

THE PATENT PANDEMIC: AN EMPIRICAL CRITICAL AND
COMPARATIVE ANALYSIS OF THE PHILIPPINES' EMERGENCY
PATENT LAWS
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INTRODUCTION

MEDICAL ISSUES IN RELATION TO PATENTS

A continuous global issue nowadays is in the field of medicine. From emerging new diseases to complex access to healthcare, the field remains a big problem for individuals and governments. Technology aids in this problem as it serves as inventions that propel humanity in progressing to create medicine either to alleviate symptoms of illnesses or cure them altogether. Patents protect these inventions by giving inventors exclusive rights to their intellectual inventions for a limited period of time unless they are compensated for the use of such inventions. The pharmaceutical industry relies heavily on patents as its activities not only involve producing and selling drugs but also researching and creating them as well.

¹ These invented drugs are usually expensive at first but later on will be turned into generic and cheaper yet effective drugs to provide better and wider access to medicine for the public. Problems arise, however, when large pharmaceutical companies either refuse to give licenses of their medical patents or charge expensively for such licenses. Thus, when disasters such as pandemics strike, the masses are left to deal with expensive drugs or inappropriate medication.² Such events call for government action, particularly

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¹ Ronil Remonquillo, *Implications of the Patentability Requirements and Other Policy Considerations to the Pharmaceutical Industry - The Japanese and Philippine Experience*, WIPO/JPO Long-Term Research Fellowship, 1-2, Sept. 30, 2009.

² Remonquillo, *supra* note 1, at 2.

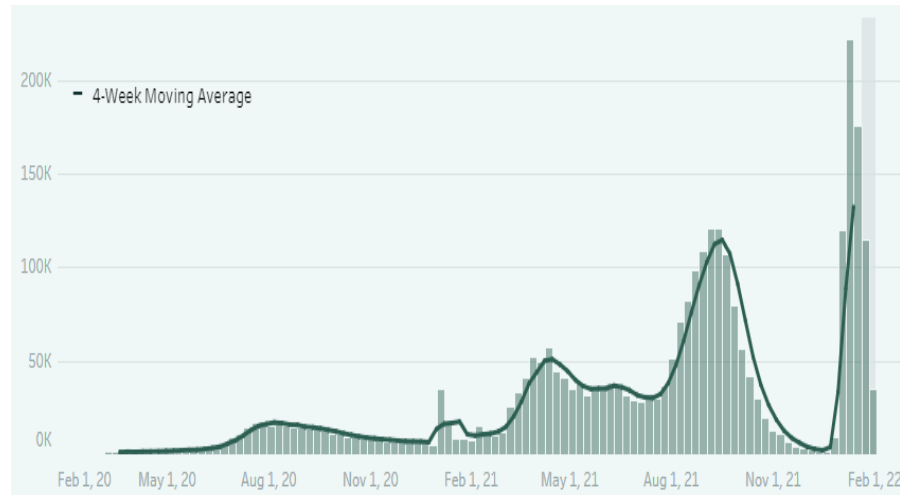
in the medical field, as the government has to protect the health and wellbeing of its people.

COVID-19 PANDEMIC

The year 2020 began with the Coronavirus, commonly known as COVID, creeping into every nation around the world. By the second quarter of the year, it brought governments to their knees as it affected the global economies and the world was sent into a pandemic situation. Countries scrambled to adjust their policies in containing the spread of the disease through actions such as quarantines, work-from-home setups, and state-financial aid.

Globally, there are more than 370 million confirmed cases of COVID as January 2022 ends. As shown in the chart below taken from the World Health Organization (WHO), it shows the upward curve of global COVID cases, revealing the continuously significant increase in cases. The continuous increase is due to multiple variants appearing and spreading as the disease mutates. Examples of variants include the Delta variant and the recent Omicron variant. Both variants are extremely pervasive, hence the numerous surge of cases during the points of their emergence.

In the Philippines, numerous spikes have occurred throughout the pandemic, as shown in the chart below. These include the summer of 2021, 3rd quarter of 2021 and early 2022, when the Omicron variant emerged. In an effort to mitigate the damage of the disease, the Philippine government enacted Republic Act (RA) 11494, also known as the Bayanihan Act, during the height of the early lockdown. This paved the way for numerous policy changes by government agencies to combat COVID. These policies include financial aid to those employees who lost their jobs due to the pandemic, benefits for frontline workers (e.g., death benefit), and quarantine passes to control movement in high-density areas.



Source: Department of Health (DOH) COVID19 Tracker (<https://doh.gov.ph/covid19tracker>)

The pandemic prompted pharmaceutical companies as well as other industries to find remedies to counteract COVID. As of late 2020, vaccines are now being introduced into society to provide protection against the disease's effects. Before and after the release of the vaccines, however, industries have already invented their own products and methods to either increase their protection from COVID or mitigate the effects of the disease on those afflicted with it. Thus, there is increasing debate on the exception or circumvention of invention rights or intellectual property rights on these inventions as there is a greater need to prevent the loss of human life due to COVID.³

This paper will discuss the Philippines' Patent law, particularly on its emergency patents provision (sec. 74 and 93), as well as its implications on the country from socio-political, economic and legal perspectives. The scope of this paper includes Patent law in the pharmaceutical industry coupled with the application of certain legal concepts onto the said law. This study will be done using comparative research through jurisprudence and extrapolation of studies and reviews conducted in other countries (e.g., United States of America, Nigeria, South Africa).

³ World Health Organization (WHO), *Intellectual Property Protection: Impact on Public Health*, WHO Drug Information Vol. 19 (3), 236-238, 2005.

PATENT LAW IN THE PHILIPPINES

INTELLECTUAL PROPERTY CODE

The Intellectual Property Code of the Philippines⁴ (IPC, RA 8293) is the governing law for matters involving Intellectual Property. Prior to the current law, there were three laws for the protection of intellectual property which were Presidential Decree (PD) 49 (Decree on the Protection of Intellectual Property), RA 165 (Old Patent Law), and RA 166 (Trademark Law).

The creation of RA 8293 is provided under sec. 2 of the law; summarily to provide protection and security for intellectual property rights holders as well as promote technological transfers, encourage innovation, and ensure market access for new inventions.

The law has various provisions on the kinds of intellectual property, particularly on Patents, Trademarks, and Copyright. This paper, however, will focus on Patent law, specifically on its rights, limitations, compulsory licensing, and government use of Patents.

Suppletorily, for this paper, the Universal Access to Cheaper Drugs law or RA 9502⁵ shall be mentioned and applied as it is the law providing for easier access to cheaper and quality medicine. Its application is mainly to show the legislature's actions in developing a stronger foundation for accessible medicine by amending certain provisions in the IPC. Specifically, excluding certain medical inventions from patent protection, creating limitations on Patent rights pertaining to medicine, and expanding the provisions on compulsory licensing, especially in accordance with the Agreement on Trade-Related Aspects on Intellectual Property Rights (TRIPS Agreement)⁶. Said agreement shall be further discussed in the latter parts of the paper.

⁴ An act prescribing the Intellectual Property Code and establishing the Intellectual Property Office, Providing for its powers and functions, and for other purposes, RA 8293.

⁵ An act providing for cheaper and quality medicines, amending for the purpose RA 8293, RA 6675, and RA 5921, and for other purposes, RA 9502.

⁶ The TRIPS Agreement provides for the minimum standards for enforcing intellectual property law across signatories for all types of intellectual property. According to the WTO's Fact Sheet (2003), the TRIPS agreement attempts to universalize or standardize a level of protection to states through obligations and modes of dispute settlement to protect IPR holders.

PATENT LAW, RIGHTS, AND LIMITATIONS OF A PATENT HOLDER

A patent holder has certain rights as provided for under Sec. 72 of the IPC they may exercise with respect to their patented property:

If the patent pertains to a product, the patent holder may prohibit and prevent any unauthorized person from making, using, offering for sale, selling, or importing the patented product;

If the patent pertains to a process, the patent holder may restrain, prevent, or prohibit any unauthorized person from using the process. This means using the said process for manufacturing, dealing, selling, or importing any product derived from the patented process;

Patent owners may also assign or transfer the patent and create licensing contracts to other entities who may wish to use the patent.

In summary, a patent gives protection to patent holders to prevent any abuse of one's inventions. This form of protection will last for a total of 20 years from the time of filing of the application.⁷ As stated in *Pearl and Dean vs. Shoemart, Inc.*: "... The goal of a patent system is to bring new designs and technologies into the public domain... On one side of the coin is the public which will benefit from new ideas; on the other are the inventors who must be protected."⁸ The said case also referred to the case of *Bauer & Cie vs. O'Donnell*, which briefly emphasized that the patent system allows for the promotion of new and useful inventions to remain in public for the people's use. Furthermore, the protection of the invention for a number of years while gaining the privilege of reaping the fruits from their invention.

Despite the promotion of intellectual property rights, however, such rights are not absolute. Sec. 72 of the IPC provides for the exceptions to which a Patent holder may not prevent a user from utilizing his invention/process:

Using a patented product which is put on the market in the Philippines by the owner of the patented product (or with his express consent to put such product into the market);

With regards to drugs: the limitations on patent rights apply after the drug has been introduced in the Philippines or anywhere else in the world by the patent owner or their authorized representative.

⁷ RA 8293, sec. 54.

⁸ *Pearl and Dean vs. Shoemart, Inc.*, G.R. No. 148222, August 15, 2003.

Provided further by the provision, the right to import the drug must be available to any government agency or private third party

When the product/process is done privately or not on a commercial scale;

Provided that the use does not significantly prejudice the economic interests of the Patent owner.

When the product/process is exclusively used for experimental use of the invention or for scientific or educational purposes;

For drugs/medicine, if the act is for the purpose of development and submission of information for issuance and approval of government regulatory agencies required by law;

When the act is for preparation for cases (medical/pharmaceutical) of medicine in accordance with a medical prescription;

When the invention is used in any ship, vessel, aircraft, or land vehicle entering the territory of the Philippines temporarily or accidentally

Provided such invention is for the needs of such vehicles and not to be used for manufacturing anything to be sold in the Philippines.

EMERGENCY PATENTS

Emergency Patents are not formally defined by any academic journal nor legal source but for the purposes of this paper and for brevity, this paper defines and coins the term “Emergency patents” as “those patents exploited or used without the consent of the patent owner for the purpose of dealing with national emergencies and preservation of public interest.” However, this definition shall be limited to the scope of public health and medicine. The reason for this is the limited literature on patent use outside of the field of medicine and public policy.

The critical idea of emergency patents is that these patents are to be exploited by an entity without the permission of the patent holder to mainly and urgently preserve said public health. The research theorizes that there are two kinds of “emergency patents”: (1) Government Use and (2) Compulsory Licensing. They are considered emergency patents as they can be an urgent mechanism (particularly during national emergencies) for the use of patented inventions without the consent of the Patent owner.

