

Technical Note: The LDC TRIPS Transition Extension and the Question of Rollback

ICTSD Programme on Innovation, Technology and Intellectual Property

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1. The transition period granted to LDCs under the TRIPS Agreement and the 2005 extension

When the TRIPS Agreement entered into force on January 1, 1995, least developed country (LDC) Members of the WTO were accorded a transition period of 11 years (until January 1, 2006) to apply the provisions of the agreement, other than the national treatment and MFN provisions (Articles 3-5).¹

Following on to the mandate of paragraph 7 of the Doha Declaration on the TRIPS Agreement and Public Health, on July 27, 2002, the TRIPS Council (based on Article 66.1, TRIPS Agreement) adopted an extension in favor of LDCs removing any obligation to comply with Section 5 (Patents) and Section 7 (Protection of Undisclosed Information) of Part II, including any obligation to enforce rights under these provisions, until January 1, 2016.² Such decision was made without prejudice to the right to seek further extensions pursuant to Article 66.1, TRIPS Agreement.

On July 8, 2002, the General Council, again further to the mandate of paragraph 7 of the Doha Declaration, adopted a waiver (pursuant to paragraphs 1, 3 and 4 of Article IX of the WTO Agreement) of the obligations of LDCs under Article 70.9 relating to the potential grant of exclusive marketing rights (EMRs) during the pendency of a mailbox application under Article 70.8.

On October 13, 2005, Zambia on behalf of LDC Members requested the TRIPS Council to grant an extension of the general transition under Article 66.1 of the TRIPS Agreement “for a further 15 years”.³ This request was unconditional in the sense that it did not make any reference to a standstill on existing legislation or a no-rollback commitment.

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- 1 Article 66.1 TRIPS Agreement, read in conjunction with Article 65.1, TRIPS Agreement.
- 2 A proposal to exclude LDCs from any requirement to make available patent protection for products or processes relating to public health was part of the initial developing country text proposal (non-paper) for a Ministerial Declaration on the TRIPS Agreement and Public Health of September 12, 2001, and the modified language of paragraph 7 of the adopted Doha Declaration can be found in a preliminary text circulated by the Chair of the General Council on October 27, 2001 (JOB(01)/155).
- 3 Request for an Extension of the Transitional Period Under Article 66.1 of the TRIPS Agreement, Communication from the Delegation of Zambia on behalf of the Least-Developed Country Members IP/C/W/457, 21 October 2005.



On November 29, 2005, the TRIPS Council adopted an extension of the general transition otherwise due to expire on January 1, 2006 in favor of all LDCs. The extension was for a period of 7.5 years, or until July 1, 2013. A Member that ceased to be an LDC during the transition would no longer benefit from the extension. The terms of the extension included the following two clauses:

“5. Least-developed country Members will ensure that any changes in their laws, regulations and practice made during the additional transitional period do not result in a lesser degree of consistency with the provisions of the TRIPS Agreement.

6. This Decision is without prejudice to the Decision of the Council for TRIPS of 27 June 2002 on “Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for Least Developed Country Members for Certain Obligations with respect to Pharmaceutical Products” (IP/C/25), and to the right of least-developed country Members to seek further extensions of the period provided for in paragraph 1 of Article 66 of the Agreement.”

Clause 5 has come to be referred to as the “no-rollback” clause or provision. Clause 6 clarifies that the time line of the 2002 extension with respect to pharmaceutical products is not affected by the shorter period of this general extension.

