find out in regard to the research question. Those solutions will be, of course, results of the research which, from a methodological point of view, confirm or not our predictions and assumptions commonly called by legal theorists' "hypothesis". Tayler writes "*A research hypothesis is a statement of expectation or prediction that will be tested by research*²⁷". It is said to be the starting point of any investigation or inquiry in the process of legal research. Hypothesis occupies an utmost position for any investigation and proceeds in a direction to find out answer to the problem. Therefore, it must be "*very clear, simple and definite without any creeping ambiguity therein*"²⁸. Assumingly, it seems that the international protection of industrial property rights in Congolese law is organized through different agreements and multilateral treaties pertaining to intellectual property to which DRC is a party. Those international legal instruments work on the basis of principles of law early applicable in different European countries national legal systems. Despite the application of the aforesaid principles and strategies to industrial properties containing traditional aspects, the convention on the biodiversity and the Nagoya protocol set additional principles that, for longer, aims at benefiting to local communities and indigenous populations.

V. Work Objectives

The present work aims at reviewing different international legal instruments that assure the protection of industrial property rights in DRC. This review finds justification in the lack of knowledge of this field of law by a great number of Congolese and difficulties faced by inventors when seeking to protect their invention in door as well as outdoor. More specifically, the present research aims at awaking Congolese on the way to profit from their intellectual rights via intangible assets at the international level and demonstrating that there is a need for DRC to adopt a law that implements the convention on the biodiversity and the Nagoya protocol for the sake of addressing issues related to industrial properties containing traditional aspects.

VI. Methodology

The collection of data concurring to the formulation of answers to the present research questions

²⁷Tayler, *Sample student hypothesis* 2008-2009, available on www.uclouvain.facdroidit.be consulted on 28th February 2022 at 16 h:7

²⁸International conference on mixed methods research in *journal of biomedical sciences*, 2019, p.1 available on www.uclouvain.facdroidit.be consulted on 28/02/2022 at 16:2

requires the use of an appropriate methodological approach. The last, as an intellectual process, is a tool that allows “*testing theories by demonstrating the inevitable relationship between facts and theory*”²⁹. For bringing the most effective result, the present research is performed through a doctrinal legal and comparative method as privileged by Leila Ghassemi whose methodological approach revealed more attractive. For Leila Ghassemi, doctrine is “*central to law and understanding it through a focus on foundational facts becomes appropriate*”³⁰. T. Mann describes a doctrinal approach as “*a synthesis of rules, principles, norms, interpretive guidelines and values which explains, makes coherence or justifies a segment of the law as a part of the larger system of law*”³¹.

On the one hand, since law, itself, is “*a doctrine put into application in a social circumstance*”³², this work focuses on the way in which Congolese industrial property law evolves, operates and brings specific type of consequences in regard to the international protection. On the other hand, considering the relevance of a comparative method for legal research as demonstrated by Leila Ghassemi, it is worth writing that this work highlights successful experience in Belgian industrial property law frame and tries to show how such achievement can be integrated in Congolese intellectual property law at different dimensions. From a teleological point of view, comparative method aims at drawing lessons from the approaches of different jurisdictions to the same or similar problems. It provides a much “*richer range of model solutions by considering similarities, identifying discrepancies and working on them. It widens the dimensions of a critical legal research and facilitates a contrast between specificities of different legal systems*”³³.

More precisely, it is micro-comparison that interested us as much as it is done between legal systems of the same law family, and focuses on specific rules particularly industrial property rules to resolve the issue of the international protection of industrial property rights in Congolese law. Concretely, the above-mentioned methods are materialized by practical tools that are called techniques. As far as this work is concerned, documentary technique plays a key role in the collection, exploration, explanation, evaluation and treatment of information that concur to the construction of solutions hereby highlighted.

²⁹E. Hessel Yntema, « Comparative legal research: some remarks on ‘Looking out of the cave’, *Michigan law review*, 1956, pp. 899-928. 903.

³⁰F. L. Ghassemi, *Op.Cit.*, p.87

³¹Taub Man cited by L. Ghassemi, *ibidem*, p.91.

³²P.M. Bakshi, “Legal research and Law reform” in *SK Verma and M. Afzal Wani*, Indian Law Institutes, 2010, pp110-119

³³E. Hessel Yntem, *Op.Cit.*, p. 900.

VIII. Study plan

A good appraisal of the way Congolese legal system organizes the international protection of industrial property rights requires the review of different legal instruments related to. It implies that the legal framework be presented and correctly circumscribed before focusing on principles and strategies that govern the aforesaid protection. Therefore, the last forcedly depends on different conventions, treaties or agreements to which DRC is a party as well as the Congolese laws that regulate the protection of industrial property rights and other related aspects (Chapter I). Going deeply into such legal instruments, it is underlined rules and principles of protection that combine two dimensions which are of national and international scope. Industrial properties that have been using traditional knowledge especially in local drugs industry, deserve a specific attention with regards to the convention on the biodiversity and its protocol (Chapter II).

CHAPTER I: LEGAL FRAMEWORK OF INTERNATIONAL PROTECTION OF INDUSTRIAL PROPERTY RIGHTS IN DRC

Legal sources addressing industrial property rights protection work in a complementarity system at the extent that numerous authors support “*the sector of intellectual property including industrial property is one of the most complete fields of law*”³⁴. Different legal instruments have been adopted by States authorities in the form of convention or agreements at the international scale (**Section I**) and statutes or text of laws at national levels. The same goes for DR. Congo in the field of industrial property and other related aspects. However, the inter-play between these two kinds of sources of protection clarifies the way to, efficiently, deal with rules related to the international protection of industrial property (**Section II**).

Section I: International legal instruments

In principle, industrial property rights (IPR) are legally protected in the DRC. However, the enforcement of regulations related to is still virtually non-existent and almost passive comparing to the Belgian legal system. Prior to independence in 1960, industrial property rights were regulated by multiple Belgian instruments. In 1975, the DRC, as an independent State, joined the 1883 Paris Convention for the Protection of Industrial Property. Its membership to the Paris convention implied international requirements that have motivated the

³⁴ST.P. Ladas, *Op.Cit.*, p.15

adoption the law No. 82-001 on Industrial Property in 1982, which still remains in force, despite the lack of enforcement mechanisms. The last depends on the absence of legislative acts that integrate into the Congolese national legal system rules concerning the above-mentioned mechanisms. In the same line of ideas, it is better indicating that, as signatory to agreements with the World Intellectual Property Organization and World Trade Organization, “DRC is ostensibly subject to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), an international legal agreement between all the member nations of the WTO which sets down minimum standards for the regulation by national governments of many forms of IPR”³⁵.

The main features of this instrument are the standards of protection, the enforcement means of rules contained in the Paris convention and the dispute’s settlement mechanisms. Ultimately, substantive standards of protection at the international level of industrial property in Congolese law are framed specifically in the Paris convention (§1) and TRIPS agreement (§2) above-mentioned

§1. The Paris Convention as revised today

The Paris convention as revised several times, substantively, aims at articulating national systems of State-parties. It fixes obligation for parties to adopt rules that grant protection of intangible assets that, for short, concern patents, trade or service marks and other intangible assets without, unfortunately, setting minimum standards. It is applied to industrial property in the “widest sense, including patents, trademarks, industrial designs, utility models, service marks, trade names, geographical indications and the repression of unfair competition”³⁶. More concretely, Countries of the Union are required to “grant temporary protection to patentable inventions (A), utility models, industrial designs (B), and trademarks (C), in respect of goods exhibited at official or officially recognized international exhibitions held in the territory of any of them³⁷”. The same obligation goes for trade names, geographical indications, including appellations of origin (D) and repression of unfair competition acts (E).

A. Patents and patentability rules

Broadly speaking, “the patent system is governed by a number of policy objectives designed to promote the production and dissemination of technological information. Many commentators

³⁵Y. Katsung, *Art.Cit.*, p.6

³⁶See ST.P. Ladas, *Op.Cit.*, p.14

³⁷See article 11 of the Paris Convention on the protection of Industrial Property of 1883

have argued that the patent system is necessary to encourage individuals to engage in inventive activity. Proponents of this view reason that, absent a patent system, inventions could easily be duplicated by free riders, who would have incurred no cost to develop and perfect the technology involved, and who could thus undersell the original inventor. The resulting inability of inventors to capitalize on their inventions would lead to an environment where too few inventions are made. By providing individuals with exclusive rights in their inventions for a limited time, the patent system allows inventors to realize the profits from their inventions”³⁸.

Under the Paris convention, member-States are entirely free to settle criteria for patentability. They freely decide whether *“patent application should or should not be examined in order to determine, before a patent is granted, whether these criteria have been met, whether the patent should be granted to the early and first inventor or to first applicant for a patent or whether patent should be granted for products only, for processes only, or for both of them and in which fields of industry and for what term”³⁹*. Without defining a patent, the convention gives different kinds of patent applicable in the union at its article 1§4 saying *“(…) patents shall include the various kinds of industrial patents recognized by the laws of the countries of the union such as patent of importation, patent of improvement and certificate of addition.”* Each State defines the patent through its national law to comply with the international obligation settled under the convention. However, case law study demonstrates that judges have contributed to the clarification of the meaning of the patent at the extent that either in civil law or common law system, the conception has been the same.

Therefore, in USA for instance, BILSKI Vs. KAPPOS case addressed by the USA supreme court (2010) gives a complete and understandable definition of patent irrespective of the type of law family in which it is applied: *“A patent is an exclusive right granted for an invention, which is a product or a process that provides, in general, a new way of doing something, or offers a new technical solution to a problem. To get a patent, technical information about the invention must be disclosed to the public in a patent application”⁴⁰*

Looking at terms of the Paris convention, it is worth writing that the first type of right protected by patent relates to an invention, a concept with an undetermined content by the convention. *“Patent rights are subject to a significant restriction that is termed the ‘exhaustion’ doctrine. Under the exhaustion doctrine, an authorized, unrestricted sale of a patented product depletes*

³⁸John F. Duffy and Richard Hynes, “Statutory Domain and the Commercial Law of Intellectual Property,” *In 102 Virginia Law Review*, 2016, p.1.

³⁹W. W. Herrington, *International Intellectual property law and Policy*, 9th ed., Mc Gill Guide, p.118.

⁴⁰See US Supreme court, BILSKI vs KAPPOS, 2010.

the patent right with respect to that physical object. As a result of this doctrine, the purchaser of a patented good ordinarily may use, charge others to use, or resell the good without further regard to the patentee. The courts have reasoned that when a patentee sells a product without restriction, it impliedly promises its customer that it will not interfere with the full enjoyment of that product. The result is that the lawful purchasers of patented goods may use or resell these goods free of the patent. Because it is the first sale of a patented product that extinguishes patent rights with respect to the item that is sold, some authorities refer to the exhaustion doctrine as the “first sale rule”⁴¹.

G. BODENHAUSEN opines that the definition of an invention is of member states freedom granted by the convention. The determination of the meaning of other kinds of patents cited by article 1§4 of the same convention is “*clarified through national laws of countries of the Union*”⁴². A patent of importation also called patent of introduction or conformation, is generally “*the one of relatively short duration of validity granted for an invention which has already been patented in a foreign country and which therefore has lost its novelty but still protected for the sake of allowing a patentee to exploit the invention in another country concerned*”⁴³. It is different from the patent of improvement which is characterised by a special provision as to duration and the payment of maintenance fees”⁴⁴. Patent or certificate of addition are “granted in a similar manner to an invention which are not forcedly improvements”⁴⁵.