GOVERNMENT USE

Under Sec. 74 of the IPC, the Philippine Government or its authorized entity may exploit a patented invention without any agreement or consent of the patent holder during certain circumstances as follows:

When public interest (particularly: national security, health, development) so requires;

A judicial or administrative body deems that the manner of exploitation by the patent owner or his licensee is anti-competitive;

For drugs/medicine, there is a national emergency or other circumstances of extreme urgency that would require the use of the patented invention;

For drugs/medicine, there is public non-commercial use of the patent without satisfactory reason;

For drugs/medicine, the demand for the patented invention is not being met to an adequate extent and on reasonable terms.

Under sec. 74.2, the execution of sec. 74 provides for the requirements on the usage of emergency patents. This paper will focus mainly on national emergencies thus, only sec. 74.2 (a), (d), (e), (f), and (g) shall apply which are briefly and summarily stated below:

Subsection a provides for the notice to the patent holder should the emergency patent be used for national emergencies.

Subsection d states that the emergency patent shall only be used for the purpose it is authorized with;

Subsection e states the non-exclusivity of the emergency patent;

Subsection f creates the right of the patent holder to be adequately remunerated for the use of their emergency patent (basing the value on the economic value of the authorization); and

Subsection g provides for the requirement of the existence of a national emergency or circumstances of extreme urgency. Such is only determined by the President of the Philippines.

COMPULSORY LICENSING

Compulsory licensing under sec. 93 of the IPC is the granting by the government of a license to an individual who has the ability to exploit a patented invention without an agreement with the patent holder. This compulsory license may be granted under the following circumstances:

National emergencies or other circumstances of extreme urgency;

If public interest requires such license (for national security, nutrition, health, economic development);

When a judicial or administrative body has determined that the manner of exploitation by the owner of the patent or its licensee is anti-competitive;

In cases of public non-commercial use of the invention by the patent holder without satisfactory reason;

Without satisfactory reason, the patented invention is not being worked in the Philippines on a commercial scale despite being capable of being worked upon,

Provided the importation of the patented invention will constitute to be working or using of the patent;

When the demand for the patented drug is not being met as determined by the Dept. of Health (DOH).

Under RA 9502, it inserted a new section under sec. 93,⁹ which provides for the issuance of a Special Compulsory license under the TRIPS agreement to which the Philippines is a party. Following the TRIPS agreement, sec. 93-A gives the Director General of the Intellectual Property Office (IPO) the power to grant a special compulsory license for importation of patented drugs and medicine of those who did not opt out of Art. 31bis of the TRIPS agreement. Art. 31bis shall be discussed in the latter parts of this paper but regarding RA 9502, these special compulsory licenses are for ensuring access to quality, affordable medicine in the local market. The special license also grants the right of adequate remuneration to the patent holder and such license must provide measures in order to protect the patent holder from any possible abuses to his patent rights.

Furthermore, sec. 93-A is available for the manufacturing and exportation of drugs and medicines to countries having insufficient manufacturing capacity in their pharmaceutical sector to address public health matters. The importing country, however, must also grant the compulsory license on their end in order for the importation of the drug from the Philippines in compliance with the TRIPS agreement.

The purpose of compulsory licenses is mentioned in the case of *Smith Kline & French Labs. vs. Court of Appeals*: "... the legislative intent in the grant of a compulsory license was not only to afford others an opportunity to provide

⁹ RA 8293, sec. 93-A.

the public with the quantity of the patented product but also to prevent the growth of monopolies.”¹⁰

COMPULSORY LICENSING VS. GOVERNMENT USE

In differentiating compulsory licensing from government use, the former is a grant given by the Director-General of the IPO to a private individual whom the government sees as one who has the ability to exploit the patented invention under the circumstances provided. Government use, on the other hand, is when a government agency or a government-authorized entity exploits a patented invention even without an agreement with the Patent holder.

As provided under sec. 93 and 94, one of the main differences is that a compulsory license is mainly petitioned or initiated by a private entity who believes that they are capable of utilizing a patented invention using the grounds of sec. 93 as basis for their license application. Plain-text reading shows that only private persons are involved in the grant of a compulsory license, whereas for emergency patents, it allows for the use of the patented invention by government agencies in addition to private entities. The exception is the special compulsory license under the TRIPS agreement initiated by the DOH as they are the ones who recommend to the Director-General the need for such license for importation of a certain patented drug.

This leads to another difference which is the importation and exportation of the patented product. Compulsory licenses allow an individual to exploit a patented invention without the patent owner’s consent. As provided by sec. 93-A, the provision talks of not only importation of a foreign patented product but also exportation of a locally patented medicine (provided that the importing foreign country granted the same compulsory license in their jurisdiction). Meanwhile, sec. 74 is silent as to the use of the patented invention for importation and exportation. Overall, this would perhaps mean that the scope of sec. 74 remains on a national level while compulsory licenses are able to transcend said scope to have an international reach on other nations’ patents.

Another difference in the essential components to the execution of emergency patents are the grounds. Government use of the patents are determined by the President as stated in sec. 74.2 (g).¹¹ For compulsory licensing, the provisions in the chapter for said subject are silent on who

¹⁰ Smith Kline & French Labs vs. Court of Appeals, G.R. No. 121867, July 24, 1997.

¹¹ The President of the Philippines determines the national emergency and the urgency of the need to exploit the patented invention.

determines a “national emergency”. Additionally, one detail different from the government use is the taking into account “vital sectors of the national economy” when it comes to concerns of public interest. The significance of this is that it would also deal not only with actual emergencies declared by the government but also with unfamiliar emergencies.¹² The petition for compulsory licenses may present arguments that could possibly highlight the need to exploit a certain patented invention in order to address matters such as inaccessibility of medicine for certain diseases.

Lastly, there is a difference when it comes to the limitations of patent use (importation, exportation). For government use, the provisions are silent on the “use” including importation or exportation of patented products. Therefore, it is plausible that government use strictly focuses on Patents in the Philippines only, whereas compulsory licensing allows for the use of Patents abroad as it involves the importation and even exportation of said patented products.

To briefly show the subtle difference between the two, a table is provided below:

EMERGENCY PATENTS		
	GOVERNMENT USE	COMPULSORY LICENSING
SCOPE & LIMITATIONS	<ul style="list-style-type: none"> - Local Level; - Only local patents can be exploited; -Does not involve importation and exportation. 	<ul style="list-style-type: none"> -International level; -Patents abroad can be imported -If Patents abroad are to be exploited, foreign country must have the compulsory license for that product as well;

¹² Unfamiliar meaning these are emergencies that while not as mainstream or commonly broadcasted as certain events, can still be said to become detrimental to national health as it involves some sort of danger if left untreated (e.g. prevalence of known diseases such as Hypertension or HIV/AIDS and incoming unknown diseases into the country).

		-May involve importation and exportation
INITIATOR	-Government agency or authorized entity; -IPOPHL provides for the implementing rules & regulations for the use of the patent.	-Private entity; -Granted by the Director-General of the IPO; -Sec. of DOH may file a petition for a special compulsory license.
GROUND	-National emergencies as determined by the President	-Silent on who determines national emergencies; -Includes vital sectors of the national economy in consideration.

The importance of differentiating the two emergency patents is mainly to determine who would be initiating the “exploitation” of the patented product and the scope & limitations of the patents to be used for the pandemic/national emergency.

While one can argue that one is deprived of property because of the taking of one’s patented invention without some sort of agreement, remuneration is still provided in accordance with the value of the patent authorization as provided. Furthermore, the idea of the government “taking” patented inventions is substantiated through jurisprudence, especially for matters involving public need. In obtaining an invention, the Philippine government can execute its power of eminent domain over the private property of a patent owner. Applied in this paper, it is the taking of a patented medical invention for public purposes and with just compensation. Eminent domain is defined as “... entering upon private property for more than a momentary period, and,

under the warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof'.¹³ The case of *Vda de Castellvi* stated circumstances for valid eminent domain which are: (1) the entrance and occupation of the private property, (2) such entrance must be more than a momentary period, (3) entry is under the warrant or color of authorities, (4) the entry must be for public purpose, and (5) the utilization results in the deprivation of the owner in enjoying their property. This criterion may not strictly and directly apply to cases of emergency patents and their taking of patented inventions. Thus, a more in-depth discussion shall be provided later in the implications as local and foreign jurisprudence and laws shall be analyzed.

INTERNATIONAL LAW ON PATENTS

The Philippines currently accedes to or is a member of numerous international obligations pertaining to Intellectual Property, particularly on patents. On the subject of emergency patents, the Philippines is a member of the World Trade Organization (WTO) and therefore is obliged to follow the provisions set by the Agreement on Trade Related Aspects of Intellectual Rights (TRIPS Agreement). In the next following sections, the research provides a brief background on the international obligations being observed by the Philippines in connection with emergency patents.

TRIPS AGREEMENT

The TRIPS agreement provides for a system of standardization on intellectual property protection, in this case, patents. Because the Philippines is a member of the United Nations (UN), the former complies with international laws and agreements of such international organizations. When the TRIPS was enacted, the Philippines conformed to such agreement through amendments to its own patent system.¹⁴ One of the amendments made in conformity with the TRIPS agreement is the mentioned RA 9502, adding essential provisions that would relate to emergency patents and medicine.

¹³ *Republic vs. Vda de Castellvi*, G.R. No. L-20620, August 15, 1974.

¹⁴ Remoquillo, supra note 1, at 18.

Amidst the COVID pandemic, the Philippines, through its Senate Committee on Foreign Relations, released P.S. Res. No. 560.¹⁵ This document is a resolution urging the Executive Department, particularly the Department of Foreign Affairs, to support India and South Africa's proposal to the WTO to suspend certain provisions of the TRIPS agreement that would pertain to the prevention, containment, and treatment of COVID-19. The resolution was made to address the monopoly of certain vaccine-technologies and other inventions that may facilitate the sharing and expedite production by local pharmaceuticals of medicine that may address the effects of the Coronavirus.

In relation to emergency patents, news reports during the peak of the pandemic show the concern of international organizations as well on the TRIPS waiver. In 2021, a representative of Citizens Urgent Response to End COVID-19 (CURE Covid) stated that the TRIPS waiver is necessary to increase the supply of vaccines and other medical supplies and technology.¹⁶

DOHA DECLARATION

The Doha Declaration is a reaffirmation of the TRIPS agreement wherein members acknowledge the right of States to grant compulsory licenses and to determine the grounds to grant such licenses. Furthermore, the declaration also recognizes the challenges of certain states and their pharmaceutical industries on compulsory licensing issues as based on art. 31(f) of the TRIPS agreement.¹⁷ The key content of the Doha Declaration in relation to emergency patents is that the interpretation of the agreement should be seen to support the right to protect public health and provide flexibility in providing such protection.¹⁸ The agreement recognizes the rights of member states to determine what would constitute national emergencies or circumstances of extreme urgency.¹⁹

APPLICATION OF EMERGENCY PATENTS CONCEPT

¹⁵ S 274, 18th Congress, 2d Session (July 6, 2021).