The WTO Ministerial Conference by decision of December 17, 2011 “invite[d] the TRIPS Council to give full consideration to a duly motivated request from Least-Developed Country Members for an extension of their transition period under Article 66.1 of the TRIPS Agreement, and report thereon to the WTO Ninth Ministerial Conference.”⁴

2. The present extension request

On November 5, 2012, Haiti on behalf of WTO LDC Members requested further extension of the transition that otherwise ends on July 1, 2013 “for as long as

the WTO Member remains a least developed country”.⁵ The extension request is stated unconditionally in the sense that it does not incorporate a proposed no-rollback commitment similar to that embodied in Clause 5 of the 2005 extension. At the request of Nepal on behalf of LDC Members, this request was discussed at the TRIPS Council meeting of March 5-6, 2013.⁶

3. Interpretation of Article 66.1

Article 66.1 of the TRIPS Agreement provides:

1. In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65. The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.

Article 66.1 sets a precondition for extension of the transition period as “upon duly motivated request” by an LDC. Once that precondition is met, the TRIPS Council “shall ... accord extensions of this period.” In a legal sense, the term “shall” is used to express or denote something mandatory or required.⁷ From an interpretative standpoint, it seems clear that once a “duly motivated” request is presented by an LDC, the TRIPS Council is obligated to grant the extension.

The terms “duly motivated”, standing alone, are ambiguous. The term “duly” generally refers to something that is properly presented.⁸ However, while “duly” can be understood to refer only to a matter of form or timeliness, it may also be understood in a more substantive sense to refer to an adequate reason or ground. The term “motivated” refers to the reason or impetus for an action.⁹

4 Ministerial Conference, Transition Period for Least-Developed Countries Under Article 66.1 of the TRIPS Agreement, Decision of 17 December 2011, WT/L/845, 19 December 2011.

5 Request for an Extension of the Transitional Period, Under Article 66.1 of the TRIPS Agreement, IP/C/W/583, 5 November 2012.

6 WTO: 2013 News Items, Intellectual Property: Formal Council Meeting, Poorest countries’ extended intellectual property transition: time-limited or indefinite?, 5 and 6 March 2013, at <<http://www.wto.org>>. A report on this meeting is understood to appear in the record of the minutes of this TRIPS Council Meeting, available to WTO Members.

7 See Miriam Webster Online Dictionary: “2 b —used in laws, regulations, or directives to express what is mandatory <it shall be unlawful to carry firearms>”; and The New Oxford Shorter English Dictionary (1993), “5 Must according to a command or instruction”, at page 2808.

8 See Miriam Webster Online Dictionary: “in a due manner or time: properly <a duly elected official><duly noted>”; and The New Oxford Shorter English Dictionary (1993), “In due manner, order, form, or season; correctly, properly, fitly; punctually; sufficiently”, at page 763.

9 See Miriam Webster Online Dictionary for “motivate”: “something (as a need or desire) that causes a person to act”, or for “motivated”: “to provide with a motive : IMPEL”; and The New Oxford Shorter English Dictionary (1993), for “motive”: “2 A factor or circumstance inducing a person to act in a certain way”, or for “motivated”: “Supply or be a motive for (and action)”.

From a strictly textual standpoint, Article 66.1 means either that (a) once a request in the proper form is presented, the TRIPS Council is obligated to grant an extension, or (b) once a request with an adequate justification is presented, the TRIPS Council is obligated to grant an extension.

The ambiguity in the terms “duly motivated” probably derives from the negotiating history of the TRIPS Agreement, wherein proposals from the European Communities (NG11/W/68)¹⁰ and Switzerland (NG11/W/73) reflected in a 12 June 1990 Chairperson’s composite text each refer to potential extensions of transition arrangements in favor of developing and least developed countries. The EC proposal stated:

1A PARTIES shall take all necessary steps to ensure the conformity of their laws, regulations and practice with the provisions of this Annex within a period of not more than [-] years following its entry into force. The Committee on Trade Related Intellectual Property Rights *may* decide, *upon duly motivated request*, that *developing countries which face special problems* in the preparation and implementation of intellectual property laws, dispose of an additional period not exceeding [-] years, with the exception of points 6, 7 and 8 of PART II, in respect of which this additional period shall not apply. Furthermore, the Committee may, *upon duly motivated request*, extend this additional period by a further period not exceeding [-] years in respect of *least developed countries*. (68) [italics added]