In short, the Paris convention instituted an international obligation in the chief of countries of the union to issue patent for invention, importation, improvement and addition without indicating what a patent is. It is a regime of freedom granted to member-State to determine conditions of patentability and all other issues related to patent. Nevertheless, under the WIPO system, States should consider that patents grant monopolies without allowing the owners of a patented invention to make, use or sell anything.

The idea behind granting a patent is that the patented invention may not be exploited in the country by third persons, generally competitors, unless the owner agrees to such activity. This means that the owner is not given a statutory right to practice his invention but a statutory one to prevent competitors or other persons from commercially exploiting his invention. Thus,

⁴¹W. Zheng, “Exhausting Patents,” 63 UCLA Law Review (2016), 122.

⁴²See G. BODENHAUSEN cited by Wayne W. Herrigton, *O.p.Cit.*, p.119

⁴³*Ibidem*, p.120.

⁴⁴*Ibidem*

⁴⁵*Ibidem*

according to the WIPO handbook above-mentioned, *“the right to take action against any person exploiting the patented invention in the country without his agreement constitutes the patent owner’s most important right, since it permits him to derive the material benefits to which he is entitled as a reward for his intellectual effort and work, and compensation for the expenses which his research and experimentation leading to the invention have entailed⁴⁶”*.

B. Industrial designs and utility models

Despite few similarities with patent, utility models are recognized in a small number of countries. In doctrine, utility models *“are described as second-class patents and embody an exclusive right destined to cover industrial innovation of less importance than patentable invention with possible restriction as to the kind of innovation to which they apply”⁴⁷*. On his view, Uma Suthersanen opines *“Although the right has been in force in some form or other in several jurisdictions for at least 160 years, patent protection is still far from a widely implemented or harmonized species of law. Approximately 70 countries provide second tier patent protection resembling utility model protection in some form or another, including countries with highly successful innovation strategies, notably Japan, South Korea, China and Germany. Conversely, other countries which manifest a similar economic history of innovation, including the United States, the United Kingdom, Singapore, Sweden and Canada, have not embraced any utility model regime⁴⁸”*.

In the WIPO intellectual property handbook of 2004, the difference between utility model and patent system is found on the technological progress required. This is expressed as follow: *“In essence ‘utility model’ is merely a name given to certain inventions, namely—according to the laws of most countries which contain provisions on utility models—inventions in the mechanical field. This is why the objects of utility models are sometimes described as devices or useful objects. Utility models differ from inventions for which patents for invention are available mainly in two respects. First, the technological progress required is smaller than the technological progress (“inventive step”) required in the case of an invention for which a patent for invention is available. Second, the maximum term of protection provided in the law for a utility model is generally much shorter than the maximum term of protection provided in the law for an invention for which a patent for invention is available. The document that the*

⁴⁶WIPO publication n°49, 2004, p.17.

⁴⁷Read TRIPS agreement, part II and III.

⁴⁸U. Suthersanen, *Utility models: do they really serve national innovation strategies*, p.2 available on: <https://www.researchgate.net/publication/335901837>

inventor receives in the case of a utility model may be called, and in several countries is called, a patent. If it is called a patent, one must, in order to distinguish it from patents for invention, always specify that it is a 'patent for utility model'⁴⁹.”

The exclusive right granted, on the basis of utility model, is normally of shorter duration than the one of traditional patent. However, industrial designs consist of “*ornamental aspects or elements of a useful article including its different dimensional features of shape and surface that make up the appearance of the article*”⁵⁰. The legal protection related to offers the owner the exclusive right under different national legislations such Belgian and Congolese, to make, sell those articles containing such an industrial design. The enjoyment of such right is possible if only the owner files an official registration before competent authorities. It is not an automatic right and requires diligence on the behalf of the proprietor. The protection of industrial designs and utility models constitutes a State’s international obligation under the same convention.

C. Trademark and trade names

As a special tool that helps to make a distinction between wares of one enterprise from those of competitors, trademark plays a very important role in business. Its owner has also an exclusive right to use trademark or variation of it for the same or similar goods⁵¹. On the one hand, the role of trademarks is of great value in industrialization at the extent that they have been considered key factors of international trade and “market-oriented economies”. In other words, international trade and market oriented-economy allow “*competing manufacturers and traders to offer consumers a variety of goods in the same category. Often without any apparent differences for the consumer, they do generally differ in quality, price and other characteristics. Clearly consumers need to be given the guidance that will allow them to consider the alternatives and make their choice between the competing goods. Consequently, the goods must be named. The medium for naming goods on the market is precisely the trademark*”⁵². By enabling customers to distinguish by names goods available on the market, “*trademarks encourage their owners to maintain and improve the quality of the products sold under the trademark, in order to meet consumer expectations. Thus, trademarks reward the manufacturer who constantly produces high-quality goods, and as a result they stimulate economic progress*”⁵³. The same goes for services in term of exclusive right. On the other hand, trade

⁴⁹WIPO publication n°49, 2004, p.40.

⁵⁰Y. Katsung, *Art.Cit.*, p.7.

⁵¹*Ibidem*

⁵²WIPO publication n°49, 2004, p.67.

⁵³*Ibidem*.

name has been differently interpreted by national legislations of member states. However, it is understood as a designation identifying the enterprise of a natural or legal person. It is usually protected against unlawful acts of third persons. All activities of the owner in its different relations with customers or the State administration must be identified via the trade or service name.

The Paris convention doesn't indicate whether the right to a trademark is to be acquired after registration or use. It leaves the countries of the union free to decide what they desire in this field and to what extent a submission of application of registration can be required. The same freedom is granted for the determination of the scope of the protection of the trademark except in few cases indicated by the article 6 point 5 and 7. It is better highlighting that the Paris Convention allows collective marks in its Article 7bis. The last provision ensures that *“collective marks are to be admitted for registration and protection in countries other than the country where the association owning the collective mark has been established. This means that the fact that the said association has not been established in accordance with the law of the country where protection is sought is no reason for refusing such protection. On the other hand, the Convention expressly states the right of each member State to apply its own conditions of protection and to refuse protection if the collective mark is contrary to the public interest⁵⁴”*.

More precisely, “a collective mark is used in case of the affiliation of enterprises. Those enterprises own in common a mark. Each member may use the collective mark on the condition to comply with the requirements fixed in the common regulations concerning the use of the collective mark which must be submitted with the registration filing. Nevertheless, the collective mark should not be confused with the certification mark⁵⁵”. According to the WIPO hand book of 2004 that took the general conception of lawyers, the main difference between collective mark and certification mark is *“the former may be used only by particular enterprises, for example, members of the association or affiliation which owns the collective mark, while the latter may be used by anybody who complies with the defined standards⁵⁶”*. It means that the certification mark is used to show consumers or customers that particular goods and/or services, or their providers, have met certain criteria as safeguard for the protection of the public against dangerous practices which are, for more cases, linked with unfair competition. By this token, “the users of a collective mark are members of a well-identified association while, in respect of certification mark, the rule is the open shop principle⁵⁷”. The last means *“the entity which applies for registration is competent to certify the products concerned and the owner of a certification mark must be the representative for the products to which the certification mark applies⁵⁸”*. In DRC, the certification

⁵⁴WIPO publication n°49, 2004, p.69.

⁵⁵ *Ibidem*, p.71

⁵⁶*Ibidem*, p.70.

⁵⁷ *Ibidem*

⁵⁸*Ibidem*

mark is governed by the regulation Iso/IEC/17065 on general requirements for bodies operating product certification and ISO/IEC/17021 on requirements for the certification of systems. These regulations are applied by the Congolese control office, CCO, a technical administration organ that controls the conformity of goods with standards before they can be availed for consumers.

D. Geographical indications and appellation of origins

The Paris Convention does not prioritize the notion of geographical indication. Focusing on its article 1 paragraph (2), it uses terms such indications of source and appellations of origin which are still officially mentioned by conventions and agreements administered by WIPO. Traditionally, “*‘indication of source’ means any expression or sign used to indicate that a product or service originates in a country, a region or a specific place, whereas ‘appellation of origin’ means the geographical name of a country, region or specific place which serves to designate a product originating therein the characteristic qualities of which are due exclusively or essentially to the geographical environment, including natural or human factors or both natural and human factors*”⁵⁹. Indication of sources includes “all expression or signs used to indicate that a product or service originates in a given country or group of countries, region or locality. False use of such indications is prohibited. An appellation of origin, as a geographical name of a country, region or locality which serves to designate a product originating there in, considers the quality or characteristics appreciated due exclusively or essentially to the geographical environment including natural and human factors”.⁶⁰.

E. Repression of unfair competition

The repression of unfair competition is, generally, included in the protection of industrial property because, in many cases, “*infringement of industrial property rights will, at the same time, be an act of unfair competition*”⁶¹. However, while industrial property protection confers exclusive rights with respect to the subject matter concerned, protection against unfair competition is based “*not on such grants of rights but on the consideration—either stated in legislative provisions or recognized as a general principle of law—that acts contrary to honest business practice are to be prohibited*”⁶². For instance, in several countries especially European ones, unauthorized use of a non-registered trademark can be considered illegal on “*the basis of general principles belonging to the field of protection against unfair competition (some*

⁵⁹WIPO publication n°49, 2004, p.120.

⁶⁰N. Binctin, *Op.Cit.*, p. 458

⁶¹*Ibidem*

⁶²WIPO publication n°49, 2004, p.131.

countries” such call it “passing-off”)⁶³. The same is, sometimes, invoked when an invention is not disclosed to the public and still considered as a trade secret. For authors, such Yav Katsung, this should include an act of “slavish imitation”⁶⁴

Likely, other substantive standards of protection, the repression of unfair competition constitute an international obligation for each contracting party to the Paris convention. Consequently, States are called to adopt national laws that implements mechanisms and strategies susceptible to favour the effectiveness of such obligation. Nevertheless, due to the lack of enforcement measures and minimum standard of protection under the Paris convention, some States like DRC did not efficiently engage in as soon as it was expected. According to such States, mostly developing countries, intellectual property, in whole, didn’t constitute priority of their policies and needs. Therefore, to cut short, developed States initiated, under the WTO custody, an agreement that addressed issues of lack of enforcement measures and minimum standards of protection via the “Trade-Related Intellectual Property agreement ‘TRIPS” which membership is directly linked to the adhesion to WTO system.

§2. TRIPS agreement

The TRIPS⁶⁵ agreement was adopted in a context *“according to which the protection and enforcement of intellectual property rights should efficiently contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations”*⁶⁶. Such a context reflecting objectives of the same agreement brought solutions to lacks of standards of protection of intellectual property rights, enforcement measures and disputes settlement mechanisms known by the Paris convention in respect of industrial property. It contributes to the WTO objectives of the reduction of distortions and impediments to “international trade, promotion of effective and adequate protection of intellectual property rights, and ensuring that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade”⁶⁷. *“Under Part III of the TRIPS Agreement, all member countries agreed to enact patent statutes that include certain substantive provisions. In particular, Article 27*

⁶³WIPO publication n°49, 2004, p.131.

⁶⁴Y. Katsung, *Art.Cit.*, p.18.

⁶⁵The TRIPs Agreement stand for “*Trade-Related Aspects of Intellectual Property Rights*”, *Including Trade in Counterfeit Goods*. It was “*signed on April 15, 1994 as part of the agreement establishing the World Trade Organization (“WTO”)*. All members of the WTO are required to accept and abide by the procedural and substantive provisions of TRIPs.