¹⁶ TRIPS waiver in light of the COVID-19 pandemic in the Philippines, Mirandah, 26 October 2021, <https://www.mirandah.com/pressroom/item/trips-waiver-in-light-of-the-covid-19-pandemic-in-philippines/>.

¹⁷ Jamie Feldman, Compulsory Licenses: The Dangers Behind the Current Practice, Journal of Int'l Business and Law: Vol. 8:1, Art. 9, 2009, 147.

¹⁸ Feldman, supra note 17, at 148.

¹⁹ Feldman, supra note 17, at 149.

LOCAL JURISPRUDENCE

In the Philippines, there are only a number of cases reaching the Supreme Court involving compulsory licenses, and none which involve government use or the triggering of sec. 74. The jurisprudence mentioned in this research is to create a relationship between the principles being used for emergency patents and national emergencies, i.e., pandemics such as the COVID-19 pandemic. Such principles may then be extrapolated as a substantiation to socio-political, economic and legal current events involving the said pandemic and future national emergencies.

The case of *Dupont vs. Francisco* is significant because it emphasized the judiciary's power in protecting the public interest in national health, particularly on the Losartan product of the petitioner (Dupont). The patented product deals with hypertension and the Court in this case denied the petition as they deem that public interest is prejudiced if Dupont's patent revival is granted. This is because respondent (Therapharma, Inc.) and a number of other pharmaceutical companies also produce Losartan products that compete with the retail price and effectiveness of petitioner's. The Court ensured the economic competition and accessibility of Losartan products to those afflicted with Hypertension as the case showed facts on how the said disease is very prevalent and deadly in the Philippines. The doctrine of the aforementioned, which is to be applied in the contemporary period, is that it is the Court's duty to protect the accessibility of medical products, especially during national emergencies. The Supreme Court, in this case, utilized the fact that Hypertension is a pervasive disease and medicine against it is becoming economically problematic to lower-earning households. Today, the idea can be applied to rule for compulsory licenses or be a basis for administrative or judicial bodies to use certain patents to combat COVID.

A significant case relating to compulsory licenses is the case of *Smith Kline & French Laboratories, LTD. vs. Court of Appeals, et. al.*²⁰ In this case, the product being filed for a compulsory license by the private respondent (*Doctors Pharmaceuticals*) is the drug, Cimetidine, which is a vital medicine for heartburns and ulcers. The Court of Appeals decided for the private respondent as it found that the Director of Patents correctly granted the license. The Director determined that the product is considered useful as it is necessary for the promotion of public health thus, the grant was a valid exercise of police power. The petitioners (*Smith Kline*) elevated the case to the Supreme Court as they argued that the compulsory license grant is invalid as the grant was a wrongful

²⁰ *Smith Kline*, G.R. No. 121867.

exercise of police power and that there was an unjust taking of the intellectual property without just compensation; an invalid exercise of eminent domain. The Court answered that the license grant is a valid exercise as the legislative intent of compulsory licenses is to provide others the opportunity to supply the public with a quantity of the patented product as well as prevent the growth and possible abuses of companies who have a monopoly on certain products, especially on medical products. Furthermore, compulsory licensing of medical products is not a deprivation of property as it provides the patent owner a monopoly over the product for two (2) years and afterwards, a form of agreement can be made between the compulsory license petitioner and patent holder for a reasonable royalty.

Lastly, the case of *Barry John Price, et. al. vs. United Laboratories (UNILAB)*²¹ focuses on the factual findings on the grants for compulsory licenses and the subject of just compensation in the “taking” of the patented product. The respondent in this case was granted a compulsory license for a pharmaceutical compound used for making anti-ulcer medicine, which the petitioner opposed. The case was elevated up to the Supreme Court where the essence of the decision focused on the capabilities of the private respondent being a qualified entity to be granted the compulsory license. This is because the respondent has the necessary equipment, technological expertise, and standards to ensure the quality of products that will be crucial to producing medicine for the public health. On the matter of compensation, the Court answered petitioner’s arguments through sec. 36 of RA 165, which states that should there be no agreement on the terms of the license, the Director of Patents can set such terms which he did in this case as the petitioner is provided a reasonable royalty for the Patent use.

The cases of *Price* and *Smith Klein* focus on compulsory licensing, specifically on the issue of capability, public health, and property rights (pertaining to eminent domain and police power). The relevance of the two cases in application to the COVID-19 pandemic is that they can be used as precedence for future cases that involve the exploitation of patents without the agreement of the Patent holder. Should some patented medicine be urgently needed to address a pervasive emergency, the arguments of police power and protection of public health can be used. Additionally, any entity able to show their prowess and means to tinker and utilize medical products may also be granted compulsory licenses that can perhaps aid communities in accessing and obtaining cheaper alternative medicaments. Given that the

²¹ Barry John Price, et. al. vs. United Laboratories, G.R. No. 82542, September 29, 1988.

country is facing another wave of spiking cases²² with the emergence of the Omicron variant, perhaps the use of emergency patents could swiftly address the matter at a different pace. Other nations have applied similar principles to their own situations during the current pandemic and past crises as well.

FOREIGN CASES

Applying the similar principle of governments taking patents without an agreement for national emergencies, some of the significant examples include: the United Kingdom's (UK) *IPCom GMBH & Co. vs. Vodafone Grp., PLC.*,²³ Australia's *Stack vs. Brisbane City Council*²⁴, and United States' Abbot and Merck against the failure of Thailand to enforce intellectual property rights after the latter applied for a compulsory license. Additionally, many countries have aligned their Intellectual Property laws and policies to Art. 31bis of the TRIPS agreement particularly on emergency patents (i.e., Compulsory licenses and State-use of Patents). Briefly, Art. 31bis of the TRIPS agreement provides for the global minimum standards for the protection and enforcement of intellectual property rights.²⁵ The agreement also provided for the use of compulsory licenses which, as mentioned earlier, allows for a government to license the use of a patented invention to an entity without the consent of the Patent holder; such licenses are also granted especially in times of urgency and national emergency.²⁶ The aforementioned foreign examples use the principle stated under Art. 31bis in order to either grant a compulsory license or for the state to utilize a patented invention without the patent owner's consent.

In the case of *IPCOM, GMBH.*, while not a case involving pharmaceutical inventions, it utilizes the Crown use (state-use) of infrastructure technology. The principle of the case shows the government use of such technology to give access for emergency responders and that the provisions of the UK's Patents Act²⁷ provide for the kinds of services that are included for state-use. For the case of *Stack*, it is similar to *IPCOM*'s, wherein the Federal Court of Australia used Crown use over a patent on water meters to levy charges on users based

²² Calonzo, Andreo, [Philippine Posts Highest Covid Positivity Rate as Cases Spike](https://www.bloomberg.com/news/articles/2022-01-05/philippines-posts-highest-covid-positivity-rate-as-cases-spike), Bloomberg Politics, 5 January 2022, <https://www.bloomberg.com/news/articles/2022-01-05/philippines-posts-highest-covid-positivity-rate-as-cases-spike>.

²³ *IPCOM GMBH & Co. KG vs. Vodafone Group, PLC*, EWHC 132 (Pat) paras [184]-[213].

²⁴ *Stack vs. Brisbane City Council*, FCA 570 [1995].

²⁵ WHO, supra note 3 at 238.

²⁶ WHO, supra note 3, at 239.

²⁷ Subsections 56 (2) and 59.

on their water consumption for state purposes. Lastly, the case of Abbot and Merck involves Thailand's use of compulsory licenses for drugs treating chronic illnesses (e.g., Malaria, Ebola) and the United States placing the former on its IP watch list due to the former's failure in enforcing IP rights. This event's relevance is shown by the "strong arming" of a country to a patent holder as the latter has little recourse against the arguments of governments on "national emergencies".²⁸ Merck, the Patent holder in this case, was forced to argue under Thai law on the case given to them and this resulted in a negative international perception towards the company.²⁹ The protest from the company is due to the vague wordings of the Art. 31bis particularly on the duration of the use of the patented product together with the definition of a "national emergency".

The aforementioned foreign cases mainly discuss the extensive reach of the TRIPS agreement pertaining to the provisions of emergency patents. The scope of public health and national emergency is vast to the point that there are various studies arguing against art. 31bis as it contains deficiencies that may prove problematic to patent owners. This will be discussed in the latter parts of the paper but to briefly state, some of them include matters on broad terminologies on the agreement and matters on compensation. In spite of the issues, many countries have continued to adopt their IP laws in accordance with the TRIPS agreement, providing provisions for the notice, agreement, and compensation for the use of patented medicine.

EMERGENCY PATENTS LAW COMPARATIVE ANALYSIS

This portion of the paper provides an overview of some countries' legislative action and their emergency patent response to the COVID-19 pandemic. The inclusion of the provisions and literature could provide a supplement for lawyers, judiciaries, and scholars on creating arguments and decisions pertaining to emergency patents and its use in national emergencies. Such supplements can also be used for substantiation for further IP-policy making and future emergency patent use for nations heavily affected by COVID-19.

²⁸ Alexandra Farquhar, Redefining the TRIPS Agreement to Accommodate en masse compulsory licensing of vaccines & other pharmaceuticals for the treatment of COVID-19, *North Carolina Journal of Law & Technology* vol. 22 (2), 271-272, December 2020.

²⁹ Darren Schuettler, Angered U.S. firm excludes Thailand from new drugs, Reuters, 14 March 2007, <https://www.reuters.com/article/us-thailand-drugs-abbott-idUSBKK27714620070314>.

South Africa has its South African Patents Act, which provides for patent rights and emergency patent use. Similar to the Philippines', the South African Patents Act also contains the two variations of the emergency patents³⁰ (i.e. government use and compulsory licensing).³¹ Its Constitution however, explicitly shows the conditions to determine the just compensation of the “taking” of the intellectual property.³² It being:

- (1) current use of the property;
- (2) history of the acquisition and use of the property;
- (3) its market value;
- (4) extent of direct state investment, beneficial capital investment, and subsidy in the acquisition of the property, and
- (5) purpose of the expropriation of said property.

In comparison with the Philippines' emergency patents provision, such criteria on remuneration for the taking of patented inventions is slightly different. The difference lies on the 4th criterion which is a factor not explicitly taken into account for cases of eminent domain nor the IP code's emergency patents. In the IP Code, it only takes into account the economic value of the authorization/grant for government use or compulsory licenses.³³ This could possibly result in inaccurate valuing of the patented invention if state subsidies and investments onto the invention are not factored in. On a different perspective, the “economic value of the authorization” can be seen as broad and without much detail as to how the valuation is calculated. This could leave patent owners without proper just compensation and due process for the taking of their property.