In the Swiss proposal, the terms “duly motivated request” made reference to the developing countries; not to the least developed countries, although the proposed Committee would have authority to grant extensions for LDCs.¹¹

The Brussels text of December 1990 included for developing countries a draft general transition (but without a timeframe specified),¹² and a proposal for developing countries to submit a schedule of their timetable for TRIPS compliance (but “without commitment”), as well as the possibility for the Committee to authorize, “upon duly motivated request, departures” from the non-binding timetables.¹³ This proposal was substantially modified in the final TRIPS Agreement text. (However, it is at this stage that language ultimately reflected in a “no-rollback” clause for developing countries appears,¹⁴ as this language (with insubstantial modification) was incorporated in Article 65.5 of the TRIPS Agreement applicable to developing countries, but not LDCs.)

The “duly motivated” language was initially proposed by the EC in the context of a non-mandatory grant of extension for developing countries on the basis of “special problems”.¹⁵ When the final text of the TRIPS Agreement was concluded, the transition arrangements for developing countries were expressly scheduled, and there was no specific provision for extension of those transitions. However, the “duly motivated” language remained in the context of least developed countries, even though the “special problems” language from the original EC proposal was removed. The grant of the extension for LDCs was made mandatory on presentation of the “duly motivated” request.

Language further incorporated in the final text of Article 66.1 may add support to a reading of “duly motivated” that minimizes or obviates a possible requirement for justification by an LDC for an additional extension. Article 66.1 provides as an introductory ground for the transition arrangement:

10 European Communities, Draft Agreement on Trade-Related Aspects of Intellectual Property Rights (27 March, 1990), Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, MTN.GNG/NG11/W/68, 29 March 1990, at Part V, art. 4.

11 Status of Work in the Negotiating Group, Chairman’s Report to the GNG, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, MTN.GNG/NG11/W/76, 23 July 1990, referring to Swiss submission NG11/W/73.

12 Article 68.2, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Revision), MTN.TNC/W/35/Rev.1, 3 December 1990, Special Distribution (the “Brussels Text”).

13 Article 68.5, Brussels Text.

14 Article 68.4 of the Brussels Text provided:

4. Any PARTY availing itself of a transitional period under paragraphs 1, 2 or 3 shall ensure that any changes in its domestic laws, regulations and practice made during that period do not result in a lesser degree of consistency with the provisions of this Agreement.

15 As regards LDCs, the Brussels text predecessor to the final text of the TRIPS Agreement was substantively equivalent to the final text (although a cross-reference that would have exempted LDCs from the apparently nonbinding transition timetable was removed). Article 69.1 of the Brussels Text provided:

Article 69: 1. In view of their special needs and requirements, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, least developed country PARTIES shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, insofar as compliance with those provisions requires the amendment of domestic laws, regulations or practices for a period of ...years from the date of application as defined under paragraph 1 of Article 68 above. The Committee shall, upon duly motivated request by a least developed country PARTY, accord extensions of this period. The requirement of paragraph 5 of Article 68 above shall not apply to least developed country PARTIES.

“In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, ...”

The recognition of the “special needs and requirements” of LDCs that inherently flows from their overall economic situation may adequately take the place of identifying some “special problems” as would have been contemplated by the EC’s initial draft language that referred to developing countries. That is, the “special needs and requirements” inherent in denomination as an LDC provides the foundation for a “duly motivated” request in the sense contemplated by the EC proposal.

A contextual reading of Article 66.1 “better suggests” that least developed countries need only present a formal request in a timely manner in order to be granted an extension. The negotiating history suggests that “duly motivated” when initially proposed (in a different context) had some sense of “justified” request (i.e. based on “special problems”) when relating to developing countries (which were distinguished from LDCs), but the special needs and requirements of LDCs inherent in their circumstances should probably be considered adequate to satisfy any residual sense of justification.