⁶⁶Article 7 of the TRIPS agreement

⁶⁷ Read the preamble of the TRIPS agreement

stipulates that “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 prevented.” Article 27 ordinarily requires that all classes of invention receive the same treatment under the patent laws, subject to certain minor exceptions. It would generally be impermissible under Article 27, for example, for a country to accord patents on pharmaceuticals a lesser set of proprietary rights than is available for patents on automobile engines, computers, or other kinds of inventions⁶⁸”.

TRIPS Agreement adds a substantial number of additional obligations on matters where the pre-existing conventions is silent or was seen as being inadequate at the time the Paris convention was adopted. The main achievement of the TRIPS agreement has been the *“internationalization of the patent system, which has been built on the already existing patent standards in the WIPO Paris convention. It has gone hand in hand with the establishment of an overall uniform or single patent”⁶⁹* without forbidding any bilateral treaty between member States that creates a community patent system. However, it is worth highlighting that standards of protection (A), enforcement measures (B) and disputes settlement mechanisms (C) found in the TRIPS agreement are of great value in the process of the transfer of technology considering that it *“requires developed country members to provide incentives for their companies to promote the transfer of technology to least-developed countries in order to enable them to create a sound and viable technological base”⁷⁰*.

A. Standards of protection

Standards of protection constitute the minimum level of protection that must be respected by all contracting parties. However, *“The extent of protection and enforcement of these rights varied widely around the world; and as intellectual property became more important in trade, these differences became a source of tension in international economic relations. New internationally-agreed trade rules for intellectual property rights were seen as a way to introduce more order and predictability, and to settle disputes more systematically”⁷¹*. The TRIPS agreement, referring to industrial property rights enumerated in the Paris convention, goes beyond the mere fact of constituting an obligation upon State members and practically fixes standards of protection of industrial property rights expected from country members. This

⁶⁸JS. Sherkow, “The Natural Complexity of Patent Eligibility,” *In 99 Iowa Law Review* (2014), p.1137.

⁶⁹F. L. Ghassemi, *Op.Cit.*, p.65.

⁷⁰M. CORREA, *Trade related aspects of intellectual property rights: A commentary on the TRIPS Agreement*, 2007, pp.91-92.

⁷¹M. CORREA, *Op.Cit.*, 2007, pp.91-92.

means member States are required to respect the minimum standard of protection instituted by part II and III of the TRIPS agreements as a matter of international obligation. Nevertheless, member States are free to grant a more extensive protection to industrial property rights as cited by the aforesaid agreement unless it appears contrary to its objectives⁷². In particular, the main elements of protection, that TRIPS agreement clarifies, are the “*subject matter eligible for protection, the scope of rights to be conferred, permissible exceptions to those rights, and the minimum duration of protection*”⁷³.

B. Enforcement measures

The second main set of provisions of the TRIPS Agreement deals with domestic procedures to be taken by all contracting parties and remedies for the enforcement of intellectual property rights. This Agreement lays down, as a matter of guarantee, certain general principles applicable to all Intellectual Property Rights enforcement procedures. In addition, it contains provisions on “*civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures, which specify, in a certain amount of detail, the procedures and remedies that must be available so that right holders can effectively enforce their rights*”⁷⁴. Thus, article 41 of the agreement above-referred to stipulates: “1. Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse. 2. Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays”.

As a commentary to the above-mentioned article, the WIPO handbook of 2004 says that it is a requirement under TRIPS Agreement for States to avail specified enforcement procedures that “*permit effective action against any act of infringement of intellectual property rights covered*

⁷²Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice. Article 1 of the TRIPS agreement

⁷³M. CORREA, *Op.Cit.*, p.93.

⁷⁴*Ibidem*.

by the Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements”. Those procedures have to be applied in a manner that favours the avoidance of barriers to legitimate trade and to provide for safeguards against their abuse (Article 41.1). Enforcement procedures should be fair and equitable in the sense that they are neither unnecessarily complicated and costly, nor entail unreasonable time-limits or unwarranted delays (Article 41.2).

When deciding a case related to intellectual property rights, in general and industrial property ones, in particular, the tribunal decision shall *“preferably be in writing and reasoned, shall be made available at least to the parties to the proceeding without undue delay, and shall be based only on evidence in respect of which parties were offered the opportunity to be heard”* (Article 41.3). At the end of the day, *“Parties to a proceeding shall have an opportunity for review of final administrative decisions and of at least the legal aspects of initial judicial decisions on the merits of a case, except for acquittals in criminal cases”* (Article 41.4). Nevertheless, there is no, under TRIPS Agreement, an obligation for member States *“to put in place a judicial system for intellectual property enforcement distinct from the one for the enforcement of law, in general, and for the distribution of resources”* (Article 41.5)⁷⁵. In short, article 41 of TRIPS Agreement mentions enforcement measures and strategies of intellectual property rights, in general, and industrial ones, in particular, by calling contracting parties to integrate them under their respective national law for effectiveness matters. It places the bar on the struggle against any act that infringes intellectual property rights in such a manner as to avoid potential barriers to legitimate trade and to set safeguards against the abuse of enforcement procedures. The last refers to any potential act of member state that would make enforcement procedures complicated and more expensive. The idea behind that is to simplify the way for the promotion of international trade and the protection of intellectual property rights.

C. Dispute settlement provisions

Disputes settlement mechanisms of intellectual property cases is one of the major originalities of the TRIPS agreement and constitutes a strong weapon in addressing issues related to. These mechanisms are found in part IV of the agreement that lets understand that *“disputes between WTO Members concerning obligations under the TRIPS Agreement are subject to the WTO dispute settlement mechanism. The rules that govern the settlement of disputes between Members of the WTO are contained in article xxii and xxiii of the GATT 1994 and the*

⁷⁵WIPO publication n°49, 2004, p.355

understanding on rules and procedures governing the settlement of disputes as contained in annex 2 of the Marrakesh agreement⁷⁶”.

Technically speaking, this aforesaid dispute settlement system works in respect of specific and detailed timetables when examining a case. First of all, there must be the selection of three panelists who are expected to specify the agreement allegedly violated (TRIPS Agreement for instance) and publish their findings in a report⁷⁷. In case of an appeal, the WTO’s Appellate Body, composed of seven members elected for a term of four-years, knows complaints of the appellant. All rules and procedures to follow are set out in “*the Dispute Settlement Understanding (DSU), which is administered by the Dispute Settlement Body (DSB), consisting of representatives of all WTO members⁷⁸”*. The WIPO highlights that “*a particularly important element of the TRIPS Agreement are the rules on dispute prevention and on dispute settlement. These provisions concern disputes between member States concerning whether the obligations under any of the WTO Agreements, including TRIPS, have been properly implemented. Consequently, these provisions concern mainly relations between states and not disputes between individuals and are therefore generally of less interest for judges in their day-to-day work. But of course, the outcome in particular cases may cause concern on the side of any of the parties and the party may claim that TRIPS has not been implemented properly and urge his government to act. However, there does not seem to be any need for any detailed description of the WTO dispute settlement system in this context. Only a few general remarks shall be made. The intellectual property conventions administered by WIPO in general do not contain any detailed provisions on dispute settlement. The Berne and the Paris Conventions provide for recourse to the International Court of Justice in the Hague in case of a dispute between States concerning the implementation of the conventions. Such recourse has, however, hardly ever occurred. Countries have generally preferred to solve potential disputes bilaterally. The provisions on dispute prevention and settlement under the TRIPS Agreement have a different structure. First, they concern both measures aiming at preventing disputes and measures for solving disputes that have arisen and failure to comply with the results of a process under the dispute settlement procedures may result in trade sanctions⁷⁹”*.

In practice, it is noticed a regular use of the WTO’s dispute settlement system at the extent that several authors call it a trust-worthy dispute settlement mechanism. Besides, under WTO

⁷⁶ www.wto.org visited on the 18 March 2022 at 11h42

⁷⁷ WIPO publication n°49, 2004, p.14

⁷⁸ www.wto.org visited on the 18 March 2022 at 11h42

⁷⁹ WIPO publication n°49, 2004, p.14.

rules, there is no obligation for a member to demonstrate its interest of various nature in the subject matter of a dispute. This can be proven in case law by the “*EC – Bananas*” case. In the last case, the United States complained about preferential access of banana producers from Africa to the European Union market in violation of WTO non-discrimination rules, regardless of the lack of direct interest for United States.

In conclusion, TRIPS agreement requires WTO members to provide protection for intellectual property rights and to act in a way that favors enforcement measures related to⁸⁰. It fixes minimum standards of protection that is to be respected by signatory States. Thus, it plays a crucial role in ensuring respect of the WTO agreements via the dispute settlement system that “*leads to more harmonious trade relations between members and promotes economic growth*”⁸¹. In the search of the compliance to its international obligation under the Paris convention and TRIPS agreement, DRC adopted the law No. 82001 of January, the 7th 1982 that regulates industrial property rights and plays a key role in the implementation of all principles and rules, standards of protection, set out in the above-mentioned agreement.

Section II: National legal framework

In DRC, industrial property is regulated by the law n°82001 of January, the 7th 1982. This law goes in the sense of the TRIPS agreement and gives precisions about the way recommendations under international legal instruments related to industrial property, to which DRC is a signatory, are applied at the national level. However, it is better writing that, in terms of minimum standards of protections of industrial property rights and enforcement measures, as a least-developed country member, DRC was given a longer transition period, in 2006 to comply with TRIPS requirements and rules. Unfortunately, until today, it continues to be out of the strict compliance with its international obligation under industrial property law. Indeed, such state of things is at odds with the TRIPS agreement and creates a legal insecurity in the field of industrial property. As a matter of principle, the law above mentioned frames the protection of industrial property rights in two main groups that are inventive activities (§.1) and distinctive signs and names (§.2).

§.1. Inventive activities

This group comprises inventions and industrial designs. Patents, as described by the TRIPS agreement, can be of three categories such as invention patent, import patent and improvement

⁸⁰ABBOT et al., *The international intellectual property system: A commentary and materials*, 1999, p.634.

⁸¹*Ibidem*

patent⁸². By insisting on the novelty of the patentable subject matter, the Congolese law sets criteria of patentability and places its patent system in the direction of the TRIPS agreement. Thus, under Congolese law, patent protection requires that an invention fulfils several criteria of patentability. The last includes, most significantly, the existence of a patentable subject matter, that is susceptible of industrial application. It must be new and exhibit a sufficient “inventive step” and the disclosure of the invention in the patent application have to meet certain standards. The phrase “industrial applicability” should be considered *“in its broadest sense, including any kind of industry. In common language, an “industrial” activity means a technical activity on a certain scale, and the “industrial” applicability of an invention means the application (making use) of an invention by technical means on a certain scale⁸³”*. The novelty requirement plays a fundamental role in any examination of patentability. According to WIPO handbook previously cited *“novelty is not something which can be proved or established; only its absence can be proved⁸⁴”*. It deeply prohibits any use of the potential invention by the prior art understood here as *“all the knowledge that existed prior to the relevant filing or priority date of a patent application, whether it existed by way of written or oral disclosure⁸⁵”*. For an invention to be considered part of the prior art, the WIPO handbook of 2004 gives three main ways: *“by a description of the invention in a published writing or publication in other form; by a description of the invention in spoken words uttered in public, such a disclosure being called an oral disclosure; by the use of the invention in public, or by putting the public in a position that enables any member of the public to use it, such a disclosure being a “disclosure by use⁸⁶.”* Regarding inventive step requirement, it is about checking whether the invention *“would have been obvious to a person having ordinary skill in the art⁸⁷”*. The idea behind such a requirement depends on the premise that *“protection should not be given to what is already known as part of the prior art, or to anything that the person with ordinary skills could deduce as an obvious consequence thereof⁸⁸”*.

