

IP Trends in African LDCs and the LDC TRIPS Transition Extension

ICTSD Programme on Innovation, Technology and Intellectual Property

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Introduction

Africa is the continent with by far the largest share of Least Developed Countries (LDCs) than any other continent. Thirty-four of the 49 countries in the United Nations (UN) list of LDCs are found in the African continent (see Table 1). Twenty-five of the LDCs are members to the World Trade Organization (WTO) (see Table 2). Six LDCs are negotiating their accession to the WTO.¹ Only three African LDCs are neither member of nor in the accession negotiations at the WTO.²

Table 1. List of LDCs in Africa

1	Angola	18	Madagascar
2	Benin	19	Malawi
3	Burkina Faso	20	Mali
4	Burundi	21	Mauritania
5	Central African Republic	22	Mozambique
6	Chad	23	Niger
7	Comoros	24	Rwanda
8	DRC	25	São Tomé and Príncipe
9	Djibouti	26	Senegal
10	Equatorial Guinea	27	Sierra Leon
11	Eritrea	28	Somalia
12	Ethiopia	29	South Sudan
13	Gambia	30	Sudan
14	Guinea	31	Togo
15	Guinea-Bissau	32	Uganda
16	Lesotho	33	Tanzania
17	Liberia	34	Zambia

Twenty-three of the LDCs belong to the two African intellectual property organizations: eleven to the African Regional Intellectual Property Organization (ARIPO) and 12 to the Organisation Africaine de la Propriété Intellectuelle (OAPI) (see Table 3). Similarly, 32 of the LDCs are members of the World Intellectual Property Organization (WIPO) and are party to one or more of the treaties under the auspices of WIPO.



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1 Comoros, Equatorial Guinea, Ethiopia, Liberia, Sao Tomé & Principe and Sudan.
2 Eritrea, Somalia and South Sudan.

Table 2. African LDCs Members of WTO

Angola	Djibouti	Mali	Togo
Benin	Gambia	Mauritania	Tanzania
Burkina Faso	Guinea	Mozambique	Uganda
Burundi	Guinea-Bissau	Niger	Zambia
Central African Republic	Lesotho	Rwanda	
Chad	Madagascar	Senegal	
Democratic Republic of Congo	Malawi	Sierra Leon	

IP trends in African LDCs: a broad overview

The intellectual property (IP) landscape in the African LDCs is diverse. While many of the LDCs have put in place some form of IP regulation, a number of the laws are very old, some inherited from the colonial era and others issued before the coming into force of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). The scanty laws in most cases cover only a few IPRs such as patents, copyrights and trademarks and do not extend to all the categories of IPRs covered by the TRIPS Agreement.³ Even in cases where relatively recent regulations are in place the regulations are in most cases little more than a framework, with detailed rules yet to be developed for their full implementation. National regulatory frameworks of African LDCs on IP are thus still evolving.

On the basis of the status of their IP regimes, African LDCs could broadly be classified into five categories.⁴

First, there are LDCs that continue to grapple with old colonial/pre-TRIPS IP laws. Such laws could be found in Angola whose industrial property law dates back to 1992 and its copyright law to 1990. In Comoros, patent, copyright and trademark laws were issued in the 1840s, 1950s and 1960 respectively. The Democratic Republic of Congo (DRC) is still using an industrial property law issued in 1982 and a literary and artistic work law issued in 1986. The industrial property law of Lesotho was issued in 1989 with amendments in 1997 and the copyright law in 1989. Madagascar still uses industrial property laws issued in the 1980s and Malawi's patent law dates back to 1890s and trademark law to 1960s. A number of these laws were issued a long time ago and all of them before the coming into force of the TRIPS

Agreement; they naturally require major revisions to conform to the TRIPS Agreement.

Second, there are also African LDCs that have embarked on reforming their IP laws largely based on TRIPS standards (though not complete yet). The reform has been taking place in two fronts: revision of their existing legislation and issuance of new laws in areas where there were none. LDCs that belong to this group include Uganda that issued its trademarks act in 2010, trade secrets protection act in 2009, copyright and neighboring rights act in 2006 and patents amendment act in 2002. The group also includes Gambia that put in place an industrial property act in 2007, a copyright act in 2004 and industrial property regulations in 2010. Burundi with its 2009 industrial property law and the 2005 copyright and related rights act; Djibouti with industrial property act in 2009 and copyright and neighboring rights act in 2006; and Rwanda with its 2009 IP laws may also belong to this category.