In all events, the LDCs have presented sufficient grounds for requesting an extension of the transition for compliance. The LDC request is straightforward and of indefinite duration, terminating for each LDC as and when it transitions from that status. Certain Members have proposed an extension of limited (e.g., five year) duration, and inclusion of a “no-rollback” clause.

4. The “no-rollback” clause

a. Constitutive issues

Clause 5 of the current extension provides “Least-developed country Members will ensure that any changes in their laws, regulations and practice made during the additional transitional period do not result in a lesser degree of consistency with the provisions of the TRIPS Agreement.” As noted above, this language first appeared in the draft Brussels Text with respect to developing countries, and such language appears with respect to developing countries in Article 65.5 of the TRIPS Agreement.

It is notable that TRIPS negotiators were conversant with the idea that IP laws should not become “less consistent”

with the TRIPS Agreement, but chose not to impose that condition on LDCs in the context of Article 66.1. In that regard, the introduction of the “no-rollback” clause in the 2005 extension added a condition not expressly provided for by the TRIPS Agreement.

As noted above, once a “duly motivated” request from LDCs is presented, the TRIPS Council is under an obligation to authorize the extension (i.e. “The Council for TRIPS shall”). Article 66.1 does not make any reference to the application of conditions on extension.

It is an important question whether the TRIPS Council had the authority to attach the no-rollback condition in the approval of the extension requested by LDCs in 2005. This eventuality is not expressly contemplated by the language of Article 66.1. By way of contrast, Article IX:4 of the WTO Agreement with respect to “waivers” expressly states that “A decision by the Ministerial Conference granting a waiver shall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate.” There is, in the context of the waiver, express acknowledgment of the authority of the Ministerial Conference to establish “terms and conditions”. Neither Article IV of the WTO Agreement establishing the TRIPS Council, nor Article 68 of the TRIPS Agreement establishing the institutional arrangements for the TRIPS Council, refers to conferring a general power to impose conditions not otherwise referenced in the TRIPS Agreement.

It can be argued that a power or authority to grant a “concession” inherently includes a power or authority to condition the concession. But, Article 66.1 does not appear to confer a discretionary authority on the TRIPS Council with respect to requests for extension by LDCs. It is not being asked to authorize a “concession.” Rather, “upon duly motivated request the” the TRIPS Council “shall... accord extensions of this period”. Because the grant of the extension is mandatory following a “duly motivated request”, the argument that there is an inherent authority to condition the grant is weakened. It may be further weakened in this particular case because TRIPS Agreement negotiators were manifestly aware of the possibility of linking an extension to a no-rollback requirement (as in Article 65.5), but did not reference possible “terms and conditions” applicable to the extension in Article 66.1 (as compared, for example, to Article IX:4 of the WTO Agreement referenced above).

An argument in support of the no-rollback conditionality incorporated in the extension adopted in 2005 is that it

was adopted by consensus of the TRIPS Council, and this consensus included LDCs. It may be that a WTO body may not adopt a decision outside the scope of its authority regardless whether or not it is acting by consensus. But, whether such a body may adopt a decision outside its express authority might depend on the nature of the decision. That is, there may be a contextual aspect to the question of “scope of authority”. From an equitable standpoint, Members that have voted in favor of a decision (or have elected not to block a decision) might carry a more difficult burden in persuading the DSB that they have been subject to a decision outside the scope of authority.

From the standpoint of the extension adopted in 2005, the question of TRIPS Council authority will soon become moot as the extension expires as of July 1, 2013. However, the question is a live one in the context of the current extension request. In principle, LDCs could take the position in the TRIPS Council that an extension may not include the condition of a “no-rollback” clause because, as discussed above, the grant of the extension is mandatory on the basis of a duly motivated request and there is no express authority conferred on the TRIPS Council to add a condition to an extension. LDCs could also argue that by accepting the no-rollback clause in 2005 they did not waive their right to insist on action within the legitimate scope of TRIPS Council authority in 2013.