In our understanding, this means that a person having the average level of skill should not have known it. Of course, it is difficult to examine such a criterion seeing that it entails aspects of subjectivity and is debatable. Different point of views can be made in its appreciation. What is important would be the justification given for each position. However, there is a debate in

⁸²ABBOT et al., *Op.Cit.*, p.635

⁸³WIPO publication n°49, 2004, p.18

⁸⁴*Ibidem*, p.19

⁸⁵*Ibidem*, p.20

⁸⁶*Ibidem*, p.20.

⁸⁷*Ibidem* p.22.

⁸⁸*Ibidem*, p.23.

doctrine about novelty and inventive step. For the majority of authors, relating the position of WIPO and Congolese law, novelty and inventive step are different criteria. Thus, Yav Katsung writes: “Novelty exists if there is any difference between the invention and the prior art and that inventive step exist if only there is novelty⁸⁹”. According to the WIPO handbook of 2004, the phrase ‘inventive step’ “conveys the idea that it is not enough that the claimed invention is new, that is, different from what exists in the state of the art, but that this difference must have two characteristics. Firstly, it must be “inventive”, that is, the result of a creative idea, and it must be a step, that is, it must be noticeable. There must be a clearly identifiable difference between the state of the art and the claimed invention. This is why, in some jurisdictions, there is the concept of an ‘advance’ or ‘progress’ over the prior art⁹⁰”.

Like the TRIPS Agreement, the aforesaid law excludes from patentable subject matters “discoveries of materials or substances already existing in nature; scientific theories or mathematical methods; plants and animals other than microorganisms, and essentially biological processes for the production of plants and animals, other than non-biological and microbiological processes; schemes, rules or methods, such as those for doing business, performing purely mental acts or playing games; methods of treatment for humans or animals, or diagnostic methods practiced on humans or animals (but not products for use in such methods)⁹¹”.

In DRC, Patents of invention are granted for a maximum term of 20 years. However, on the one hand, the duration of validity is reduced for invention relating to pharmaceutical products for which patents are granted for a maximum term of 15 years. Both of these periods are calculated from the filing date of the application. On the other hand, patents of importation expire at “the same time as the foreign patent on which they are based. And the expiration date of the patent of improvement plays at the same time as the initial Congolese patent on which they are based⁹²”. Any owner of an invention or a potential patentable subject matter should file an application before its invention is used by the public at the national level as well as the international one. This is a requirement under TRIPS agreement and is almost the same principle in DRC as well as in Belgium.

The present study being a comparative analysis between the Congolese law and the Belgian one (broadened to the EU industrial property regimes in some way), it takes into consideration

⁸⁹Y. Katsung, *Op.Cit.*, p.15

⁹⁰WIPO publication n°49, 2004, p.21.

⁹¹Y. Katsung, *Art.Cit.*, p. 16.

⁹²*Ibidem*, p.16.

rules as well as case law of Belgium and DRC with the specific aim of drawing lessons from one legal system or another. Legal lessons of this kind can inspire future improvements of Congolese industrial property law which, till today, lacks conformity with TRIPS agreement. That is why, we cite at a point on another case law of Belgium and the EU. However, the WIPO, in its different publications, refers to the US caselaw to ascertain or not a principle of industrial property law that have been object of different views in member States. Thus, when dealing with a notion interpreted by the WIPO referring to the US case law, it is better mentioning the case in point.

This being said and regarding to the notion of novelty, the US Supreme court (cited by the WIPO) confirmed novelty as fundamental to a patentable subject matter and revealed an exception to it in the case of *City of Elizabeth v. American Nicholson Pavement Co.*, (1878), in which it held that *“when the public uses an invention during more than one year prior to the inventor’s application for a patent normally causes the inventor to lose his right to a patent, except when the public uses are for experimental purposes.”* This requirement goes also for the priority right in case the inventor would like to apply for a patent in a foreign country party to the TRIPS agreement. It is worth bearing in mind that any product, process or combination of process protected by a patent confers to the patentee an exclusive right to use it for a period 20 years except inventions related to pharmaceutical products. For the last ones, it is 15 years of exclusive rights. It means that they will be the only one to sell the patented products or process, to grant a license to anyone interested. Nevertheless, an issue arises when a licensee or someone else who has got legally the patented product decides to sell it, in door or abroad, at a price under the one fixed by the patentee. This is what has been noticed in DRC about medicinal products imported or exported.

In the American case law as referred to by the WTO in its publication of 2004, the US Supreme court has addressed this issue in the case of *Bauer & Cie. v. O'Donnell* by deciding *“an act of a purchaser of a patented product bearing a price-fixing notice does not incur guilt of patent infringement by reselling the product at a price lower than that which the notice commands”*.

In DRC, the current legal position about such an act is that the fact of selling a protected product at a price lower than the fixed one either by the owner or by the price list regulation constitutes an infringement of industrial property rights.

In the same line of ideas, a recent WIPO consultation paper reports that: *“Significant number of patent applications concern inventions which are in some ways related to traditional*

knowledge”⁹³. Leila Ghassemi Farreras opines that, in most of the cases, “*the patented-claimed invention may have only been very remotely influenced by traditional knowledge or, on the contrary, may be directly based on traditional knowledge*”⁹⁴. This implies the consideration of the use of traditional knowledge in patentable subject matters. In other words, none should expect that traditional knowledge be protected by patent because, for many cases, it does not fulfil conditions of patentability. Nevertheless, there are principles of international law that govern the use of traditional knowledge in patentable subject matters. Then, for some communities, the rule has been that “*granting patents that encompass traditional knowledge within their scope constitutes an offence to their laws and customs*”⁹⁵. This is something to check under Congolese patent law and its customary systems which seem to be silent.

As an inventive activity, industrial designs are also protected by the same law in DRC. According to the aforesaid law, an industrial design is understood to “*include any assembly of lines and/or colors intended to give any industrial or artistic article a distinctive appearance. It is further understood to include any plastic shape, whether associated with colors or not, and/or any industrial or artistic article that can serve as a model for manufacturing of other similar articles and which can be distinguished from similar articles, either by a distinct or recognizable configuration that gives it a novel character, or by one or more external effects giving it a specific and novel appearance*”⁹⁶. It is important to note that the Law provides that, for the purpose of pursuing protection, the same creation cannot be considered as being an invention and also a design or an industrial model. If the “*same creation has features that could be susceptible both to industrial design and patent protection and these features are inseparable from one another, only those features relating to the invention shall be susceptible to protection*”⁹⁷.

The same law gives the list of designs that are not protected in DRC by stating as follows: “*any industrial design or model that is contrary to public order or decency, any industrial design or model, the shape of which has been designed for technical or industrial purposes to such an extent that it is inseparable from the desired result and any reproduction or servile imitation of a natural design or model*”⁹⁸. Regarding to the duration of protection, the initial term of the

⁹³WIPO IGC, “Recognition of traditional knowledge within patent system” 13-17 October 2008, WIPO/GRTF/IC/13/13/7

⁹⁴F.L. Ghassemi, *Op.Cit.*, p.87

⁹⁵*Ibidem*

⁹⁶Y. Katsung, *Patent and industrial design protection in DRC*, p. 9. Available on www.leganet.cd consulted on the 20th of March 2022 at 9h45

⁹⁷Y. Katsung, *Op.Cit.*, p. 10

⁹⁸*Ibidem*, p. 10

design registration is five years with the possibility of extension upon payment of renewal fees for a further five-year term. The term of the registration starts from the date of application for registration. The requirement of registration settled for industrial designs to be protected in DRC goes also for distinctive signs and names.

§.2. Distinctive signs, names and geographical indication

In the Congolese law regulating industrial property rights, distinctives signs refer to trade mark, service mark and names. These are included in distinctives signs that make a difference between a trader's activity and his competitors. By the same token, Yav Katsung writes that *“A mark is defined to mean a distinctive sign that permits different objects or services of a specific commercial company to be recognized or identified. Signs which may serve as a mark include a name or denomination, letters, figures or a combination of letters and figures, seals, slogans, emblems, piping, edging, combinations or arrangements of colors, drawings, reliefs or mottos⁹⁹”*. To be able to claim any protection related to, the owner is required to apply for registration. For a sign to serve as registrable trademark, a set of conditions have to be fulfilled. These conditions as mentioned in the article 6 quinquies B of the Paris convention have been reasonably standard in trademark laws throughout several countries including Belgium and DRC. As a matter of principle, the first condition relates to *“the basic function of a trademark, namely, its function to distinguish the products or services of one enterprise from the products or services of other enterprises¹⁰⁰”*. However, it should be noticed that *“the distinctiveness of a sign is not an absolute and unchangeable factor. Depending on the steps taken by the user of the sign or third parties, it can be acquired or increased or even lost. Circumstances such as (possibly long and intensive) use of the sign have to be considered when the registrar is of the opinion that the sign lacks the necessary distinctiveness, that is, if it is regarded as being not in itself distinct enough for the purpose of distinguishing between goods and services”*. Then, a sign that lacks distinctiveness cannot be registered as a trademark.

In the sense of WIPO handbook of 2004, the proof of distinctiveness should not be brought by the applicant. It is up to the registrar to demonstrate any lack of distinctiveness when processing the application and in the case of doubt the trademark should be registered. A number of authors have challenged such a way of doing things. For them, as mentioned by Yav Katsung, national trademark laws of many countries place the onus on the applicant to show that their mark fulfils

⁹⁹Y. Katsung, *Trademarks law in DRC* available on www.leganet.cd., checked on the 20th March 2022 at 12h10

¹⁰⁰WIPO publication n°49, 2004, p.68.

conditions of registration¹⁰¹. The second one refers to “*the possible harmful effects of a trademark if it has a misleading character or if it violates public order, morality¹⁰²*” or decency, coats of arms, flags or national emblems, signs or indications likely to mislead the public. The notion of public order has to be understood in its two dimensions which are national and international. Traditionally speaking, it refers to “*essential values of a country that concur to its legal, economic and political organization*”¹⁰³. According to article 6 of the Paris convention, national trademark laws of State parties should not “*attempt to draw up an exhaustive list of signs admitted for registration*”¹⁰⁴. It means that State parties have an obligation to avail a practical illustration of what can be registered, without being exhaustive. It is better mentioning that the same requirement goes for names constituting of a business designation. However, an interesting debate has been made by legal authors about olfactive marks. Legal scholars have been split into two groups either by supporting or not the registration of olfactive marks. The Court of Justice of the European Community decided in the case SIECKMAN that a registrable mark “*must present distinctive characters and be susceptible to constitute a graphic, clear, precise and comprehensive representation for the majority of trader, firms and consumers. Thus, an olfactive mark is not registrable*”.

The same law regulates issues related to geographical indications. Its article 159 defines them as “*referring to either an appellation of origin or an indication of source. An appellation of origin shall refer to a specific place – a locality, region or country – used to distinguish one or more products which come from that place and whose characteristics are essentially due to the geographical environment*”. This definition meets the WIPO understanding of the same notion. According to the handbook previously mentioned, “*references to geographical origin (as opposed to the origin of the goods in the sense of the origin-indicating function) are basically not distinctive. They convey to the consumer an association with the geographical name, indicated either as the place of manufacture of the goods in question or of ingredients used in their production, or—depending on factual circumstances—with certain characteristics of the goods attributable to their origin*”¹⁰⁵. Oppositely, signs referring to practically unknown localities from where nobody would expect the origin of the goods to be manufactured are distinctive¹⁰⁶.