For the United Kingdom and Australia, they have the 1977 Patents Act (United Kingdom; Sec. 56-59 for emergency patents) and the 1990 Patents Act (Australia; Sec. 163), respectively. In UK's emergency patent law, anyone authorized in writing to act on the Crown's behalf may act on matters involving emergency patents. Such acts include making, using, and importing a patented medicine but not selling and offering for sale. The provisions for the UK's Patent Act do not require the state to negotiate with the Patent owner and an entity may obtain the authorization to infringe the patent even after the act has

³⁰ South African Patents Act 57 of 1978, sec.s 4, 78-80.

³¹ Mikhalien du Bois, State Use Provisions for Patent Law, and Expropriations: Some Comparative law Guidelines for South Africa during the Covid-19 Crisis and Beyond, PER/PELJ 2020, 3, 2020.

³² South African Constitution, Sec. 25 (2) and (3).

³³ RA 8293, sec. 74.2 (f) and 100.6.

been done (Crown defense will be applied; immunity from infringement). An interesting provision is Sec. 57A of the UK's Patents Act allows for the determination of the compensation to the patent owner after the commencement of Crown use and courts can even award compensation for lost contracts and reasonable manufacturing profits.³⁴ Comparing UK law with the Philippines', the latter does not provide for compensation on lost contracts and manufacturing profits. Sec. 57A of the UK's Patent Act provides for a detailed procedure on the compensation for the loss of profits on the part of the patent owner. Such detail is somewhat lacking in the IP Code of the Philippines to the extent that the IP code does not specify who shall be remunerating the inventor. Furthermore, the code does not state the consideration of loss of profit from failure to secure contracts or from manufacturing costs.

Australia's crown use, on the other hand, provides for the assurance of immediate access to inventions for the benefit of the services of the respective governments and that infringement only takes place when there is a non-compliance with the terms agreed on in sec. 163 (2) of their Patents act. In 2020, amendments were made requiring prior negotiations with the Patent owner before any use of the invention with the exception of emergency instances. The amendments now explicitly require authorities to have tried for a reasonable period to achieve an agreement with the patent owner before the exploitation of the invention. These amendments are absent to the Philippines' as there is no provision which requires government authorities to obtain an agreement with the owner. The invocation of government use of patents does not explicitly provide the requirement for the state to attempt to negotiate with the patent owner for a certain period of time. For compulsory licenses, it at least requires the petitioner's efforts in obtaining authorization from the patent owner³⁵ before they may obtain a license without the latter's permission. Exceptions to this are national emergencies or when the demand for patented drugs is not being met.³⁶

For Canada's Patent Act of 1985, it is similar to Australia's Patent act wherein the Canadian government has to negotiate with patent holders before the Patent's usage. Only when there is a failure can the government apply for the use of the patent without the Patent owner's consent. Again, the exception is a national emergency. In mid-March 2020, Canada legislated the COVID-19 Emergency Response Act making changes to current legislation to respond to the COVID-19 pandemic. The amendment clarified the government use of

³⁴ Cornish, et. al., Intellectual Property, Sweet & Maxwell (6th Ed.), 324-325, 1 Jan 2007.

³⁵ RA 8293, sec. 95.

³⁶ RA 8293, sec. 95.2 (c) and (d).

patents during public health emergencies; it provided limits to the period of the patent use to 30 September 2020³⁷. Additionally, the amendment mandates that any application for the use of the Patents must mention the specific patent to be used as well as the person/entity authorized to exploit such invention.³⁸ Lastly, subsection 19.4 (5) clarified the remuneration for the government use of the patented invention by taking into account the economic value of the authorization and the extent to make, construct, use, and sell the patented invention. Comparatively, the significant difference between Canada and the Philippines is the legislation, which the former issued to adapt against the pandemic and its specificity on matters such as period of use and remuneration. The Philippines has not adopted any sort of legislation relating to emergency patents and the COVID-19 pandemic, which Canada has for its COVID-19 response act. Moreover, the emergency patent provisions of the Philippines do not take into account the extent to produce and sell the patented invention. Concurringly, Canada and the Philippines do have the same provisions on the limitations of the scope and duration.³⁹ Only in their COVID response act did Canada provide a more specific limitation on the duration, particularly in addressing the COVID-19 pandemic.

The aforementioned Patent laws of the various countries all show a form of protection and urgency to national emergencies, particularly on the subject of public health and negotiation & remuneration to the Patent owner. In comparing other countries' emergency patents provision against the Philippines', the differences mainly lie on the specificity especially on the matter of remuneration. Nations such as South Africa and Canada protect inventors by laying down in detail the basis of their remuneration. This is to ensure that inventors get compensated properly for their works especially since in the field of medicine, such products are mass produced and distributed to countries that differ in economics.

Summarily, the scope of the mentioned laws, cases, and their principles may be applicable to the Philippines. This is because the country experiences national emergencies similar to other countries' that could call for the use of emergency patents. An augmentation in the supply of booster shots (and vaccines) and other medicaments through emergency patents may help in the recovery of the Philippines in the socio-political and economic aspects. Furthermore, the idea of the government "taking" patented inventions is

³⁷ COVID-19 Emergency Responses Act, sec. 19.4 (9), 2020.

³⁸ Supra note at 19, sec. 19.4 (2)(d), 2020.

³⁹ Patent Act (R.S.C., 1985, c. P-4), sec. 19 (2)(a).

substantiated through jurisprudence, especially for matters involving public need.

LEGAL DISCUSSION

In analyzing the use of emergency patents, numerous implications on various legal concepts arise. These would include the right to due process, eminent domain, and antitrust. A discussion on these legal concepts is relevant to the paper as it allows readers to see and appreciate the complexities of emergency patents in the Philippines. Furthermore, it also presents to readers the harmonization of other countries' use of the concept of emergency patents in connection with the legal concepts as well.

DUE PROCESS

In the case of *Ang Tibay vs. National Labor Union, Inc.*,⁴⁰ it emphasized the right to due process and that while non-judicial courts are more liberal when it comes to formal rules of procedure, the quasi-judicial body, in this case, may not dispense an individual's due process right. The court must decide based on justice, equity, and the substantial merits of the case brought upon them. This would mean that there has to be a proper basis for decisions of courts which would also be equitable and in conformity with the circumstances surrounding the case at hand. *Ang Tibay* summarized the cardinal rights in due process or the "elements" of dissecting due process to determine if one has been afforded it. Such cardinal rights are:

Right to a hearing which includes the right of the affected party to present his own case and submit his own evidence to support his claims;

The judicial entity must consider the evidence that the affected party has presented;

The judicial entity must have something supporting its decision otherwise, such decision would be null

The evidence for the conclusion must be substantial. Substantial means that the evidence is something that a reasonable mind would accept as an adequate support to buttress one's conclusion;

⁴⁰ *Ang Tibay vs. Court of Industrial Relations and National Labor Union, Inc.*, G.R. No. L-46496, February 27, 1940.

The decision must be rendered based on the evidence presented or on the records. The decision must be disclosed to the parties afterward;

The deciding body must act independently and in consideration of the law and the facts of the controversy.

Lastly, the deciding body must render a decision wherein the parties to the case are aware of the issues involved and the reason for the former's decision.

The right to due process is essential for emergency patents as it is the precursor to the just compensation of a patent owner for the taking and use of their invention without consent. The principle here is that there must be a fair and standard procedure on safeguarding the property rights of a patent owner before they are deprived of their own property.

The jurisprudence research done in this study yielded Philippine cases that do not show the method or valuation of the patents nor the patent license on occasions of government use. For compulsory license, on the other hand, cases such as *Price vs. Unilab* showed the method of valuation done by the Philippine Patent Office. In the said case, the Office granted the compulsory license to UNILAB and the latter should pay Price, et al. a royalty of 2.5% percent of the net sales. These net sales would exclude transportation charges, discounts, credits or allowances, and other taxes included in the production, sale and transportation of the product. The subject of valuation will be further discussed in the next section. For this section, it will focus more on the principle of procedure in emergency patent cases and the need to follow the cardinal rights mentioned.

While procedures and jurisprudence are present for cases on compulsory licenses, such is the contrary when it comes to government use. An analysis of other nations' statutes also shows an absence of guidelines or procedures on how to quantify the value of patents for the purpose of compulsory licensing. A study conducted on compulsory licenses in Kenya⁴¹ highlights the explicit guidelines on just compensation for land expropriation such as urgency to the acquisition, damage sustained by the owner, and increase on the value of the subject land. The Kenyan Constitution and statutes were also referenced in relation to their intellectual property laws wherein Kenyans must be provided due process for emergency patent use; when one is deprived of their private

⁴¹ Kiremu Wanja, Property Rights vs. Public Right: A study on the relationship between compulsory licensing of patents and the eminent domaine doctrine in Kenya, Strathmore University Law School, February 2018.

property for public use. The guidelines, however, did not provide for the actual method of quantifying intellectual property specifically.

In analyzing the studies of intellectual property academics, there is a need for further clarification and/or improvement on the compulsory licenses and government use provisions especially for the Intellectual Property law of the Philippines. For procedures, there are established methods provided by institutions such as the World Health Organization (WHO) and other IP law academics who have set more flexible and competitive ways of compensating patent owners for the use of their inventions. In the mentioned study on Kenyan Law, it made a comparative analysis on the patent laws of the United States as the country has established a transparent method of determining the appropriate value of patents and its licenses.⁴² The US Court of Federal Claims (USCFC) has established their own method in determining just compensation via two components to consider:

- (1) the determination of the value of the license at the time it was taken
and
- (2) the government's delay in paying for the license.

In calculating the damage, the case of *Decca Ltd. vs. United States*⁴³ provided three methods of valuating the license value:

- (1) determination of reasonable royalty for the license;
- (2) awarding a percentage of government cost savings from governmental use of the patented invention; and
- (3) awarding of lost profits.

For the executive branch, some guideline or procedure should also be set by relevant administrative bodies to properly ascertain the correct value of compensation to be given. Providing the guidelines allow a more transparent and smoother evaluation of the values given by Courts when deciding on the just compensation of the patented inventions. It builds assurance for both the State and inventors that the invention is justly and adequately compensated; no inadequacies nor over compensation.

Comparatively, the presence of a provision on the requirement for negotiations is also in Philippine law whereas states such as Australia and Canada explicitly place negotiations as a requirement for the use of emergency

⁴² Wanjia, supra note 41, at 32-34.

⁴³ *Decca Ltd. vs. United States*, [Ct Cl 1980] 640 F.2d 1156, 1167.

patents.⁴⁴ Whether government use or compulsory licenses, applications of emergency patents should have an obligation explicitly stated in the law to negotiate with the inventor to support the necessity of due process and provide protection to the patent owner. It would be best to require a level of effort from the applicant (i.e. number of attempts to communicate and negotiate) as to provide the protection of due process to the inventors.