Third, 12 LDCs are member of OAPI which was created on March 2, 1977 under the Bangui Agreement to introduce a uniform law on IP and to create a common industrial property office. In each Member State, OAPI serves as both the national office of industrial property and the central authority for documentation and information regarding IP. The 1999 revision to the Bangui Agreement was intended to make OAPI compatible with the TRIPS Agreement and the agreement now includes all categories of IPRs covered by the TRIPS Agreement.⁵

OAPI is considered to be TRIPS compliant, in some cases even "TRIPS Plus."⁶

In the case of ARIPO, its members maintain their national IP systems.

³ Copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits, and undisclosed information.

⁴ This note does not claim to be based on a comprehensive study of IP in African LDCs but rather based on a general observation of the IP landscape in those countries.

⁵ Annexes I-IX, Agreement Revising the Bangui Agreement of March 2, 1977, on the Creation of OAPI, Bangui, February 24, 1999.

⁶ OAPI's standards on the protection of new varieties of plants are based on the standards of UPOV though the latter was not referred to by the TRIPS Agreement. OAPI is also in the process of acceding to the UPOV.

Table 3. LDC membership of ARIPO and OAPI

ARIPO	OAPI
Gambia	Benin
Lesotho	Burkina Faso
Malawi	Central African Republic
Mozambique	Chad
Rwanda	Equatorial Guinea
Sierra Leon	Guinea
Somalia (only the 1979 Lusaka Agreement)	Guinea-Bissau
Sudan	Mali
Tanzania	Mauritania
Uganda	Niger
Zambia	Senegal
	Togo

Fourth, six LDCs are in the process of accession to the WTO. Each of these countries is at a different stage in the accession negotiations but their IP laws are being scrutinized by WTO Members for TRIPS compatibility. Indeed, the experience of LDCs that have already acceded to the WTO shows that African LDCs will be required to issue and enforce IP laws based on TRIPS standards. These countries are making all the necessary efforts to develop new laws and revise the existing ones along TRIPS as part of their negotiations for membership to the WTO. However, capacity and resource related challenges continue to delay their attempt to make their IP regimes compatible with TRIPS.

Fifth, there are LDCs that are yet to issue laws in the main IP areas: Eritrea, Somalia and South Sudan. These countries are neither WTO members nor in the accession process to join the organization.

What the broad survey of the IP landscape in Africa suggests is that African LDCs are at different stages in terms of IP law making and enforcement and the existing IP regimes are far from being TRIPS compliant. Almost none (except OAPI members) has put in place laws covering all the IP categories under the TRIPS Agreement. A cursory look at the laws suggests that there are gaps in the existing IP regulations of several LDCs in Africa.

Recent IP related developments

There have been a number of developments in Africa with regard to IP at the continental, regional and national levels.

At the continental level, the implementation of an ambitious proposal of establishing a Pan-African Intellectual Property Organization (PAIPO), that seeks harmonization of IP standards and enforcement, is being discussed at the African Union (AU). If this initiative succeeds it will have a significant implication on harmonization of IP law making and enforcement in the entire continent. At a regional level, the Common Market for Eastern and Southern Africa (COMESA) has come up with a draft IP policy which capitalizes on innovation and competitiveness where IP has been taken as an important tool for the region's competitiveness strategy. The draft policy also underlines the link between IP and economic development particularly in relation to the role of IP in promoting innovation in developing countries. This development may influence or even shape the IP direction of the 18 members⁷ of the Organization of which 12 are LDCs.⁸

There have also been IP-related developments at the national level. There have been a few cases where African LDCs attempted to use IP to promote socio-economic development. For example, the Ethiopian Government

⁷ Burundi, the Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

⁸ Burundi, the Comoros, Democratic Republic of Congo, Djibouti, Eritrea, Ethiopia, Madagascar, Malawi, Rwanda, Sudan, Uganda and Zambia.

launched the Ethiopian Coffee Trademarking and Licensing Initiative to improve the earnings of poor coffee farmers in the country through trademark registration and licensing. Contributing to about 60 percent of Ethiopia's export earning, coffee is the backbone of the country's economy. Ethiopia has succeeded in trademark registration of Harrar®, Sidamo® and Yirgacheffee® coffees in different countries in Europe, the US and Japan. This is a clear attempt by an African LDC to harness the maximum benefits from its largest export product and promote socio-economic development using IP.

African countries have showed little interest to join international treaties on plant variety protection. The general trend in Africa with regard to plant variety protection has been to develop separate plant variety protection laws that countries believe reflect their individual realities and create a balance of the different interests they wish to promote. As of January 2013, only four African countries are members of UPOV and none of them an LDC.⁹ Recently, Tanzania has initiated membership to UPOV which makes it the first individual LDC to show interest in UPOV membership.¹⁰ On its part, ARIPO and the Southern African Development Community (SADC) have been considering the adoption of a plant variety regime based on UPOV standards that may have important implications on their members, which maintain different approaches to plant variety protection.