¹⁰¹See Y. Katsung, *Op.Cit.*, p. 15.

¹⁰²WIPO publication n°49, 2004, p.73.

¹⁰³See the decision of the CJUE in Vigourou case

¹⁰⁴See article 6 of the Paris convention

¹⁰⁵WIPO publication n°49, 2004, p.74.

¹⁰⁶*Ibidem*.

Briefly speaking, as State-party to the Paris convention and TRIPS agreement, all of them related to the protection of industrial property rights, DRC has legal instruments of international scope to protect rights above mentioned. Then, a strict fulfilment of requirements under the aforesaid legal instruments is expected from DRC and constitutes a key master to the process of making effective the protection of intangible assets in DRC. The last will not only allow owners of inventions, industrial designs, trademark, service mark, trade name, etc. to enhance their business prosperity and, indirectly, contribute to the economic development of DRC. More explicitly, the Congolese national law above-referred to, is nothing than the implementation of principles and strategies of the protection of industrial property rights indoors and beyond national borders. It means that the national and most-favoured nation treatment principles, the territoriality and independence principle and the priority right ones constitute the core of international industrial property law. Besides, the WIPO has mentioned in its several handbooks and reports the fact that some patented inventions recourse to usages, methods or other intangible assets that, strictly speaking, are not covered by the patent law due to the lack of some aspects and belong to indigenous people. The same situation has been revealed by the Congolese report of pharmacists of 2021 saying that patented medicinal inventions that had recourse to a set of intangible assets that constitute traditional knowledge must be in conformity with principles and rules protecting genetic resources linked with traditional knowledge.

CHAPTER II: PRINCIPLES AND STRATEGIES OF INTERNATIONAL PROTECTION OF INDUSTRIAL PROPERTIES IN CONGOLESE LAW

The protection of industrial property rights in Congolese law takes the direction of the Paris convention and TRIPS agreement in term of principles and strategies. The adoption of a national law that regulates issues of industrial properties in DRC is a way to comply with requirements under the convention and agreement above mentioned. This means, on the one hand, that principles such as the national treatment and most-favored nation treatment (section I), the territoriality and state independence in regard to intellectual property rights (section II) are binding and have to be respected in DRC. On the other hand, as settled under TRIPS agreement as well as the Paris convention, a strategy of granting priority to any protection claim submitted in DRC and for which the inventor has been conferred an exclusive protection in another country party to the Paris union has been incorporated in the national law regulating industrial property issues (section III). All of these principles and strategies raise questions when it comes to invention based on traditional knowledge especially in the medical domain in the sense that scholars of intellectual property have been split into two groups about the

requirement that patentable invention that has recourse to the traditional medicinal knowledge should be done in conformity with the convention on biodiversity and its Nagoya protocol (section IV).

Section I: National and Most-favored nation treatments

National treatment of Intellectual properties protection as embodied in intellectual property legal instruments of international scope denotes “*a rule of non-discrimination, promising foreign intellectual property owners that they will enjoy in a protecting country at least the same treatment as the protecting country gives to its own nationals*¹⁰⁷”. As mentioned by Stephan P. Ladas “*national treatment provides for the complete assimilation of foreigners to nationals, without condition of reciprocity*¹⁰⁸.” Historically speaking, this principle was “*incorporated in bilateral friendship and commerce agreements during the nineteenth century, prior to negotiation of the Paris and Berne Conventions. One of the principal characteristics of the national treatment standard is its relativity. In international law, the national treatment standard has been invoked in two different contexts. In one context, the standard represents one of the competing international law doctrines for the treatment of the person and property of aliens which has come to be known as the ‘Calvo doctrine’. Under this doctrine, which was supported especially by Latin American countries, aliens and their property are entitled only to the same treatment accorded to nationals of the host country under its national laws. In treaty practice, national treatment has its origins in trade agreements. The first treaties to apply a concept of non-differentiation between foreign and local traders can be traced back to the practices of the Hanseatic League in the twelfth and thirteenth centuries. However, the principle of national treatment was laid down for the first time in Belgian-American Diplomacy Treaty of Commerce and Navigation concluded on November 10, 1845, under Article 1 as – ‘There shall be full and entire freedom of commerce and navigation between the inhabitants of the two countries; and the same security and protection which is enjoyed by the citizens or subjects of each country shall be guaranteed on both sides. The said inhabitants, whether established or temporarily residing within any ports, cities or places whatever, of the two countries, shall not, on account of their commerce or industry, pay any other or higher duties, taxes, or imposts, than those which shall be levied on citizens (...) and other favours, with regard to commerce or industry (...)*¹⁰⁹”

¹⁰⁷M. Elahi et al, *National Treatment and Efficient Protection of IPR as adopted in IP Treaties*, Pune, Symbiosis law School, 2012-2014 available on www.Importantnationaltreatment.pdf checked on 7/05/2022 at 15h00, p.1

¹⁰⁸*Ibidem*, p.2

¹⁰⁹M. Elahi et al, *Op.cit.*, p.3

According to articles 2 and 3 of the Paris convention, each of the contracting State have to grant the same protection to nationals of other contracting states that it grants to its own nationals. The convention elects no room for discrimination between nationals and foreigners in industrial property matters. The same treatment is provided by the convention for nationals of non-contracting states who are domiciled or have an effective and real industrial or commercial establishment in a contracting state¹¹⁰. National treatment does not elect room for policies of reciprocity in the field of industrial property protection except only the case of copyright where national treatment partly depends upon mutual accord of national treatment. Such exceptions are referred to in Art.3 (1)TRIPS Agreement and corresponding rules are contained in Arts 6 (1) and 20 Berne Convention and Arts 13 (d)¹¹¹. It results from Article 3.1 of the TRIPS agreement a requirement that each a member state must “*accord to the nationals of other members’ treatment no less favorable than that it accords to its own nationals with regard to the protection of intellectual property.*”

It must be known before hands that, the inclusion of the national treatment principle in the TRIPS Agreement produced a broadening effect on the protection of intellectual property rights. In other words, some intellectual properties (such as the trade secret) which were not, until then, subject to the Paris convention, became subjects to the national treatment principle included in TRIPS agreement, in particular, and to the whole international industrial property law, in general.

Describing the content of the aforesaid principle, Manzoor Elahi and Chetan Narang write: “*National Treatment is the simple and ingenious solution to solve the problem of worldwide protection for creative inventors and authors. National Treatment stands alongside MFN treatment as one of the central principles of various agreements, treaties and conventions. According to the principal of territoriality, countries can grant protection only within the boundaries of their own territory. Worldwide protection can be provided by international treaties having as members the greatest possible number of countries. But when concluding such treaties, the nature and scope of protection accorded to nationals of other member states was an issue that still had to be solved. Worldwide harmonization of IPR protection requires all the signatory countries to provide protections with the same coverage, the same length, or the same strength. As a general matter, the principle of national treatment means that under a*

¹¹⁰Th. Cottier, “Industrial Property, International Protection” in *Max Planck Encyclopedia of Public International Law* available on [www. Oxford Public International Law.com](http://www.oxfordpublicinternationallaw.com) checked on the 4th of April 2022 at 13h33

¹¹¹*Ibidem*

*nation's laws, a foreigner enjoys no lesser rights and benefits than a citizen of that nation receives, subject to the specific terms of the relevant international conventions*¹¹²”.

The Paris convention did not include the most-favored nation treatment principle. The latter was perceived as a pure mechanism of international trade law and found room in the field of industrial property with the TRIPS agreement. On that basis, TRIPS Agreement constitutes a break with former states practice which usually linked the protection of industrial property to “*the national territory and settled the condition of reciprocity*”¹¹³. The prohibition of discrimination between national and foreigners is currently at the heart of international instruments that address industrial property issues; a state party can’t easily breach it without violating its international obligation. The national and most-favored nation treatments pursue the same objective which is the struggle against discrimination, a principle of customary international since a long period of time. Coming back to its history, prior to the TRIPS agreement, “*an MFN clause was often included in bilateral trade agreements and, as such, contributed greatly to trade liberalization. However, in the 1930s, measures were taken to limit the MFN principle. It is generally believed that these limits divided the world economy into trade blocs. Lessons were learned from this mistake and, in the wake of World War II, an unconditional MFN clause was included in the GATT on a multilateral basis contributing to global trade stability. Considering this background, MFN in particular must be recognized as a fundamental principle for sustaining the multilateral trading system. Regional integration and related exceptions must be uniformly administered so as not to undermine the MFN principle*”¹¹⁴.

For Thomas Cottier “*Most-favored-nation treatment is a second mainstay of non-discrimination in international trade and investment regulation. It is enshrined in Art. 4 TRIPS Agreement. Unlike national treatment, this cornerstone of the international trading system does not apply to intellectual property under the Paris Convention. Neither of them contains comparable rights and obligations*”¹¹⁵. In the same line of ideas, Carlos Maria Correa writes “*In accordance with the MFN principle, as formulated in the TRIPS Agreement, ‘any advantage, favor, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other*

¹¹²M. Elahi et al, *Op.cit.*, p.4

¹¹³S. Bergé, *Protection internationale et européenne du droit de la propriété intellectuelle : présentation-textes-jurisprudence-situations*, Larcier, Bruxelles, 2015.

¹¹⁴C. Maria Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (2nd Edition), ch.2 nature and scope of obligations *In Oxford Public International Law*, available on [www. https://opil.oup.com/](http://www.https://opil.oup.com/) checked on 4th April 2022 at 14h00

¹¹⁵Th. Cottier, *Art.Cit.*, p.1

Members'. It is to be noted that the MFN principle applies in relation to benefits accorded to nationals of 'any other country'. Hence Members should be accorded the MFN treatment when benefits were granted to non-WTO Members. As incorporated, the MFN clause aims at ensuring that nationals of Members receive the best treatment accorded to a Member to nationals of other countries¹¹⁶''.

In case law, the identification of discriminatory acts of a state is not an easy task to deal with. Any allegation of the violation of national treatment principle should pass through three steps that have been established by the arbitration tribunal in the case of *Saluka v.s Czech Republic* and to which many other decisions have been referred. According to the decision taken in the aforesaid case, the three-step process of identifying the violation of national treatment principle includes: *the existence of similar cases that should be treated differently without reasonable justification.*” This means that the process goes from the identification of a group of nationals with whom to compare the claimant and the comparison between treatments granted before assessing whether the treatment received by the claimant is less favorable than that granted to the group of nationals. At the end of the process, there should be an evaluation whether the two groups are in similar circumstances or whether certain factors exist which could justify any differential treatment¹¹⁷. On its own side, the MFN principle is guided by the rule of ejusdem generis that means that an MFN advantage claimed for patent cannot be extended to other kinds of industrial property rights. This rule has been more popular in arbitration practice before the ICSID than many other arbitration tribunals used it. Most of the time, the MFN principle is used to attract a better treatment. Since the case of *Maffezini vs. Spain*, the arbitration practice has favoured the possibility to use the MFN provision to avail a dispute settlement provision in another agreement considered more favourable¹¹⁸. It should also be highlighted that the MFN is not an absolute principle. It knows exceptions that are, in several agreements, based on regional integration and generalized system of preference. According to Maria Coreia under WTO system, the idea is: “*ideally, the MFN rule would be strictly applied so that when country B accedes to the Agreement, it is required to confer MFN status on all other Members, and they, in turn, are required to confer MFN status on country B. However, country A, which is already a Member of the WTO, may have reasons for not conferring all rights and obligations of the WTO on new Member B. Because the WTO only requires the consent of two-thirds of the existing membership for accession, it is conceivable that country A may, against its will, be forced to grant MFN status to country B.*

¹¹⁶M. Coreia, *Op.Cit.*, p. 200

¹¹⁷See the case *Suluka vs Republic Czec*, under the arbitration rules of the united nations commission on international trade law, 7th May 2004.