There is no assurance that all Members of the TRIPS Council would accept that position. Some Members could argue that inherent in the express authority to grant an extension is the implied authority to condition the extension and/or that by agreeing to a no-rollback clause in 2005, LDCs are estopped from successfully arguing that the condition is outside the authority of the TRIPS Council. Whether some Members might argue in favor of an estoppel depends, *inter alia*, upon whether those Members would be willing to take the position that in cases in which they do not exercise their own WTO rights, they waive the possibility to exercise those rights in the future. It seems doubtful that Members would take such a position for their own accounts.

The Rules of Procedure for Meetings of the TRIPS Council provide that decisions are taken by consensus, and that in the absence of consensus a matter shall be referred to the General Council for decision.¹⁶ In this regard, any

Member of the TRIPS Council could vote to block the grant of an extension, even if such action may be inconsistent with the mandatory language of Article 66.1. If the General Council is unable to overcome an obstacle, and a legal issue remains, presumably an affected Member could initiate dispute settlement consultations under the Dispute Settlement Understanding.

Assuming that the LDCs insisted upon an unconditional extension, and assuming that the request was blocked and became the subject of DSU consultations, the circumstances of the LDCs with respect to TRIPS compliance would be uncertain. There are a number of ways that the potential impact of uncertainty could be mitigated. The Ministerial Conference or General Council could adopt a waiver of compliance pending a decision by the DSB. The Director General or Chairperson of the DSB could be called upon to exercise good offices, as contemplated, *inter alia*, by Article 24 of the Dispute Settlement Understanding.

The foregoing is not intended to suggest or recommend that Members avoid reaching an amicable negotiated result regarding the “no-rollback” question in advance of the expiration of the current extension. Rather, it points out some options.

b. Interpretative issues

It remains to be pointed out that the “lesser degree of consistency with the provisions of the TRIPS Agreement” language of the existing no-rollback clause in the 2005 extension, derived from Article 65.5 of the TRIPS Agreement, is ambiguous.

Outside the transition context of Article 65.5 (all time periods under which have now expired), the intellectual property (IP) laws and practices of a Member either are “consistent” or “inconsistent” with the TRIPS Agreement. This is a “binary”, yes or no, question. A dispute settlement claim may not be brought against a WTO Member on grounds that a particular IP law or practice is “less consistent” than a consistent practice might be, and an IP law or practice may not be defended on the grounds that it is “more consistent” than an inconsistent practice might be. As the Appellate Body indicated in the *India-Mailbox* case, a WTO Member has an obligation to comply with the terms of the TRIPS Agreement, no more, no less.

¹⁶ Rule 33 of the Rules of Procedure for Meetings of the Council for TRIPS, IP/C/1, 28 Sept. 1995.

There are various potential interpretations of “lesser degree of consistency” that could be speculated upon. There were no dispute settlement proceedings involving this language as it appears in Article 65.5 while it was relevant to developing countries, and no interpretation by the DSB.

For example, the TRIPS Agreement provides that design right protection should be provided for a minimum 10-year duration. If an LDC currently provides design right protection for five years, and amends its law to provide for a seven-year duration, would that be a “greater degree of consistency” with the TRIPS Agreement, even though the amended provision is inconsistent with TRIPS Agreement requirements? What if an LDC reduces the duration of design right protection from seven years to five years, but moves from providing such protection under copyright law to providing a new form of *sui generis* protection that does not require evidence of copying (as does copyright law)? Is that more or less consistent with the TRIPS Agreement?

Under the existing no-rollback clause, can a Member bring a claim before the DSB that an LDC has adopted a new element of IP legislation that is “less consistent” with the TRIPS Agreement than its previous legislation? What standards would a panel or the Appellate Body use to make a decision? Would a panel adopting a report request an LDC to modify its legislation to become “more consistent” rather than “less consistent” with the TRIPS Agreement?