EMINENT DOMAIN, PROPERTY RIGHTS, AND JUST COMPENSATION

On the subject of property, legal concepts such as eminent domain, just compensation, and health rights are rife with legal issues especially when it comes to the use of emergency patents. . The discussion of their legal implications is important to ensure that one knows the extent to which one can argue for emergency patents as well as recognize the limitations and areas of improvement on the laws relating to the subject.

For Property vs. Health rights, with the Philippines signing RA 9502, such law bolsters the already heavy emphasis on public health and affordability of medicine. Foundationally, the mentioned law finds its essence under the provisions of the 1987 Constitution of the Philippines, which highlights the protection of life⁴⁵ and health of the people.⁴⁶ The right to life trumps the right to property especially during circumstances of urgent national emergency and this would mean access to medicine. Such a right is justifiable as it would be for the interest of the public, public order, and public safety.⁴⁷ It would only be proper to justify the use of utilizing emergency patents given that cases are spiking once more this early 2022. To prevent further social and economic damage, the emergency patents provisions may be triggered by the appropriate entities (i.e., DOH, IPO).

On the matter of monopolies, eminent domain and police power, the cases of *Price*, *Smith Kline*, and *Du pont* establish the local jurisprudence on emergency patents (more emphasized on compulsory licensing than state-use). For future cases involving such Patents, the Philippine government may use the

⁴⁴ Intellectual Property Laws Amendment (Productivity Commission Response Part 2 and Other Measures Act 2020, No. 9 2020, Sec. 163, subsection 3 and Sec. 133, Subsection 3 (c).

⁴⁵ CONST, art. II, sec. 5.

⁴⁶ CONST, art. II, sec. 15.

⁴⁷ Adebambo Adewopo, Access to Pharmaceutical Patents in the COVID-19 Emergency: A case for government use in Nigeria, *Journal of African Law* Vol. 65 (2), 275-276, 2021.

aforementioned cases as a basis for a court or administrative body's decision. To supplement their decisions, the mentioned bodies may also use foreign jurisprudence such as but not limited to the cases mentioned earlier. The application of the cases and its principles could provide the Philippine government with a justification to utilize emergency patents to procure a better supply of medicine and technology to alleviate the impact of the Omicron variant.

Despite the presence of jurisprudence, both local and international, the research would academically suggest that the taking done through emergency patents should be nuanced and uniquely separated from the normal eminent domain. Some of the elements of a valid taking mentioned earlier from the case of *Vda de Castellvi* include: that there is an entrance and occupation of the private property, such entrance is more than a momentary period, and that the utilization results in the deprivation of the owner in the enjoyment of their property. These elements cannot concur properly with the "taking" of patented inventions through compulsory licensing or government use because (1) there is no "entrance/occupation" of the private property; (2) in arguing that one can argue that there is an "entrance", such entrance is only for a momentary period; and (3) the utilization of the property does not result in the total deprivation of the owner in enjoying the property. The subject property in this study is not some real property that can be "entered" unless one's definition of "enter" is through entering a contract or agreement regarding the patented invention. If that would be the case, the momentary period being discussed in the mentioned jurisprudence discusses periods that normally should not be temporary. For emergency patents, its usage only goes insofar as the duration of the national emergency requiring the use of the patented invention. Moreover, the use of the invention by the government or another capable entity does not totally deprive the owner of the enjoyment of his property. A patented medicine, while taken and produced by someone else, does not necessarily mean the patent owner is deprived or prevented from the use of their invented medicine.

In this section, one of its main focuses is on the issues of compensation and vague definitions⁴⁸ for those issues apply to the jurisprudence available and to Patent laws of the Philippines. Many studies have been done analyzing the TRIPS agreement, particularly on its art. 31bis as issues are mainly on its vague definitions, abusive use of emergency patents, and ineffective procedures under the said article.⁴⁹ For vague definitions, the first two words can

⁴⁸ Vague definitions: centers on definition issues particularly on "urgency", "national emergency", and "reasonable compensation"

⁴⁹ Farquhar, supra note 28, at 268.

somewhat be vague due to the broad dictionary definition, but in countering such argument, perhaps the intent of art. 31 of TRIPS is not to actually define such words or give grounds but to provide leeway or flexibility as mentioned earlier.⁵⁰ This is so that nations can tailor their laws, in this case IP laws, to whatever national issue they are uniquely experiencing.

On the issue of compensation, this topic was discussed in the jurisprudence of *Price* and *Smith Kline* wherein compensation is already considered just when a royalty agreement is agreed upon after the 2-year monopoly of the patent or when the Director of Patents provided an agreement. But, as mentioned earlier, the level of compensation, especially for heavily used medicine, may not be up to global standards. Thus, the WHO and United Nations Development Program (UNDP) created a guideline for establishing a royalty system through different approaches.⁵¹ The first system states a 4% base royalty rate which is flexible up to 2% depending on certain factors. Another system would be the Canadian's royalty system wherein a royalty rate is set from 0.02% to 4% of the price of the generics made from the patented invention while considering the country's rank in the UNDP Human Development Index. A royalty system is also an option wherein it is based on the patented invention's product price but adjusted to the level of income of the country. Such modifications in the emergency patents provision, particularly for just compensation, are necessary to satisfactorily protect IP rights of patent holders.

Other countries also have their own means and methods of compensating patent owners for the use of emergency patents (particularly on compulsory licenses). In India, sec. 90 of the Indian Patent act provides for the valuation of a patent namely:

- (1) the nature of the invention;
- (2) the expenditure by the inventor on making the invention; and
- (3) the costs incurred in obtaining a patent and enforcing its protection.

Indian jurisprudence also provides that in the case of Natco Pharma, an Indian pharmaceutical, the Indian Patent Office decided that the remuneration should be based on a royalty-based method with the guidelines set by the UNDP.

⁵⁰ Adewopo, supra note 47, at 281.

⁵¹ Daniel Hofileña, Reinforcing the role of Intellectual Property in the Battle against the Pandemic: The Vowel Framework, *DLSU Business & Economics Review* 30(1) 2020, p.94, 2021.

A study provided by the Texas Intellectual Property Law Journal listed numerous methods of valuing patent licenses.⁵² Some of the commonly mentioned methods are the Industry Standard Method and the 25 percent rule. For the industry standard method, the valuation is obtained by referencing royalty rates of past licensing transactions within the industry. While it is a good guide, it also has limitations as there are an innumerable number of unique factors per invention that affects the price of the invention. For the 25 percent rule, it is a widely used valuation method wherein. The licensee should pay a royalty equivalent to 25% of the expected profit from the invention being exploited. While simple and popular however, its use is mainly more as a guide and not the sole basis of valuation because the calculation does not take into account factors such as increasing production costs, operating expenses, etc., which would likely affect the hypothesized profit. While briefly stated, the aforementioned simply shows that there are commonly accepted ways of valuing patents and licenses in an attempt to create organized and standardized methods for both private and public intellectual property practitioners to follow.

The matter of valuation is a relevant and essential consideration to be accounted for when granting compulsory licenses as it is a critical procedural requirement in protecting an inventor's due process rights. A transparent and clear layout of what variables should be considered helps inventors and government bodies in correctly valuing the just compensation needed for the exploitation of the invention. This would certainly help ease the flow of the negotiation process when it comes to the procedural aspect of emergency patents. Sticking to certain globally acceptable valuation methods would possibly make procedural matters easier to follow for inventors and licensees, both local and international.

On the topic of compensation with eminent domain proceedings, this research points out the broad provisions of the IP code in providing compensation for exploiting a patent owner's invention. The provisions on the IP code state that compensation will be valued according to the economic value of the authorization/grant but do not state how the economic value will be measured. If one were to argue that the taking is something within the nature of "eminent domain," there should be guidelines in assessing the value of a property. Guidelines on valuing private property for government taking were provided in the *Vda de Castellvi* case wherein factors such as location and land condition were considered.⁵³ Thus, in instances where emergency patents

⁵² Ted Hagelin, Valuation of Patent Licenses, 12 Tex. Intell. Prop. L.J. 423, 2004.

⁵³ "We cannot disregard the observations of the commissioners regarding the circumstances that make the lands in question suited for residential purposes — their location near the Basa Air Base, just like the

are needed, there should be guidelines or a transparent calculation on how administrative or judicial bodies would value the property. This is to ensure the due process and just compensation that patent owners are duly entitled to.

Gathering the analysis on the issues of eminent domain, compensation, and due process forms a new issue for emergency patents, specifically on the subject of procedure. The nature of invoking emergency patents means that there is a great probability of the government or its authorized entity to utilize the invention before just compensation proceedings ensue. Procedurally, this would mean that inverse expropriation will be committed. The effect would then be that patent owners have to file for an ordinary civil action to obtain just compensation.⁵⁴ Legal practitioners, would have to observe the procedures under ordinary civil action and avoid raising rule 67 as it would not be applicable as provided in the jurisprudence of *National Power Corp. (NPC) vs. CA*.⁵⁵ The issue here is the probability that the matter of just compensation for the patent owner will be left solely to the judiciary instead of obtaining assistance from executive agencies (Intellectual Property Office).

The case would prove to be problematic and complex if the determination of the value of the patents would be left to the job of either the trial court or the Commissioners, assuming that the Courts utilize the latter in making a decision.⁵⁶ This may result in an improper valuation of the patent due to a possible lack of expertise or information on the patent as the IPO is not involved in valuating the invention, the circumstances surrounding it, and the taking in the first place. Thus, a recommendation to be considered is a clarification of the procedure for the use of emergency patents in the event that an invention is taken and exploited without the inventor's consent. This clarification should also explicitly provide the requirement for the involvement of the IPO in determining the value of the patent so that inventors can still be justly compensated for their inventions through proper valuation methods.

To cap the subject on procedure for emergency patents, a legal question would arise from the doctrine of the case of *NPC vs. CA*. The ruling of the case states that "the usual procedure of just compensation is waived when the

lands in Angeles City that are near the Clark Air Base, and the facilities that obtain because of their nearness to the big sugar central of the Pampanga Sugar mills, and to the flourishing first class town of Floridablanca" (*Vda de Castelvi*, G.R. No. L-20620).

⁵⁴ *National Power Corporation vs. Court of Appeals*, G.R. No. 106804, August 12, 2004.

⁵⁵ The procedural doctrine in the case provides that the procedures for just compensation would be waived when the government violates procedural requirements. Thus, the plaintiff (or in this case, a patent owner) would have to file an action for damages.