¹¹⁸See the Case *Maffezini vs.Spain*, ICSID Case No. ARB/97/7 (Decision on Jurisdiction), 9 November 2000

*WTO Article XIII is a way to respect country A's concerns by preventing a WTO relationship from taking effect between countries A and B. Conversely, WTO Article XIII also provides a means for accession of country B, even when more than one-third of the membership, like country A, has reasons for not wanting a WTO relationship with*¹¹⁹

Despite exceptions allowed by the TRIPS Agreement at its article 4 and 6, the exclusion of reciprocity and discrimination between nationals and foreigners is of obligatory effect under industrial property law. States parties are called to put the national and most-favored nation treatments into practice as a matter of international obligation which, combined with the territoriality and state independence principles, forms the cornerstone of the protection of industrial property rights at the regional and international scales.

Section II: Territoriality and state independence of industrial property rights

It results from the Paris Convention that "*patents applied for in the various countries... shall be independent of patents obtained for the same invention in other countries (....)*"¹²⁰ Understood as a standard of protection of industrial property rights, the "*independence of patents*, was designed to prevent a country from rejecting a patent application based upon the fact that another country had rejected the application. For example, if the United States received a patent application of an Italian inventor, the principle of independence of patents prohibited the U.S. patent office from denying the application based on the fact that the Italian patent office had previously found the application invalid. The purpose of the independence of patents was based upon the Convention's recognition that the laws governing patents differ from state to state. Inventions that qualify for a patent according to German law may be different from that those that qualify for patenting according to British or French law. Similarly, an application that fails to meet the patent requirements of European law may indeed satisfy all the requirements of United States Patents & Technology law. Yet, based upon the fact that the European patent office had rejected the application, the United States may be tempted similarly to deny the application, despite the fact that the application satisfied the requirements of U.S. patent law. Thus, to avoid the unjust result of valid applications being denied simply because they failed to satisfy the requirements of a different patent system, the Convention drafters established the independence of patents¹²¹". Considering revisions known by the Paris

¹¹⁹M. Corea, *Op.Cit.*, p. 200

¹²⁰*Ibidem*, p.1

¹²¹F. Abbott, et. al., *The International Intellectual Property System: Commentary and Materials*, Kluwer Law International, The Hague 1999, pp 633- 646 (quoting E. Penrose, *The Economics of the International Patent System*, Johns Hopkins University Press, 1951.)

Convention “the principle of independence of patents gained greater significance. In fact, the principle was expanded to patent litigation and infringement suits. If one country found the patent invalid, such a finding did not affect the validity of the patent in other countries. Also, if a court in one country found that a competing product had infringed a patent, such a finding had no influence or precedential value for a similar infringement suit in another country¹²²”.

The principle of territoriality has been judged by several scholars as one of the fundamental principles of International Intellectual Property Law, in general and industrial property one, in particular, considering its ability to allow countries to design their intellectual property laws in a manner that facilitates the achievement of specific societal goals¹²³. Emmanuel Kolawole Oke writes “According to the principle of territoriality, intellectual property rights **are limited to the territory of the country where they have been granted. The principle of territoriality permits states to tailor their national intellectual property laws to suit their level of technological and economic development**¹²⁴”. The territoriality principle, as inspired by specialized doctrine finds true application in industrial property law due to the state independence principle according to which a protection of industrial property granted on a territory is independent from another one granted by foreign states. For S. Bergé, it is “a principle substantially international that proposes specific solutions to international situations. Its presence in great texts that govern the international protection of industrial property rights justifies the value it entails”¹²⁵. The territoriality of the protection of industrial property rights does not reject the conventional minimum of protection settled by the TRIPS Agreement through minimum standards of protection. It means that each contracting party’s protection is independent from the foreign one on the condition that it stays in conformity with minimum standards of protection settled by different international legal instruments such as TRIPS Agreement. These standards of protection bring closer national laws of different states parties and lead to the internationalization of the aforesaid protection.

Criticisms have been made towards the independence of patent principle. According to a first trend of legal scholars, the independence of patents principle is unnecessary and not adapted to

¹²²K. Grimshaw, “International upheaval: patent independence protectionists and the Hague conference”, in *L. & Tech. Rev.* 0020, 2001, p.2

¹²³E. Kolawole Oke, *Territoriality in Intellectual Property Law: Examining the Tension between Securing Societal Goals and Treating Intellectual Property as an Investment Asset*, Volume 15, Issue 2, October 2018 available on www.google.com checked on 4th April 2022 at 14h38

¹²⁴ ¹²⁴E. Kolawole Oke, *Territoriality in Intellectual Property Law: Examining the Tension between Securing Societal Goals and Treating Intellectual Property as an Investment Asset*, Volume 15, Issue 2, October 2018 available on www.google.com checked on 4th April 2022 at 14h38

¹²⁵S. Bergé, *Op.Cit.*, p.114.

the era of globalization. For them, “A court's finding of patent infringement in one country should be binding on the courts of other countries. Requiring the parties to go through another round of litigation only wastes time and judicial resources¹²⁶”. Regarding to the second group of legal scholars, the independence of patent principle still has justification under discrepancies between legal systems of States. Supporting this position, K. Grimshaw opines “because significant differences in the patent and legal systems of each country persist, the international patent system is not ready for a rejection of the independence of patent in infringement suits. Thus, the Hague Convention or any other similar treaty proposing the elimination of the independence of patents should be rejected¹²⁷”.

On our behalf, any idea that finds unnecessary the independence of patents, is contrary to the Paris convention and TRIPS agreement for the reason that it violates the rule of priority consecrated by the same legal instruments. The essence of the priority rule is found in the recognition of the independence of state parties' legal systems.

Besides, a special attention needs to be drawn towards the incorporation of intellectual property rights protection in the investment law system. For some scholars, such an incorporation constitutes a potential threat to the principle of territoriality. According to E. K. Oke, “The incorporation of intellectual property into the international investment law system and the assetization of intellectual property can affect the principle of territoriality in at least two ways. **Firstly, free trade agreements (especially where it is an agreement between a developed country and a developing country)** typically include provisions requiring the parties to implement standards that are above and beyond the minimum requirements of the TRIPS Agreements or which eliminates a flexibility available to a WTO member under the TRIPS Agreement (typically referred to as TRIPS-plus provisions). Where an agreement expressly contains such TRIPS-plus provisions, it can curtail the ability of a party to design its national intellectual property laws in a manner that allows it to achieve specific societal goals. It is however possible to incorporate specific provisions into a bilateral investment treaty or a free trade agreement that recognizes a country's policy space and preserves its regulatory powers with regard to intellectual property. Secondly, a number of these investment agreements empower corporations to challenge regulatory measures (implemented by host countries to achieve specific societal goals) before international arbitration tribunals via the Investor-State

¹²⁶K. Grimshaw, International upheaval: patent independence protectionists and the Hague conference, in *L. & Tech. Rev.* 0020, 2001, pp43-59.

¹²⁷*Ibidem*

Dispute Settlement (ISDS) system. The threat and/or cost of litigation before an investment tribunal pursuant to an investment agreement can influence a country to decide not to implement certain regulatory measures (including measures relating to intellectual property rights) thus having a chilling effect on the regulatory powers of the country¹²⁸”.

As a commentary to the idea of E.K Oke above mentioned, it is better writing that the incorporation of intellectual property rights, in general and industrial property ones, in particular, as investment assets in bilateral investment treaties and investment articles of the free trade agreements, here called “assetization¹²⁹” process, gives to foreign investors the possibility to challenge, before an arbitration tribunal, regulatory measures taken by the host state. Such a possibility constitutes a threat to the principle of independence of State and territoriality under the Paris Convention and the TRISP Agreement. Considering that, limitations or exception under industrial property law can be seen as illegal expropriation under investment law. In other words, the incongruence between the object and purpose of assuring the protection of industrial property -that are mainly inciting creativity and allowing a state to achieve its societal goal- and the ones of investment agreements -that are focused on the protection of foreign investors and their investment abroad- leads to a tricky situation that have been object of debate in the legal doctrine related to the territoriality of industrial property. Therefore, E.K.OKE points out that: *“This incongruence between the object and purpose of intellectual property law and international investment law might impair the ability of a state to design its national intellectual property laws in a way that enables it to achieve specific societal goals¹³⁰.”*

The Philip Morris’ case, in which trademarks were both simultaneously intellectual property rights and investment assets, confirms the territoriality of industrial property law and points out that the mere fact that a trademark is included in an investment agreement does not prevent a host state to use its regulatory power especially when it aims at protecting public health. Thus, in its decision, the tribunal says: *“...under Uruguayan law or international conventions to which Uruguay is a party the trademark holder does not enjoy an absolute right of use, free of regulation, but only an exclusive right to exclude third parties from the market so that only the trademark holder has the possibility to use the trademark in commerce, subject to the State’s regulatory power¹³¹.”*

In the case of Eli Lilly v Canada, the arbitration tribunal took a similar decision confirming once more the territoriality principle of industrial property despite the existence of a dissenting

¹²⁸E. Kalowole Oke, *Op.Cit.*, p.320.

¹²⁹*Ibidem*

¹³⁰*Ibidem*.

¹³¹See, Philip Morris case, para. 271

opinion that tried to support the investment side of the case. Anyway, the trend seems to be the same in arbitration practice except in very exceptional cases where regulatory measures of the host that violate the industrial property protection of the foreign investor are so severe in light of the agreement¹³².

A part from principles above-presented, the Paris convention requires contracting parties to recognize a priority right to protection claims that have been granted previously in another state-party to the union. DRC's law related to industrial property has consecrated this principle in theory as well as in practice.

Section III: Priority right principle

Industrial property rights are governed by the territoriality principle. The latter means *“that a patent, breeders' rights, a trademark, design or model is only valid in the country in which protection was obtained. In concrete terms, these rights must be registered in countries in which you want to exercise them and prohibit third parties from using your invention, plant variety, trademark, or design or model”*¹³³. It means that a patent in a State party A to the Paris convention is not automatically recognized in State B even if party to the same convention. If the owner wants to get protection in State B for the same invention, they have to submit a new application in the new State¹³⁴. More particularly, in case the owner of an invention already patented in another countries wants to get protection for the same invention in DRC, they should comply with legal formalities under Congolese law. Nevertheless, as a national of a State party to the Paris convention, they benefit from the priority rule offering them a privilege in the processing of the application. The application of the rule referred was confirmed by the Court of Justice of the EU in the case of KaiKai Company vs. the EU office for Intellectual property. At point 59 of its decision, the CJEU said: *“(…) which grants a right of priority to anyone who has duly filed an application for registration [...] in or for one of the States party to the Paris Convention or to the agreement establishing the World Trade Organization ...”*¹³⁵

Despite the priority rule, an issue still arises under Congolese law that does not fully comply with minimum standards of protection settled by the TRIPS Agreement till today. Some scholars have written that such a situation can push other states to apply reciprocity to

¹³²E.K.Oke, *Art.Cit.*, p.329.