Particularly in view of the recognized “special needs and requirements” of LDCs, the use of an inherently ambiguous standard against which law and practice would be measured may not be especially helpful.

c. Pharmaceutical patents and regulatory data protections

The possibility for rolling back or reducing the consistency of compliance with the TRIPS Agreement has already demonstrated that it is a key component of LDC flexibility in the sense of application of the extensions granted on the basis of paragraph 7 of the Doha Declaration. Generic suppliers of antiretroviral and other medicines to Africa had expressed concern to procurement authorities regarding potential patent infringement causes of action should they supply medicines pursuant to procurement

contract. In fact, procurement authorities were themselves concerned that they might be liable for supply of those drugs procured from generic suppliers.¹⁷ As a consequence, a number of LDCs introduced a practice of providing “comfort letters” to procurement authorities and generic suppliers indicating that they were taking advantage of the paragraph 7-based flexibility not to enforce patents that might cover importation of such supplies.

In the context of the paragraph 7-based flexibilities, it would not have been adequate merely to say that LDCs were exempt from implementing patent law TRIPS requirements because most or all of the LDCs had patent laws on their books, and a number had granted patents with respect to pharmaceuticals. The LDCs needed to reduce the availability of protection in order to provide sufficient legal comfort to suppliers.

d. Calibrating IP to the LDC context

There is a certain moral imperative to eliminating patent constraints on the supply of life-saving drugs to LDCs that even the patent-owning pharmaceutical companies have taken into account in establishing waiver programs in favor of LDCs.

There is a temptation to suppose that similar moral imperatives do not present themselves in other areas of products or services. As a “technical matter” this may largely be correct. In few other areas will the presence or absence of intellectual property have such a direct or immediate impact on human well-being.

On the other hand, one might consider education a moral imperative, and that access to materials needed for classrooms in LDCs should be promoted to the maximum extent feasible. It may be that copyrights held by textbook publishers and/or authors inhibit their distribution in LDCs. It might well be that a waiver of copyrights in such works (through an extension of TRIPS compliance) would be a significant benefit to LDCs -- even recognizing that many LDCs may yet retain obligations under the Berne Convention. Because non-WTO treaties are less susceptible to economic enforcement, removal of WTO impediments may have a value. The possibility for LDCs to roll back the availability of protection would not require that an LDC apply the same reduced protection for all purposes. By way of illustration, a waiver of

¹⁷ These concerns were addressed, for example, at a WHO-UNICEF Workshop on IP coherence in procurement practices, 4-5 August 2005, UNICEF Supply Division, Copenhagen, which resulted in the drafting of model comfort letters. The use of similar letters was illustrated by other procurement authorities at a meeting, Access to Medicines and Intellectual Property: An International Expert Meeting on Canada's Access to Medicines Regime, Global Developments, and New Strategies for Improving Access, April 19-21, 2007, Ottawa, Canada.

copyright to promote public education might not extend to private for-profit book sales. Reduced protection can be crafted as an LDC considers appropriate.

Copyrights on computer software are designed to inhibit uncompensated third-party use of the programs. Do the major software producing companies have a genuine financial interest in preventing residents of LDCs from using their programs without compensation? This seems very doubtful from a purely economic standpoint (and one could even postulate a long-term beneficial network effect if use of a particular program becomes embedded within a society).

Patents and forms of plant variety protection (PVP) play an increasingly significant role in agriculture. By way of illustration, a patent on a disease-resistant genetically modified seed may be understood to prevent the replanting of seeds harvested from a crop, requiring farmers to purchase or license new patented seeds for each planting. An LDC that has granted patents on genetically modified seeds might find it advantageous to reduce the level of protection under such patents in order to promote low-cost agricultural development.¹⁸ For LDCs that may provide only PVP protection, flexibility to promote low-cost production and distribution of seeds may also be important.