⁵⁶ As provided by *NPC vs. CA*, a trial before commissioners is dispensable, thus it is the trial court's discretion on whether or not to utilize them.

government itself initially violates the procedural requirements.” There must be an emphasis on the phrase “violates the procedural requirements” as it is questionable if the State did actually violate procedural requirements on just compensation when they take a patented invention without the inventor’s consent but for public purposes/national emergencies. While the law provides for “adequate remuneration” for the use of the invention, it is quiet on the procedural aspect as the subject and procedure of eminent domain overlaps. This may possibly cause confusion on whether the proceedings should be under Rule 67 of the Rules of Court or the proceedings for Ordinary Civil Action. Since there is yet to be a case involving just compensation and the use of emergency patents, such a question would remain an academic one.

COMPETITION LAW AND ECONOMICS

The governing law for Competition law in the Philippines is RA 10667, which provides for the competition policy of the country, prohibits anti-competitive behavior and abuse of market dominance. The subject of antitrust came into the scope of the Philippine Congress due to the need for the country to enact antitrust laws as it was the only ASEAN-founding member that had yet to legislate such kind of law.⁵⁷ Competition law was also deemed as a priority as stated by President Aquino during his 2010 State of the Nation Address. In fine, the act ensures the balance in promoting consumer interest while also leveling the playing field between large companies and small and medium enterprises (SMEs).

In relation to Competition law, patents give exclusive commercialization on a drug and, therefore, prevent competitors from the opportunity to make profit out of the newly patented drug. There is somewhat a contradiction when it comes to Patent law versus Competition law which is that the former focuses on a monopoly while the latter on an anti-monopoly lens. To reconcile this, the monopoly herein for patents only refers to a temporary period of time to reward the inventor for his knowledge and hardwork on inventing the drug. On the other hand, competition law does not necessarily prohibit monopolies but rather aims to prevent the abuse of market dominance by those who are deemed as monopolies. These monopolies are considered such because of factors such as their ingenious inventions and exemplary customer satisfaction.

⁵⁷ Lim and Recalde, *The Philippine Competition Act: Salient Points and Emerging Issues*, Rex Printing Company, Inc., 3, 8 August 2016.

In the context of emergency patents, competition law plays a role as patents can be exploited without the consent of its inventors should the invention (particularly on patented drugs and medicine) not meet the market demand as provided for by sec. 74 (e), 93.6, 95.2 (d), and 95. 5 of the IP law. Comparatively, other nations such as the United Kingdom, and Germany also share the same idea when granting emergency patents (particularly on compulsory licenses).⁵⁸ In the United Kingdom, similar to the Philippines, the former's Patent Act of 1988 also takes into account market demand and the protection of the British economy as a ground for granting compulsory licenses under Sec. 48 and 51 of the mentioned law. For Germany, jurisprudence (Polyferon Case) provides that special circumstances must exist in order for the court to grant a compulsory license. This means that the Courts have to be cognizant of a variety of factors such as economic, socio-political, and medical factors as they deem it necessary to market's stability.⁵⁹

Analyzing emergency patents, while it can be seen on face that the main consideration is of national emergencies and public health, the law also takes into consideration market demand and economic protection (on a macro and micro scale). From a macro perspective, courts require a great level of analysis when granting emergency patents as they still have to ascertain whether market demand for medicine is being met and if granting the license would result in possible abusive monopolistic acts. From a micro perspective, courts also have to consider possible factors such as the willingness to pay of consumers, income per capita, and availability of alternative products. Government bodies still have to be mindful of the possible effects in the entry of new competitors/alternatives as providing licenses to local companies may still result in abuses of market dominance by larger entities over smaller and independent inventors.

⁵⁸ Kung-Chung Liu, The need and justification for a general competition-oriented compulsory licensing regime, Int.l Review of Intellectual Property and Competition Law 43, (6), 3, 2012.

⁵⁹ Kung-Chung Liu, supra note 58, at 13.

NON-LEGAL DISCUSSION

The implications of using emergency patents in the Philippines could be extrapolated from cases mentioned earlier as well as through intellectual property data, current and past events, and studies conducted relating to pharmaceutical patents and compulsory licenses on medicine. While there is limited quantitative data and judicial cases relating to emergency patents in the Philippines, the research attempts to deduce possible implications using the principles of the international data and knowledge obtained from various academic and institutional data.

SOCIO-POLITICAL

Policy makers must be vigilant in adopting and adapting legislation to the current demands resulting from current events, in this case, the COVID-19 pandemic. This is so that Filipinos and industries may be able to adapt to the pandemic as well as invoke their rights during this emergency situation. It also creates a good perception that policy makers address multiple areas of public policy to find ways to control the pandemic. Unfortunately, on the World Intellectual Property Office's (WIPO) website (as of January 20, 2022), the Philippines has yet to produce any emergency patent provisions that react to the COVID-19 pandemic. There were efforts however to create guidelines on the use of special compulsory licenses through a Joint Administrative Order by the DOH and IPO Philippines in early 2020.⁶⁰ As of February 2022, the said order has not been released and it was originally only meant to receive comments from the public. As of January 2022, no form of emergency patent issuance has been released by the intellectual property office. There are no legislations also that would pertain to the use of emergency patents (both government use and compulsory license) especially directed for use during the pandemic. Currently, the IPO Philippines has only released issuances on filing matters, intellectual property deadline extensions, and other adjustments pertaining to the pandemic. None of the issuances include a focus on the use of emergency patents nor realize the latter's potential to combat COVID.

⁶⁰ Editha Hechanova, Philippines: IPOPHL posts proposed guidelines on compulsory licenses, 20 January 2020, <https://www.managingip.com/article/b1kblk4tssz7kv/philippines-ipophl-posts-proposed-guidelines-on-compulsory-licences>.

In a global survey conducted in April 2020 by Law Firm Norton Rose Fulbright,⁶¹ a global law firm, conducted a global survey listing certain nations that have adopted an emergency patents provision as well as their response towards patents and COVID-19. For Canada, as mentioned earlier, it created provisions relating to its Patents Act (sec. 19.4) which allows for the use of a patented invention during public health emergencies and sets an expiration for such use. For France, while it does not directly deal with emergency patents, the country did introduce an emergency law⁶² which authorizes the seizure of goods and services necessary to fight against the disaster (COVID Pandemic). This may arguably pertain to medical patents as one form of seizable goods should the French government deem it necessary. Israel, at the onset of the pandemic, has issued a compulsory license to import a generic version of an experimental drug to combat COVID, which is also an essential drug for treating HIV. Days later, a ripple effect from Israel's government action resulted in the Patent holder of the drug announcing that it would no longer enforce its patents. Such an act progressed the battle against HIV/AIDS as well as the treatment of COVID-19 for it significantly gave access to cheaper versions of the patented drug.⁶³

The aforementioned examples, on a policy level, show the active prudence of policy makers to adapt and attempt to overcome national emergencies. In the situation of the Philippines, several legislative challenges concerning emergency patents have yet to be addressed. A notable one is the remuneration for the use of the patents, which may not be updated to existing global standards.⁶⁴ The prices of medicine may vary depending on the country and the quantity of orders a nation would procure. Philippine jurisprudence provides only the Director of Patents' decision to provide for the adequate compensation for the compulsory license. The jurisprudence did not state any rationale in forming for the rate of compensation given to the patent owner. At the onset of pharmaceutical companies producing massive quantities of medicine, a more detailed and transparent method of compensation should be conducted to show actual just compensation of the patent use. Failure to adequately compensate patent owners for the unconsented use of their

⁶¹ Sanft, et. al., Governmental use of patented inventions during a pandemic: a global survey, Norton Rose Fulbright, April 16, 2020.

⁶² Emergency Law No. 2020-290.

⁶³ Perehudoff, et. al., Overriding drug and medical technology patents for pandemic recovery: a legitimate move for high income countries, too, *BMJ Global Health Journal*, 2, 2021.

⁶⁴ Mario Cerilles Jr. and Harry Fernan, Analyzing the interplay between the right to health and pharmaceutical patent rights in the introduction of a COVID-19 vaccine into the Philippines, *Int'l Journal of Human Rights in Healthcare* Vol. 14 (3), 240-254, 2021.

inventions discourages inventors and/or gives a negative perception of the country for its failure to protect IP rights.

The strengthening of intellectual property laws or, in this case, emergency patents, may result in the government being able to effectively and swiftly respond to health threats. This is because the use of emergency patents allows the government to properly utilize its powers to make medicine easily available, especially during circumstances of national emergency.⁶⁵

On a non-policy level, the Philippines has challenges in its research and development compared to other developing countries.⁶⁶ For patents, the IPO Philippines' website records the patent filings growing continuously since 2015 (see tables 1 and 2 below) but a significant number of these are from the Patent Cooperation Treaty (PCT)⁶⁷, which means these are filed by international companies and are not filed by locals. In 2020, Patent applications declined and unusually contradicted the theory of Liu, et. al.⁶⁸ which stated that there is normally a pattern of patenting activities following a pandemic of human coronavirus. This is proven by figure 3 below taken from Liu et. al.'s study on patents relating to coronaviruses. This theory however, can be corrected in 2021 as the IPO Philippines released a news article that its intellectual property filings have increased by the 3rd quarter of said year.⁶⁹

⁶⁵ Remoquillo, supra note 1, at 43.

⁶⁶ Zuraida Cabilo, Philippine Intellectual Property Rights under the World Trade Organization, 1995-2005: Implementing the flexibilities under a TRIPS-Plus Commitment, *Philippine Journal of Third World Studies* 2009 24(1-2), 85, 2009.

⁶⁷ The Patent Cooperation Treaty (PCT) provides for a uniform standard on patent filing applications in order to protect inventions in different countries.

⁶⁸ Liu et. al., Global landscape of patents related to human coronaviruses, *International Journal of Biological Sciences* vol. 17 (6), 1592-1593, 2021.

⁶⁹ Intellectual Property Office of the Philippines, H1 Intellectual property filings record 20% growth, 30 Aug. 2021, <https://www.ipophil.gov.ph/news/h1-intellectual-property-filings-record-20-growth/>.