¹³³S. Bergé, *Op.Cit.*, p.114

¹³⁴*Ibidem*

¹³⁵Court of Justice of the EU in the case of KaiKai Company vs. the EU office for Intellectual property, 14 April 2021

Congolese applicants abroad even if prohibited under the Paris convention and TRIPS Agreement. In this sense, Yav Katsung opines that the expiration of the deadline given to DRC by the WIPO to comply with TRIPS Agreement should not be seen of less importance. It can be interpreted not only as bad faith to comply with international obligation but also can be a vector of discrimination of Congolese applicant abroad¹³⁶. Of course, the non-compliance of DRC with TRIPS Agreement requirements can lead to a drastic and discriminatory situation towards Congolese abroad. The fact of putting in the national law and applying the principle of priority right is not enough, in itself, to secure protection of Congolese in other countries, party to the Paris convention and TRIPS Agreement. There is a need for DRC to comply with TRIPS Agreement requirements.

Moving to the local situation, intellectual property scholars in recent publications related to drugs and medicinal inventions in DRC support that the same problem of non-compliance with TRIPS Agreement requirements is known in case of Traditional knowledge used in industries. During 10 recent years, it has been noticed that an important number of drugs locally produced in DRC contain aspects of traditional medicinal knowledge. It means that some pharmacists have combined modern scientific knowledge with traditional one in the process of drug production. Of course, some of those drugs are exported in neighboring countries with the possibility that foreigners get interest in knowing how they are produced. The same goes for drugs imported in DRC which production process was based on or had recourse to traditional medicinal knowledge. Thus, from an industrial property law point of view, such recourse to traditional medicinal knowledge gives place to several questions. It is commonly discussed in doctrine whether or not traditional knowledge is covered by the TRIPS Agreement or any other legal instrument that addresses, somehow, issues of industrial property. The presentation of this doctrinal discussion combined with the position of the WIPO constitutes the object of the section below.

Section Iv. Issues related to pharmaceutical inventions based on traditional knowledge

Legally speaking, traditional knowledge defined by the WIPO as “*the content, substance or idea of knowledge (such as traditional know-how about the medicinal use of a plant, or traditional ecological management practices)*”¹³⁷, lacks criteria of patentability to be protected

¹³⁶Y. Katsung, *Trademarks law in DRC* available on www.leganet.cd, checked on the 20th March 2022 at 12h10

¹³⁷WIPO publication n°49, 2004, p.448.

under intellectual property law system. Then, what should be the interest to talk about traditional knowledge when dealing with patented invention?

It results from the WIPO intergovernmental committee reports that “*The debate about traditional knowledge protection has come to a head because of the increased-perceived value of traditional knowledge in the global marketplace. Traditional knowledge and associated genetic resources have been drawn on to create new products, pharmaceuticals and agricultural products. In addition, the cultural, spiritual and technological dimensions of many traditional knowledge systems have survived, often adapting to the challenges of contact and interaction with modern technological society: traditional knowledge remains part of the life of many living communities, and should not be relegated to the archives as a historical curiosity. Certainly, traditional knowledge is a new concept in international intellectual property*¹³⁸”. In the search of verifying whether there could exist a real link between intellectual property and traditional knowledge, the WIPO initiated a workshop on traditional knowledge in 1998 at the end of which it was demonstrated that there exists a link between the Convention on Biological Diversity and traditional knowledge. This link, focused on genetic resources, plays a landmark role in the recognition of traditional knowledge in international law in general. Does the recognition imply protection under intellectual law system? In doctrine, there is different views about the possibility of granting such protection under intellectual property law. While few authors have supported such a protection without sufficient proof of fulfilment of the patentability requirement by traditional knowledge, a great number of lawyers share the WIPO point of view that gives a negative answer.

More practically, there is no efficient legal instrument that clearly addresses issues related to the protection of traditional knowledge neither at the national level (in DRC) nor the international one. Nevertheless, the convention on Biological diversity and the Nagoya protocol recognize that indigenous and local communities play an essential role in the conservation of the biodiversity and “*expressly acknowledge the relevant role of traditional knowledge, innovations and practices in biodiversity conservation and sustainable development (...)*¹³⁹”. Thus, it stipulates, at its article 8.j : “ *each contracting party shall as far as possible and as appropriate (...) subject to its national legislation, respect, preserve and maintain knowledge, innovation and practices of indigenous and local communities embodying traditional lifestyle relevant for conservation and sustainable use of biological diversity and promote wider*

¹³⁸WIPO publication n°49, 2004, p.448

¹³⁹F. L Ghassemi, *Op.Cit.*, p.246

application with the approval and involvement of holders of such knowledge, innovation and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovation and practices”. On its side, the Nagoya protocol¹⁴⁰ does not refer to traditional knowledge itself but associates it with genetic resources without also defining what traditional knowledge is. For Leila Ghassemi, this can lead to a misunderstanding of the content of the Nagoya protocol towards traditional knowledge by quoting: *“Traditional Knowledge that inspires the process or provides the lead to the properties of a genetic resource although it may not be reflected in the end product, it remains associated to that product”*¹⁴¹. *whilst genetic resources are, in principle, subject to national sovereignty, traditional knowledge belongs to indigenous communities*¹⁴².

By the same token, the WIPO recognizes the relevance of traditional knowledge in some patentable inventions by saying *“More recently, international intellectual property policy debate has broadened its focus to consider the related issue of traditional knowledge (TK), and particularly how traditional knowledge may be protected through the intellectual property system. Increasingly, traditional knowledge is considered as the content, substance or idea of knowledge (such as traditional know-how about the medicinal use of a plant, or traditional ecological management practices), as distinct from the form, expression or representation of traditional cultures (such as a traditional song, performance, oral narrative or graphic design), which are known as TCEs or expressions of folklore”*¹⁴³.

Technically speaking, the WIPO has mentioned that debate related to issues of traditional knowledge have to be held with strict reservation seeing that *“traditional knowledge protection can amount to a fundamental reassessment of the basic principles and assumptions of the intellectual property system, and a complex debate about how traditional knowledge relates to the formal concepts and structures of the modern intellectual property systems”*¹⁴⁴. According to Leila Ghassemi, *“intellectual property facilitates the assertion of illegitimate property rights over material derived from traditional knowledge”*¹⁴⁵ when the patent or any other protection

¹⁴⁰The Nagoya protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity is an international agreement which aims at sharing the benefits arising from the utilization of genetic resources in a fair and equitable way. It entered into force on 12 October 2014.

¹⁴¹L. Ghassemi, *Op.Cit.*, p.65

¹⁴²*Ibid.*

¹⁴³WIPO publication n°49, 2004, p.445.

¹⁴⁴*Ibidem*, p.446.

¹⁴⁵L. Ghassemi, *Op.Cit.*, p.245.

is granted regardless of recourse to traditional knowledge.

Regarding to all hesitation towards the protection of traditional knowledge under intellectual property system, it is better writing that the CBD and the Nagoya protocol contains traditional knowledge related-provisions that use a non-binding language. They place on State parties the obligations to regulate the access to genetic resources and traditional knowledge through a system of prior informed consent of the indigenous and the local communities. The same system is required under the UN declaration for the right of indigenous peoples that linked traditional knowledge to the right to self-determination and the right to take part in public life. According to article 3.1 of the above declaration, there is some intellectual properties that belong to indigenous people with regard to their traditional knowledge; States are called to take effective measures to not only recognize but also protect the exercise of those rights¹⁴⁶. Thus, from a human right approach, it is supported by scholars that the intellectual property “*may include the protection of traditional knowledge as the intellectual property of indigenous peoples*”¹⁴⁷. However, as mentioned by the WIPO in its handbook of 2004, traditional knowledge lacks criteria of patentability to be protected under intellectual property law system. Besides, it should be paid attention to the fact that: “*Holders of Traditional Knowledge, such as indigenous and local communities, have stressed that there is a holistic relationship between their traditional knowledge, the genetic resources (such as plants) which form part of their environment, and the expressions of folklore that reflect their cultural identity. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) was established in 2001 to address these issues in a comprehensive way, and has therefore considered the protection of both traditional knowledge together with intellectual property aspects of genetic resources*”¹⁴⁸. However, the fact of making a link between traditional knowledge and intellectual property via genetic resources does not give answers to concerns that “*attempts to protect traditional knowledge within the intellectual property system could turn traditional knowledge into an asset sought by third parties, thereby separating it from the very communities that create and nurture it, and consequently depriving them of vital benefits*”¹⁴⁹.

In the same line of ideas, the article 5.5 of the Nagoya protocol requires parties to take appropriate legal and administrative acts to ensure that benefits generated from the utilization

¹⁴⁶L. Ghassemi, *Op.Cit.*, p.88.

¹⁴⁷*Ibidem*, p.127

¹⁴⁸WIPO publication n°49, 2004, p.447.

¹⁴⁹*Ibidem*, p.448.

of traditional knowledge associated with genetic resources are shared in a fair and equitable way with the indigenous and local communities holding such knowledge. For a deep understanding, article 7 of the aforesaid protocol makes two great principles that state should respect when regulating access to genetic resource associated with traditional knowledge: on the one hand, the prior informed consent and involvement of the indigenous communities and on the other hand, the establishment of the mutual agreed terms between the user and the holders.

In case law, the question of patentability of pharmaceutical inventions based on traditional knowledge has already enticed the European Patent Office interest. In the *Pelargonium case*¹⁵⁰, the EPO reviewed legal aspects of the protection of traditional medicinal knowledge and recognized that traditional knowledge has similarities with intellectual property rights. Thus, when a patent is granted for an invention based on traditional knowledge, it is possible that the local community, owner of the traditional knowledge used, claim protection and respect of principles related to. By the same token, the EPO decided that conditions contained in the convention on biological diversity and the Nagoya protocol are not criteria of patentability. It means that the violation of prior informed-consent and the benefits-sharing principles does not constitute a violation of industrial property rules and neither is contrary to the European public order as claimed by the opponent.

For the EPO, there is not requirement under the biodiversity convention and the Nagoya protocol that concern directly the patentability of an invention. The opposition division confirmed the decision of the court above-mentioned by excluding the prior informed consent from the list of patentability requirements. According to this opposition division, the revocation of the patent granted to the German Phyto-pharmaceutical company is justified by the lack of “*sufficient proof of inventive activity and product comparing to prior art in South Africa where indigenous people have been using the pelargonium plant during a long period of time*”¹⁵¹.

As a State party to the convention on the biodiversity and the Nagoya protocol, DRC is required to adopt a national law that addresses issues of the protection of traditional national not as a patentable subject matter but as an ownership of indigenous or local communities. Unfortunately, till today there is no a text nor a legal initiative that goes in that direction yet indigenous and local populations hold traditional knowledge and know-how in different fields

¹⁵⁰See EPO opposition Division, 20 April 2014

¹⁵¹*Ibidem*

of production that should be protected.

In practice, there are problems linked to transnational traditional knowledge and the inadequacy of protection between different States. This is the case between DRC and Uganda, two countries that have a transnational community. People from that community have, most of the time, the same traditional knowledge. Normally speaking, if DRC decides to integrate in its national legal system the prior informed consent and the benefits-sharing principles, local community from Uganda can claim the same traditional knowledge. Another problem is linked to the non-compliance of DRC with the TRIPS Agreements requirements regardless to the transition period granted. At the same time, patent applications are being filed by foreigners to get protection of their invention in DRC; and Congolese are filing application for protection of their invention abroad. Does this state of things be considered as negligence and leads to the application of reciprocity in spite of its prohibition under international intellectual property law?