The Economic Partnership Agreements (EPA) negotiations are going not going on at the same pace for the different sub-regions of Africa involved: West Africa, Eastern and Southern Africa (ESA), East Africa Communities (EAC) and SADC.¹¹ With regard to the EAC (where 4 of its 5 members are LDCs) Burundi, Rwanda, Tanzania, Kenya and Uganda initialed a framework EPA on 28 November 2007, and are now negotiating a comprehensive regional EPA. Similarly, an interim EPA was signed by the EU and Botswana, Lesotho, Mozambique and Swaziland in 2009. In the same year, Mauritius, Seychelles, Zimbabwe and Madagascar signed an interim EPA.

EPA IP section is largely based on TRIPS standards with some "TRIPS-plus" provisions.

The challenges

African LDCs are facing a number of challenges in IP law making and enforcement. As indicated, there are a number of LDCs with very old IP laws in a few areas that are far from being TRIPS-compliant. And even where recent IP laws exist, the LDCs have been issuing them without articulating IP in their development policy. There are only a few LDCs, such as Rwanda, with an IP policy that clearly pronounces the role of IP in their economic development, outlines their need and priorities as well as the challenges they face. In addition, despite the belief on the part of many LDCs that current international IP standards may not be flexible enough to address their needs and interests, there appears to be little effort in identifying and making use of existing flexibilities in relation to IP protection and enforcement. Furthermore, there appears to be more emphasis on setting up laws without looking at implementation challenges. Even though almost all LDCs have some form of IP institutions those institutions are weak in terms of skilled manpower and resources. Institutional fragmentation in dealing with IP is yet another challenge for African LDCs.

What happened following the 2005 extension?

The priority needs assessment exercise

When the TRIPS Council agreed in 2005 to extend the transition period of TRIPS implementation for LDCs under Article 66.1 until 2013, it also set up a process which called upon LDCs to identify their priority needs for technical and financial cooperation preferably by 1 January 2008.¹²

So far, seven African LDCs have submitted their individual priority needs for technical and financial cooperation in accordance with the November 2005 decision:¹³

- Madagascar (2013)
- Mali (2012)
- Senegal (2011)

9 Kenya, Morocco, South Africa and Tunisia.

10 In addition to Tanzania, another four African countries are officially in the process of accession to the UPOV but none of them is an LDC: Egypt, Ghana, Mauritius and Zimbabwe.

11 For the latest updates on EPA negotiations in Africa see European Commission, Overview of EPA: State of Play, available at http://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf (last accessed 25 May 2013).

12 EXTENSION OF THE TRANSITION PERIOD UNDER ARTICLE 66.1 FOR LEAST-DEVELOPED COUNTRY MEMBERS, Decision of the Council for TRIPS of 29 November 2005, IP/C/40.

13 More information is available at: http://www.wto.org/english/tratop_e/trips_e/ldc_e.htm (accessed on 25 May 2013)..

- Tanzania (2010)
- Rwanda (2010)
- Uganda (2007)
- Sierra Leone (2007)

The need assessment exercise was undertaken with the support from different institutions such as WTO, WIPO and ICTSD but 19 of the African LDCs (that are members to the WTO) have not yet gone through the exercise.

Challenges facing the priority needs assessments

The experience in the needs assessment exercises has shown a number of challenges. First, the TRIPS Council did not adopt specific guidelines on how the priority needs assessments should be conducted. As a result, the scope and depth of the assessment exercise was not clearly set. It is not clear, for example, if the assessments are meant to address the issue of TRIPS implementation or the broader IP and development issues in the context of LDCs, beyond implementation of the TRIPS Agreement. Second, there has not been a clear source of funding earmarked for undertaking these needs assessments. Third, the availability of funding to respond to the technical assistance needs identified by LDCs that have so far participated in the exercise has remained an important lingering issue. This issue is not only a concern for those countries that have gone through the exercise and make efforts to make progress in implementing the TRIPS Agreement but it may also serve as a disincentive for others to go through it.

In any case, the priority needs assessment is a useful exercise for LDCs as part or independently of the LDC extension process. First, such an exercise may allow LDCs to make a reality check on where they stand with regard to IP; identify needs and priorities as well as strengths and weaknesses. Second, such an exercise may also allow LDCs to table concrete and specific demands to their development partners based on their identified needs and priorities. In addition, it may provide the necessary information to tailor support based on the actual needs of the LDCs as well as provide an opportunity to create awareness among a variety of stakeholders.