Table 1: Philippines' Patent Filings from 2015 to 2019 (Source: Intellectual Property Office of the Philippines)

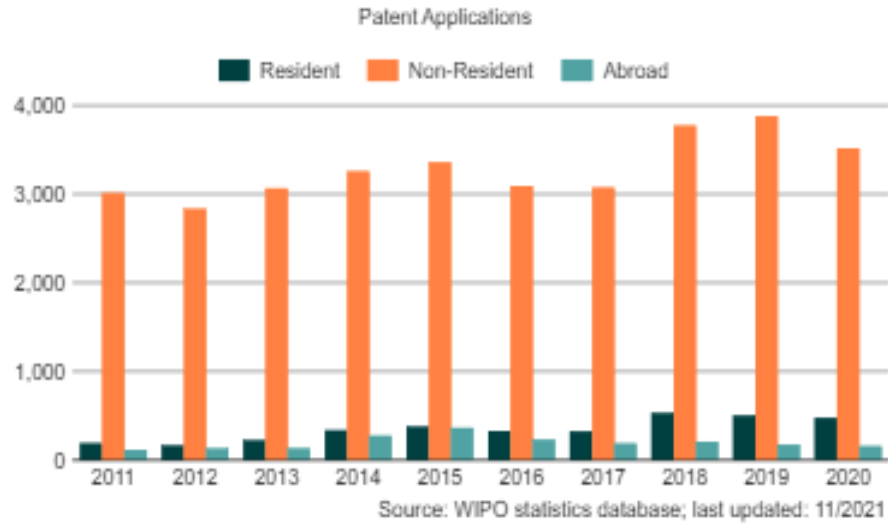
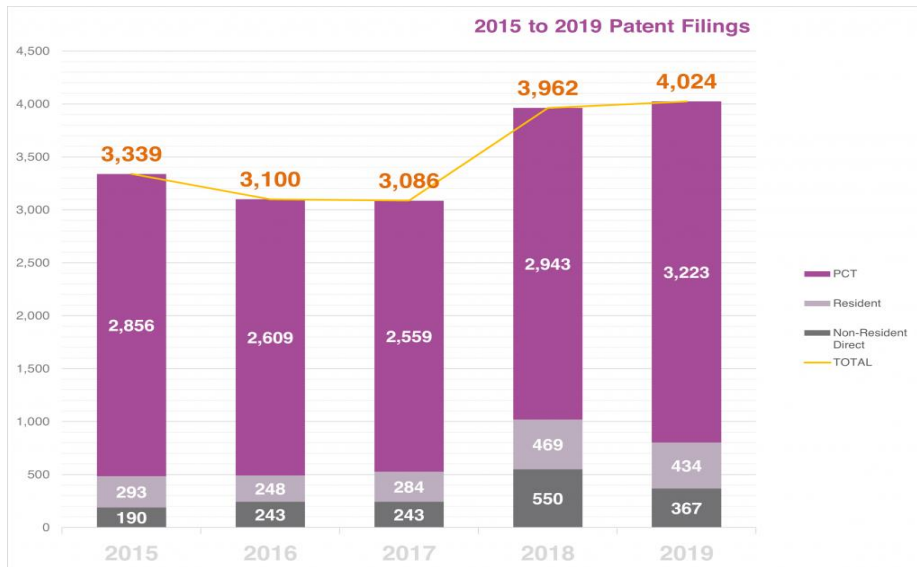


Table 2: Philippines' Patent Applications 2011-2020 (Source: World Intellectual Property Office)



Developing on the research and development subject with regard to Liu, et. al.'s study, emergency patents are available options capable of being catalysts to propel science and technology in the country. By obtaining and accessing inventions from other countries, Filipino scientists and researchers would be able to experiment and possibly concoct new and alternative forms of medicine that may help in combating COVID-19 as well as future variants of the disease and future pandemics. Government agencies and local universities may partner with foreign governments, companies, and universities to enable local scientists and inventors to obtain resources to develop new medicine. In figures 2 and 3 of Liu, et. al.'s study, there are a number of nations near the Philippines (e.g., China, Japan, India, South Korea)⁷⁰ that are significant contributors to patents with some being universities as well. Figure 1 contains multiple charts showing the constant increase in patents over the decades, especially when pandemics ensue as well as the number of publications on patents for coronaviruses. Additionally, charts C and D of figure 1 show the geographic distribution of patented inventions pertaining to coronaviruses, with China, Japan, India, and South Korea leading for Asia.

The relevance of these figures and charts is that it shows the near possibilities of establishing relationships with foreign entities to galvanize the use of emergency patents with the hope of developing better, cheaper, and more alternative medicine. With large patent producers neighboring the Philippines, the execution of emergency patents in response to the pandemic may create a ripple effect if a state were to follow Israel's steps. Applications of compulsory licenses and government-use of patented inventions could create access to a wide array of science and technology that would possibly spur some sort of cure for other diseases if not COVID alone. Politically, it would create better relations between nations as it would be publicly seen as a regional and/or continental effort to defeat diseases.

Access to medicine and poor-quality drugs go hand-in-hand with unsatisfactory research and development and insufficient scientists. In creating better partnerships and providing better incentives on science and R&D, the Philippines' pharmaceutical industry has a possibility of significantly improving thus, creating a snowball effect wherein local scientists may discover or invent medical solutions.

⁷⁰ China (2,255 patents), Japan (224 patents), India (213 patents), South Korea (191 patents).

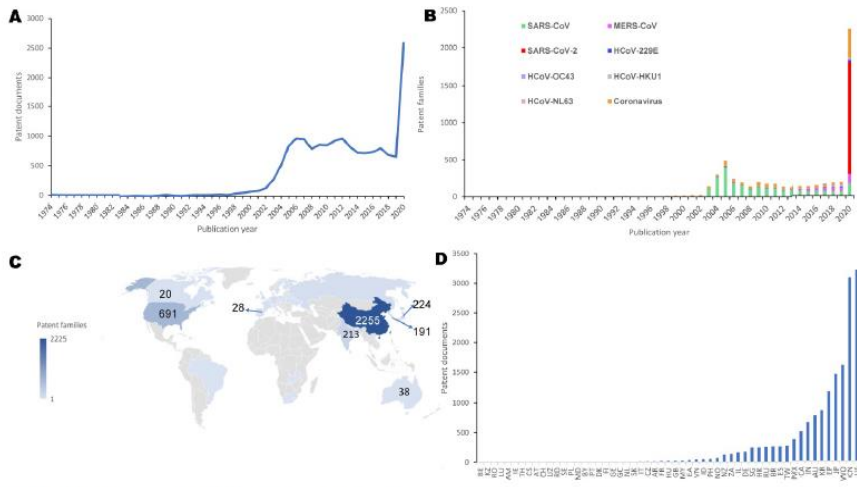


Figure 1. Temporal and geographic distribution of coronavirus patents. a. Publication trend (based on patent documents). b. Annual publication change of seven subtypes of human coronavirus and coronavirus type not announced patent (based on patent families). c. Geographic distribution by nationalities of patent inventors. The color intensity denotes the frequency of patent families. d. Geographic distribution by nationalities of jurisdictions (based on patent documents). The "Two-Letter codes" by full country names are shown in Supplementary Table S2.

Source: Liu, et. al., supra note 68, at 1590

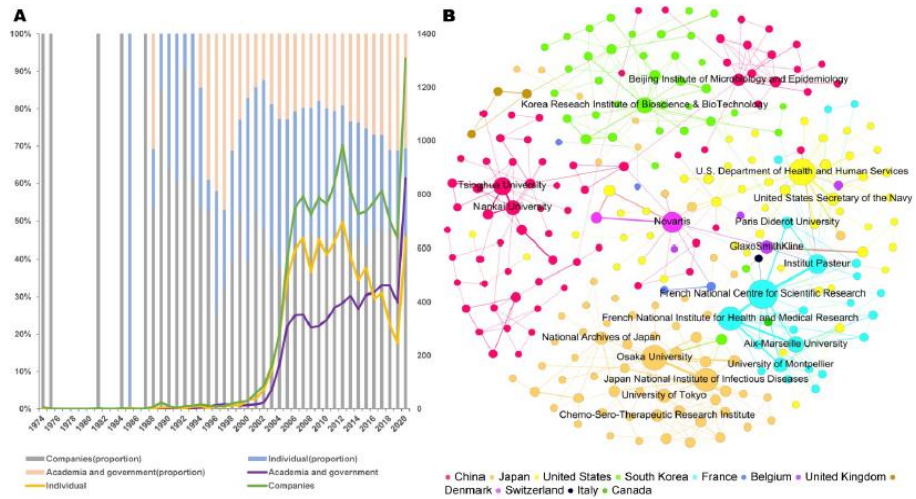
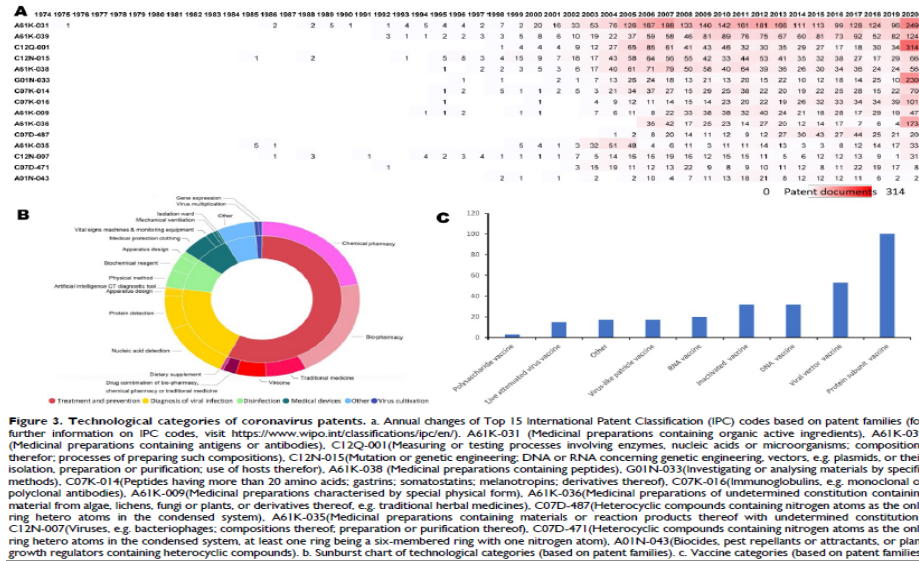


Figure 2. Types and cooperation of coronavirus patent assignees. a. Organizational types (based on patent families). b. Collaboration patterns. Institutional collaboration network, in which nodes denote assignees and edges represent co-assignee relations. The main collaboration relationships and patterns among assignees was extracted by network clusters detected using the Louvain modularity method, and labels names of top 20 active institutions. Node size is scaled to the number of patent families, while the thickness of each edge represents collaboration frequency. Countries mean regions in which assignees are located.

Source: Liu, et. al., supra note 68, at 1591



Source: Liu, et. Al., supra note 68, at 1593

ECONOMIC

Economically, emergency patents could provide better accessibility to cheaper medicine, especially for the financially constrained due to the pandemic. Given that in early 2022, a new variant, the Omicron variant, caused a spike in cases in the Philippines and many other countries as well.⁷¹

While vaccines have been an immense help in mitigating the effects of COVID, many who contract the disease still experience certain symptoms such as coughs and colds. Thus, a bigger demand for over-the-counter medicine occurred. Due to the spike in demand, reports on overpricing and hoarding have become prevalent, especially when the pandemic was coupled with heavy monsoons in late December 2021.⁷²

Emergency patents in relation to legislative change may create a positive impact on numerous issues on health such as accessibility and affordability of

⁷¹ Sebastian Strangio, Omicron driving COVID-19 Wave to new heights in the Philippines, *TheDiplomat*, 18 January 2022, <https://thediplomat.com/2022/01/omicron-driving-covid-19-wave-to-new-heights-in-the-philippines/>.