It is assumed that the integration of DRC in the East African Community will break different difficulties related to the protection of industrial property, in general. This integration will not only give to DRC the opportunity to take part in the community system of Intellectual property protection but also facilitate the approximation of national intellectual property legislation of members via the community policy. More concretely, it will be easy, for owner of patented invention to get protection in all country member of the East African community based on the community policy.

Conclusion

The international protection of industrial property in Congolese law is assured via the Paris convention and TRIPS Agreement, international legal instruments to which DRC is a contracting party. These international legal instruments set minimum standards of protection and place obligations on State parties to integrate them into their respective national legal system. Those principles are the national and most-favored nation treatment, the independence and territoriality rule of industrial property rights and the priority principle, mainly used when looking for a protection of the same intangible assets in another country. By and large, each State-party to the aforesaid instruments must adopt a law that complies with minimum standards of protection settled under international industrial property law.

As a State-party to the Paris convention and TRIPS agreement, DRC adopted the law n°82001

of January, the 7th 1982 that regulates issues of industrial property law. Under this law, some principles fixed by the Paris convention are respected. However, a series of other standards of protection are not guaranteed especially the ones set by the TRIPS Agreement. Much of the current work on industrial property law highly criticize the non-conformity to TRIPS Agreement by DRC despite the deadline transitory period granted for. For several scholars including Congolese ones, this is a serious negligence that should be sanctioned. Among sanctions invoked, the application of the reciprocity rule to Congolese national living abroad should take place considering the low degree of protection granted by their national law to foreigners even if it is prohibited under the Paris convention. Of course, such non-conformity to TRIPS Agreement by DRC constitutes a violation of its international obligation. On my behalf, it could be better to hold DRC internationally responsible and sue it before a competent international court instead of applying reciprocity to Congolese national abroad because the initiative to conform with TRIPS Agreement does not practically depend on them. Such an action would make more sense than activating a prohibited rule.

In other words, applying reciprocity to Congolese nationals living abroad is like responding to an illegal act under industrial property regime by another illegal act under the same regime. Such a response is, purely, contrary to international law seeing that both the application of reciprocity and non-compliance with TRIPS Agreement constitute the violation of industrial property law.

Turning to specificities of patented inventions that have used traditional knowledge, as a topic currently debated by scholars in DRC, it is better saying that inventors are not free to use traditional knowledge as they want. There are principles and rules under the convention on biodiversity and its Nagoya protocol that govern any use of traditional knowledge in modern inventive activities. According to the convention above-referred to, contracting States must transpose them into their respective national legal system for effectiveness matters. Unfortunately, as for TRIPS Agreement, DRC has never adopted a law that implements the convention on the biodiversity and the Nagoya protocol. Of course, an idea can go in the sense that it is possible to claim a violation of international law principles when infringing the Nagoya protocol. Nevertheless, as stated by articles 14,15,16,17, and 18 of the above-mentioned protocol, the adoption of national measures by contracting parties is of great value in the implementation process. It means that, States have to adopt measures that regulate, in conformity with customary international law and the Nagoya protocol, the access to genetic resources linked with traditional knowledge, the prior informed consent of the local community

owning those genetic resources and a fair sharing of benefits resulting from. European countries such as Belgium and France have adopted measures that make, infringement of second category, any violation of the Nagoya protocol. This is to be found at article D.151 of the French environment code. Such a measure creates a legal security to local communities whose traditional knowledge can be used in a patentable subject matter. DRC needs also to adopt such measure for national legal security issues.

More practically, principles set by the convention on the biodiversity and Nagoya protocol are the prior informed consent of local communities or their pure involvement in the inventive activities using their traditional knowledge linked with genetic resources and the benefits sharing rule. The last one embodies ideas according to which benefits gained from the use of traditional knowledge linked to genetic resources should be fairly and equitably shared among people of the local communities. However, the share of such benefits is practically difficult considering that local communities, in DRC for instance, are not contained in a same and specific traditional area. They have been moving to different places and change traditions day by day. In other words, State-Parties have to adopt national law that implements the principles of prior informed consent or the pure involvement of the indigenous or local communities in the use of their knowledge in drug industries and the benefits-sharing. By the adoption of such a law, there can be an assumption that all member of a local community owning a traditional knowledge used in a patented invention will benefits as citizens. On the convention on the Biodiversity and the Nagoya protocol front, each use of the traditional knowledge in the violation of the aforesaid principles constitutes a breach of law. Such an appraisal arises a question related to criteria of protection of industrial property rights when they are based on traditional knowledge.

According to the human right approach, the declaration of United Nations on the self-determination of indigenous and local communities linked the protection of traditional knowledge to the self-determination right. It means that each local community has right to own knowledge transmitted from generation to generation as a property. It refers, most of cases to the know-how or any other intellectual activity traditionally owned which have been used in some modern products especially medical ones.

In case law, the *Pelargonium* case has demonstrated that the prior informed consent and the benefit-sharing principles are not criteria of patentability. However, they have to be respected when an industry has recourse to traditional knowledge as a process or a know-how to produce drug. From today on, there has never been a law adopted that goes in the direction of the

protection of traditional knowledge as requested by the convention on the biodiversity and the Nagoya protocol. Such a lack disfavors Congolese local community whose traditional knowledge has been used in the violation of principles of prior informed consent and benefit-sharing.

Using the comparative method, this research comes to the result that the protection of industrial property rights in Congolese law, realized via the Paris convention and TRIPS Agreement, is still on the way of implementation. This means that efforts are requested from Congolese State authorities to comply with DRC's international obligation under TRIPS Agreement and adapt with the Nagoya Protocol to ensure that the traditional knowledge of its indigenous or local communities is internationally and effectively protected. Thus, these results totally confirm our hypothesis.

As recommendation, a plea should be done in the Congolese parliament to awake the mind of the legislative power on these weaknesses, their consequences on the State and Congolese nationals living inside or outdoors. There is a necessity to conform with TRIPS Agreement and adopt a national law that protect traditional knowledge for the good of Congolese local communities even if it is still asked questions about the legal value of principles settled by the biodiversity convention and the Nagoya protocol in comparison to criteria of patentability.

REFERENCES

I.LEGAL TEXTS

A. INTERNATIONAL INSTRUMENTS

1. The Paris Convention
2. TRIPS Agreement

B. NATIONAL CONGOLESE LAW

Law n°82001 of January, the 7th 1982

II. BOOKS

- I. ABBOT et al., *The international intellectual property system: A commentary and materials*, 1999.
- II. Bergé, S., *Protection internationale et européenne du droit de la propriété intellectuelle : présentation-textes-jurisprudence-situations*, Larcier, Bruxelles, 2015.

- III. Binctin, N., *Droit de la propriété intellectuelle : Droit d'auteur, brevet, droits voisins, marques, dessins et modèles*, 3^{ème} édition, LGDJ, 2014.
- IV. Bokeder, *A public health agenda for traditional complementarity and alternative medicine*, 2002.
- V. CORREA, *Trade related aspects of intellectual property rights: A commentary on the TRIPS Agreement*, 2007.
- VI. Drexel, J., et alii, *Pharmaceutical innovation, competition and patent law*, Edward Elgar Publishing Limited, UK, 2013.
- VII. Eastaway, N., et alii, *Intellectual property law and taxation*, 7th edition, Thomson Reuters, 2008.
- VIII. Farreras, L. Gh., *Utilization of traditional Medicinal Knowledge in the Industry: Legal aspects and protection in international law*, Ph.D. dissertation in Law of the Neuchatel University, defended on March, the 14th 2017.
- IX. Herrington, W. W., *International Intellectual property law and Policy*, 9th ed., McGill Guide.
- X. LADAS, ST., *The international protection of industrial property*, Cambridge, Harvard University press, 1930.
- XI. Ricketson, Sam., *The Paris convention for the protection of industrial property; A commentary*, Oxford University Press, 2015.
- XII. WIPO national workshop for judges organized by the WIPO in collaboration with the Saudi Arabia, December 2004.

III. ARTICLES AND WEBOGRAPHY

- I. Bakshi, P.M., “Legal research and Law reform” in *SK Verma and M. Afzal Wani*, Indian Law Institutes, 2010, pp110-119
- II. Cottier, Th., Industrial Property, International Protection in *Max Planck Encyclopedia of Public International Law* available on www.oxfordpublicinternationallaw.com checked on the 4th of April 2022 at 13h33.
- III. Hessel Yntema, E., « Comparative legal research: some remarks on ‘Looking out of the cave’ », in *Michigan law review*, 1956, pp. 899-928. 903.
- IV. International conference on mixed methods research in *journal of biomedical sciences*, 2019, p.1 available on www.uclouvain.facdroid.be consulted on 28/02/2022 at 16:2

- V. Katsung, Y., « Droit de la propriété intellectuelle congolais » in *Revue de droit des affaires OHADA*, disponible sur www.ohadata.com visited on the 7th February 2022 at 20h30.
- VI. Katsung, Y., Patent and industrial design protection in *DRC*, p. 9. available on www.leganet.cd consulted on the 20th of March 2022 at 9h45
- VII. Katsung, Y., Trademarks law in *DRC* available on www.leganet.cd., checked on the 20th March 2022 at 12h10
- VIII. Katsung, Y., Trademarks law in *DRC* available on www.leganet.cd., checked on the 20th March 2022 at 12h10.
- IX. Kolawole Oke, E., *Territoriality in Intellectual Property Law: Examining the Tension between Securing Societal Goals and Treating Intellectual Property as an Investment Asset*, Volume 15, Issue 2, October 2018 available on www.google.com checked on 4th April 2022 at 14h38.
- X. Maria Correa, C., Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement (2nd Edition), ch.2 nature and scope of obligations In *Oxford Public International Law*, available on www.https://opil.ouplaw.com/ checked on 4th April 2022 at 14h00.
- XI. Tayler, Sample student hypothesis, 2008-2009 checked on www.uclouvain.facdroit.be on 22/02/2022 at 16h7.
- XII. WIPO IGC, « Recognition of traditional knowledge within patent system” 13-17 October 2008, WIPO/GRTF/IC/13/13/7.

IV. CASE LAW

- I. CJEU, *Austro-Mechana* case, 24 March 2022.
- II. CJEU, *Ferrari* case, 28 October 2021.
- III. CJEU, *Top System* case, 6 October 2021.
- IV. Court of Justice of the EU, *KaiKai Company vs. the EU office for Intellectual property*, 14th April 2021.
- V. Court of Justice of the European Community, *SIECKMAN* case, 12th December 2002.
- VI. EPO Opposition Division, *Pelargonium* case, 12th May 2010.
- VII. ICSID, *Eli Lilly v Canada*, 16th March 2017.
- VIII. ICSID, *Maffezini vs. Spain*, 13th November 2000.
- IX. ICSID, *Philip Morris vs Uruguay*, 8th July 2016.
- X. ICSID, *Saluka v.s Czech Republic*, 7th May 2004.

- XI. US Supreme Court, Bauer & Cie. v. O'Donnell, 26th May 1913.
- XII. US Supreme court, BILSKI vs KAPPOS, 28th June 2010.
- XIII. US Supreme Court, City of Elizabeth v. American Nicholson Pavement Co., 1878
edited on 26th October 2011.