These examples are not intended to suggest that LDCs do not have an interest in providing certain forms of IP protection in circumstances that will promote their local objectives. For example, the protection of business identifiers is important to local entrepreneurs at all stages of national economic development. There are, however, a number of cases where a lesser degree of TRIPS consistency may be beneficial, even if it requires rolling back existing protections.

e. The state of IP legislation in LDCs

A number of LDCs were subject to colonial rule prior to the 1950s and 1960s, and on independence inherited intellectual property laws that had been put in place by colonial administrators.¹⁹ Although such laws may be outdated, some LDCs maintain IP laws based on this historical feature. There is not a comprehensive canvassing of all LDCs and the status of their IP law revisions following the entry into force of the TRIPS Agreement in 1995,²⁰ so it is difficult to provide precise numbers on this account.²¹ A clause precluding adoption of IP laws that are “less consistent” with the TRIPS Agreement than existing laws might lock some LDCs into maintaining stronger IP law than would be adopted “writing on a clean slate”.²²

5. The policy behind the LDC request

The LDCs do not appear to be arguing that intellectual property rights are inherently damaging to their national economies, or that implementing new IP laws is inconsistent with their long-term domestic objectives. Their argument appears to be based on decisions about the best allocation of very scarce domestic resources, and whether it is a wise use of resources to legislate, establish and maintain institutions, and pay for enforcement measures, all of which are part of TRIPS compliance. The LDCs appear to want to do this at a pace commensurate with their level of economic development, and not to face political and economic pressure to do so from non-LDC WTO Members.

The institutional capacity argument appears to have substantial merit. Once a TRIPS Agreement obligation becomes mandatory, a WTO Member faces the possibility of being subject to dispute settlement proceedings. Refer-

18 To be clear, the TRIPS Agreement does not mandate the grant of patents on plants (including agricultural products), although some form of protection (including PVP) is required. TRIPS Agreement, art. 27.3(b).

19 For example, a study of the CARICOM region and Dominican Republic undertaken by HERA in 2009 reviewed the national patent legislation for each country, and found a number of countries that had not yet updated their laws for TRIPS conformity. While only Haiti among these countries is an LDC, it seems reasonable to assume that similar circumstances are in place for some LDCs elsewhere. The patent legislation of Haiti dates from 1924. It does not provide for substantive examination of patent applications. Patents are automatically granted upon payment of a fee. See Regional Assessment of Patent and Related Issues and Access to Medicines: CARICOM Member States and the Dominican Republic (HERA), Health Research for Action Final Report - Main Report, Vol. II, 2009, at pgs. 71-72.

20 The most up-to-date document on LDC IP legislative implementation according to the WIPO Secretariat is CDIP/7/3 (March 18, 2011). This document does not fully assess the IP situation in the LDCs.

21 A notable compilation of data regarding LDCs appears in Carolyn Deere, *The Implementation Game* (Oxford 2009). There are various WIPO studies identifying aspects of LDC legislative efforts, and participation in international agreements. See, e.g., Recent Developments in the Field of WIPO's Cooperation with Least Developed Countries, Workshop for the Least Developed Countries of Asia and the Pacific Region on the Use of Intellectual Property for Technological Capacity Building, Economic Competitiveness and Development, December 15-16, 2011, Thimpu, Bhutan, wipo_ldcs_thp_11_ref_t18.pdf.

22 For example, the Dominican Republic (though not an LDC) until 2000 authorized confirmation patents based on French law, and local pharmaceutical-related patents were obtained on this basis (HERA Study, vol. II, pg. 49).

ring to a point made earlier, there has not been a systematic assessment of the existing IP legislation of LDCs in terms of TRIPS-conformity. By definition, there has not been a systematic assessment of the distance between existing LDC IP-related capacity and what would be required to implement and enforce TRIPS conformity. Under these conditions, imposing a mandatory timeline for achieving TRIPS Agreement compliance may be fairly arbitrary.