The request for a second extension under TRIPS

In November 2012, Haiti on behalf of WTO LDC members has requested further extension of the transition period which is ending on July 1, 2013 for as long as the WTO member remains an LDC.¹⁴

This assumes that these countries will be in a difficult position to be fully compliant with the TRIPS Agreement while they remain LDCs. There may be a need to look at the issue in the light of the object and purpose of Article 66.1 (taking into account the fact that the latter provision is in Part VI of TRIPS providing for transitional arrangements) as well as TRIPS Articles 7 and 8. Ultimately, an attempt should be made to strike a balance between the need for flexibility and integrating LDCs into the global IP system.

The LDCs request for transition covers the entire TRIPS Agreement but in reality LDCs have had little difficulties with regard to some IPRs such as trademarks which are being routinely used in most LDCs. Indeed the entire extension debate appears to focus more on patents and copyright which may have important implications on efforts to promote access to knowledge, technological innovation and the transfer and dissemination of technology with a view to create a viable technological base. One possible alternative in the future might be the consideration of a gradual integration approach where different transitions may apply for different IPRs.

The issue of transition needs also to be considered in the context of LDCs that are in the process of WTO accession. The revised LDC accession guidelines affirm that special and differential treatment, as guaranteed in multilateral trade agreements, ministerial decisions, and other WTO legal instruments, shall be applicable to LDCs in the process of accession.¹⁵ However, there may be situations where the current transition period may become of little help to the acceding LDCs such as when an LDC accedes towards the end of the existing transition period. In cases such as this, the better option will be to grant a separate reasonable transition period for the acceding LDC rather than applying the existing one which might not be helpful for the LDC in question.

¹⁴ Request for an Extension of the Transition Period under Article 66.1 of the TRIPS Agreement, WTO Document IP/C/W/583, 5 November 2012.

¹⁵ Accession of Least Developed Countries, WT/L/508/Add.1, 25 July 2012, Para 18.

As indicated above, African LDCs are at different stages with regard to TRIPS implementation and they continue to face challenges in making IP part of their development agenda. While IP law making along the lines of TRIPS is far from being complete, enforcement of the existing laws remains a huge challenge for African LDCs. On the other hand, there remain a number of challenges for African LDCs to benefit fully from the priority needs assessment exercise, taking also into consideration that a relatively small number of countries have gone through it.

The overview of IP law making and enforcement in the African LDCs shows that a lot remains to be done. A reality check of the IP landscape in those countries clearly suggests that the move to integrate LDCs into the international IP system remains challenging and hence continuous flexibility is critical. The most important issue is not whether LDCs in Africa need extended

flexibility which appears to be obvious under current circumstances but rather how to make the flexibility more effective, useful and achieve its objectives.

The way forward

The state of affairs on IP in African LDCs has not been fully studied and there is need for more comprehensive work to identify trends, gaps, successes and challenges with a view to making informed decisions in the future. Extending the period of TRIPS implementation is just one step in addressing the unique challenges of LDCs in Africa but above all there is a need to address the underlying issue beyond extension such as helping LDCs to build their technological base, streamline IP in socio-economic development rather than focusing exclusively on mere implementation and compliance issues. Furthermore, there is a need to revisit the priority needs assessment process with a view to addressing the challenges it faces.

ICTSD has been active in the field of intellectual property since 1997, among other things through its Programme on Innovation, Technology and Intellectual Property. One central objective of the programme has been to facilitate the emergence of a critical mass of well-informed stakeholders in developing countries that includes decision-makers and negotiators, as well as representatives from the private sector and civil society, who will be able to define their own sustainable human development objectives in the field of intellectual property and advance these effectively at the national and international level.

For further information visit: www.ictsd.org

This paper was produced under the ICTSD Programme on Innovation, Technology and Intellectual Property. ICTSD is grateful for the support of ICTSD's core and thematic donors including the UK Department for International Development (DFID), the Swedish International Development Cooperation Agency (SIDA); the Netherlands Directorate-General of Development Cooperation (DGIS); the Ministry of Foreign Affairs of Denmark, Danida; the Ministry for Foreign Affairs of Finland; the Ministry of Foreign Affairs of Norway; Australia's AusAID; and Oxfam Novib.

Citation: Merso, Fikremarkos (2013); *IP Trends in African LDCs and the LDC TRIPS Transition Extension*; Policy brief No 16; International Centre for Trade and Sustainable Development, Geneva, Switzerland, www.ictsd.org

The views expressed in this publication do not necessarily reflect the views of ICTSD's funding institutions. ICTSD welcomes feedback on this document. These can be forwarded to Ahmed Abdel Latif (aabdellatif@ictsd.ch).

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