⁷² Mary Sagarino, NBI-7 warns hoarders of flue medicines, sellers of fake meds, *Cebu Daily News*, 18 January 2022, <https://cebudailynews.inquirer.net/420938/nbi-7-warns-hoarders-of-flu-medicines-sellers-of-fake-meds>.

Top 20 Pharmaceutical Companies in the Philippines in Terms of Market Data

	MAT Aug 2006	MAT Aug 2007	Growth	Share
TOTAL MARKET	92,885,882,166	102,892,062,012	11%	100.00%
1 UNITED LAB	19,034,201,069	21,340,371,291	12%	20.74%
2 GLAXO SMITHKLINE	8,543,867,266	8,764,783,647	3%	8.52%
3 PFIZER INC	6,145,728,812	6,937,710,638	13%	6.74%
4 WYETH PHILIPPINES	5,836,145,207	6,367,694,864	9%	6.19%
5 SANOFI-AVENTIS	4,202,109,133	4,458,352,254	6%	4.33%
6 ASTRAZENECA	4,033,147,280	3,857,958,669	-4%	3.75%
7 ABBOTT LAB	3,106,255,279	3,781,479,968	22%	3.68%
8 NOVARTIS	3,351,197,241	3,406,871,792	2%	3.31%
9 ROCHE PHILIPPINES	2,695,489,288	3,250,050,495	21%	3.16%
10 JOHNSON	2,936,337,055	3,217,156,084	10%	3.13%
11 BOE. INGELHEIM	2,764,714,285	2,983,665,652	8%	2.90%
12 BRISTOL-MYERS SQB	2,940,439,895	2,885,443,947	-2%	2.80%
13 BAYER PHARM	2,193,442,530	2,333,639,382	6%	2.27%
14 PASCUAL LABS	1,847,106,515	2,233,335,226	21%	2.17%
15 SCHERING PLOUGH	1,543,215,799	1,658,449,759	7%	1.61%
16 MERCK SHARP&DOHME	1,578,695,824	1,613,525,693	2%	1.57%
17 SERVIER PHILS	1,386,312,437	1,546,608,332	12%	1.50%
18 NATRAPHARM	1,118,177,168	1,508,954,461	35%	1.47%
19 MERCK INC	1,139,948,191	1,153,087,258	1%	1.12%
20 GX INTERNATIONAL	869,120,456	1,058,297,390	22%	1.03%

medicine. In a comparative Patent study on the pharmaceutical industry of Japan and the Philippines, legislative changes in Japanese patent laws during the 1970s resulted in an increase on quality and affordability of Japanese pharmaceuticals, which in turn, helped Japanese pharmaceutical companies to compete with larger nations.⁷³

The chart below is taken from the mentioned Japan-Philippine Patent study, wherein it shows that in the Philippines, there are only two local companies (United Laboratories and Pascual Laboratories) competing for a position in the list of top 20 Pharmaceutical companies in the country.⁷⁴ This may contribute to the theory that smaller local companies may not be able to compete with the big companies resulting in an oligopoly especially on essential medicine and supplies. From an optimistic perspective on local pharmaceutical companies, when the former is given access to such patents, generics medicine can be produced and said local companies are more able to compete with the larger companies.

Emergency patents may produce a multitude of benefits for the public. It can create access to a supply chain of medicine, especially for those financially-constrained. A case of using emergency patents to deal with diseases is

⁷³ Remoquillo, supra note 1, at 7.

⁷⁴ Remoquillo, supra note 1, at 13.

Remdesivir. The drug is the first therapy drug authorized for emergency use with patients afflicted with COVID-19. The drug is priced at around 3,000USD, but through deals and executions of emergency patents, it resulted in the production of generic medicines of Remdesivir in developing countries.⁷⁵ The problem, however, is the supply that consequently resulted in higher prices of the drug which is why Russia issued a compulsory license to allow a Russian company to produce a generic Remdesivir drug at a more competitive price (around 600-1000 USD).⁷⁶ This is one of many events wherein governments decided to use emergency patents as a means to obtain more affordable medicine for their constituents. Other examples include the U.S. State of Louisiana (2017) exploring its government use provision to lower the prices of patented Hepatitis treatments to negotiate for cheaper prices.⁷⁷ Another is the UK Parliament (2019) debating on the issuance of a compulsory license to purchase generic versions of a drug to treat cystic fibrosis. Summarily, access to drugs is dependent on pricing; something that may save or threaten an individual's life.⁷⁸

These examples merely show the large possibilities of reducing drug prices and providing wider access to alternative and cheaper yet effective medicine through the use of emergency patents. Emergency patents may either be used directly or simply as a negotiating tool to lower prices.⁷⁹ This kind of power, however, could be at the expense of the Patent owner and inventors who would see the government “strong-arming” them and their inventions. Such actions could intimidate many inventors, especially smaller entities, and could possibly discourage them from further inventions. This is significant, especially when remuneration of their products are beaten by slow judicial and administrative processes.

From a micro perspective, the lowered costs would contribute greatly to the development of smaller local pharmaceutical companies and consumers in general. The former would be able to offer alternatives to the latter at a more affordable rate and for medical practitioners, they may prescribe the same instead of referring the public to branded or more expensive drugs. In sum, the development and entry of generic medicine would certainly lower prices

⁷⁵ Pehudoff, et. al., Supra note 63, at 3.

⁷⁶ Meduza, Russian Authorities issue first-ever compulsory license for controversial coronavirus treatments, 14 January 2021, <https://meduza.io/en/feature/2021/01/13/uncertain-benefits>

⁷⁷ Amy Kapczynski and Aaron Kesselheim, 'Government patent use': a legal approach to reducing drug spending, Health Affairs 2016; 35:791, May 2016.

⁷⁸ Jacob Sherkow and Patricia Zettler, Epipen, Patents, and Life and Death, New York University Law Review, 165, August 2021.

⁷⁹ Pehudoff, et. al., Supra note 63, at 3.

for those essential medicines while also addressing the treatment of certain prevalent illnesses.

CONCLUSION

Emergency patents are large sources of solutions to mitigate the impact of the COVID-19 pandemic. While the end of the pandemic is not yet in sight, every form of solution is needed to address the medical problems in the country. The utilization of emergency patents opens up access to a larger array of medicaments to tackle the ongoing crisis and the act should be done urgently not only to reduce the number of deaths and cases of COVID but also to justify the use of the legal provisions. Additionally, government agencies should be taking notice of the worth that emergency patents bring in providing solutions to this pandemic and therefore, some form of issuance with regards to the IP Code should be written and released. Their expertise in their field will be needed as under sec. 74 (a) of the IP Code, the executive department is the entity responsible for determining if an invention should be exploited for public interest purposes. Applying the principle, departments such as the DOH, Department of Labor & Employment (DOLE), and the Department of Trade and Industry (DTI) are aware of the medical and economic situation of businesses and employees. Thus, if they deem that there is an urgency to provide medical inventions to private entities, they can easily obtain such through the execution of the emergency patent provisions.

In order to remedy such matters, recommendations include: an updated legislation for an adapted response to the pandemic, an issuance on the utilization of emergency patents, and guidelines or rules on the compensation scheme for the entities who have their inventions exploited due to national emergencies.

Approaching a legislative side on the pandemic, the Philippine Congress should be legislating on other possible means of alleviating the impact of COVID-19. In this case, a law providing for further amendments on the IP code, particularly on the provisions for emergency patents must be created. The content should state the value of emergency patents in creating better access to medicine in response to the pandemic. Furthermore, it should establish protection for the patent owner by specifying their rights as the patent owner of the exploited invention, the basis of their invention's valuation/compensation, and the exploitation period of the medical invention. Some considerations for the valuation should include the quantity of the medicine to be exploited, its purpose, the production costs, and even lost

contracts. Should Congress legislation be improbable, the participation of executive agencies in involving and adapting IP law would be a sound alternative.

The creation of issuances by administrative bodies also has a large and essential role in the utilization of emergency patents. As provided under the IP Code, government use and the special compulsory licenses can be initiated by a government agency (e.g., DOH, DTI, DOLE) in order to answer a national emergency. These government agencies have the most knowledge and experience in their respective fields and, therefore, can best argue and justify the use of emergency patents in response to certain national emergencies. Additionally, they may also be more able in producing the guidelines in compensation, duration, etc., as they have the legal expertise and field knowledge, especially during the pandemic. With the assistance of the IPOPHL, government agencies can easily craft joint-issuances pertaining to emergency patents and pinpoint valuable inventions to utilize against the pandemic.

In organizing the legislative recommendations, see below a proposed brief outline in amending the emergency patents provision:

EMERGENCY PATENTS:

Determination of national emergencies

Government Use

Scope and duration of exploitation

Who may use the invention

Compulsory Licenses

Who may use the invention

Criteria to determine the entity to exploit the invention

Valuation Schemes for Emergency Patent Use

Factors to consider in remunerating inventors

Rights of the patent owner

Negotiation Requirement

Procedure

Applications, appeals, and termination of exploitation

Involvement of the IPO and other relevant government agencies and entities in determination of Just Compensation

On the judiciary's side, courts and quasi-judicial agencies should be wary of the legal implications of granting emergency patents in spite of the probable benefits. Legal issues such as due process and antitrust largely play a big role when it comes to the grant of these patents. For procedure, it is insisted that courts be required to involve relevant government agencies in identifying the proper valuation of an invention so as to observe the constitutional right of an individual to be justly compensated for the use of their property.

Careful study must be done as to the impact of grants as it could economically affect the local pharmaceutical companies. If done wrong, entry of certain drugs could bring anti-competitive actions of larger and more influential pharmaceutical companies. If done right, on the other hand, it may pave the way for easier access to cheaper and more affordable medicine and a more competitive local pharmaceutical industry.

By exempting certain medical inventions for the pursuit of a solution to end the pandemic, a country can encourage the stimulation of innovative ideas and reveal crucial information either about COVID or any national emergency.⁸⁰ Jurisprudence, locally and internationally, is rife with justifications on the use of emergency patents and the use of such only further amplifies the field of science and technology. Academics and legal scholars have written plenty of studies on such Patents and its effects are far-reaching. Only time will tell if the government will take action to utilize the available research to expand and refine intellectual property policy. Therefore, it can be safe to say that from socio-political, economic, and legal perspectives, emergency patents may be able to be justified should the right entities act upon it.

⁸⁰ Rachel Halpern, National Emergency Exemption: Patents in the Time of Coronavirus, Columbia Undergraduate Law Review Online Journal, June 20, 2020, <https://www.culawreview.org/journal/national-emergency-exemption-patents-in-the-time-of-coronavirus>.