One area of concern would be the obligations in Part III to provide adequate mechanisms for enforcement of private rights. This presumes the availability of judicial resources with sufficient expertise in the field of IPRs both to provide right holders with protection and to guard the public interest. Another area of concern involves the budget and staffing of IP offices that must possess technical resources sufficient to process applications in a way that takes account of the interests of right holders as well as the public.

The aforementioned concerns are not intended to suggest that LDCs are not building capacity in the field of IPRs, or in their administration. But, rather, to ask whether mandating TRIPS compliance and the possibility for WTO dispute settlement along a defined timeline is useful. Recall that some Members maintain domestic laws that require the initiation of WTO dispute settlement action in the event a private party demonstrates a *prima facie* case of non-compliance by another Member, so that discretion among government trade officials whether to proceed in dispute settlement is limited.

The objective of the LDC TRIPS transition arrangement, as stated in Article 66.1, is to accommodate “the special needs and requirements of least-developed country Members ... and their need for flexibility to create a viable technological base”. The central concern for and regarding LDCs is promoting creation of the technological base. As internal technological capacity strengthens, the adoption and implementation of TRIPS-consistent rules may be a consequence, but it is not the end in itself.²³

LDCs have a compelling public health interest in non-enforcement of patents and regulatory data TRIPS requirements because of external concerns among

procurement purchasers and importers, as well as for local production of some pharmaceutical products (as, for example, in the cases of Bangladesh and Uganda). This is why this issue was dealt with in the Doha Declaration on the TRIPS Agreement and Public Health. A risk in the current discussion is that the public health extension and the “general extension” will somehow become enmeshed, to the longer-term detriment of public health in LDCs.

6. The policy behind the objection

Some developed country WTO Members appear to consider that compliance with the TRIPS Agreement is a laudable goal that will improve the economic situation in the LDCs. No doubt there are elements of intellectual property that are useful in LDC economies. No one appears to be arguing otherwise.

The assumption for the developed country Members may be that by providing an extended relief from TRIPS Agreement compliance requirements, LDC Members (and their citizens) may have or develop reduced respect for IP and/or IP obligations. (In practical terms, the economic impact on developed Members of the presence or absence of particular levels of IP protection in LDCs most likely does not reach a statistically significant level.²⁴) Thus, the issue is not whether there is an economic gain to developed country Members in the short or medium term from LDC compliance, but whether a longer-term “IP problem” is being encouraged.

If a robust intellectual property system is important to the development and maintenance of a technologically developed economy, the prospects that LDCs either as a group or individually would use an extended transition as the long-term basis for avoiding the implementation of TRIPS-compatible IP systems appears rather remote. Individual inventors, artists and entrepreneurs within LDCs are going to demand protection for their creative activity and identifiers. The growth of domestic demand for IP protection is witnessed over and over again as countries progress through stages of economic development. (As with all national system of IP protection, LDCs will also require exemptions from protection in important areas.)

23 Whether an LDC should continue to enjoy maximum flexibility with respect to its IPRs regime could be assessed on the basis of a set of indicators reflecting its internal state of technological development. Technology-capacity assessment tools have been developed and used in a variety of contexts, and may incorporate data such as literacy rates, patents (or other IPRs) to nationals granted per capita, percentage of GDP spent on R&D, number of graduate engineers, published scientific papers, and similar information. While such indicators with respect to LDCs may be useful for objectively assessing technological capacity and local requirements for inward technology transfer, the designation of a country as an LDC should be a sufficient aggregate indicator that work remains toward the creation of a viable technological base.

24 It would be surprising if .01 percent of the GDP, or the trade balance, of any developed economy would be affected by whether or not LDCs maintain or roll back their current IP law conformity with the TRIPS Agreement.

There is nothing inherent in an extended TRIPS compliance transition that should impede or discourage LDCs from developing and implementing IP laws as they

consider it appropriate, nor is there anything in such a compliance transition that should inhibit the provision of technical encouragement and support.

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.

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