

How can the WTO better integrate the poorest countries into the growing knowledge-based economy?

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In June 2013, the members of the WTO granted LDCs a second transition period extension for the implementation of the TRIPS Agreement of another eight years (until 2021). With an ongoing waiver alone, however, the integration of LDCs into the international system for the protection of intellectual property has merely been postponed, and the world's poorest countries will remain cut off from the global knowledge-based economy. What is needed instead is a gradual and development-oriented approach for a properly sequenced IP reform in LDCs.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was concluded in 1994 and sets out international minimum standards for the protection of intellectual property (IP) rights (i.e. copyrights, patents, trademarks, geographical indications, industrial designs, integrated circuit layout-designs and undisclosed information). Most least-developed countries (LDCs) had neither a comprehensive domestic framework for IP protection nor much experience in negotiating international IP conventions when they became WTO members.

They mainly accepted TRIPS as part of a package deal in exchange for concessions in other areas of trade, and because they were concerned at the possibility of losing their ability to attract urgently needed foreign direct investment and technology transfer. In addition, the Agreement contains provisions that foresee technology transfer as well as technical and financial assistance in order to support the creation of a viable technological base in developing countries and LDCs (Articles 66.2 and 67 TRIPS). TRIPS also allows for certain "flexibilities" (e.g. regarding the method of implementation, the substantive standards of protection and the mechanism of enforcement) to accommodate particular national interests or resolve issues that are specific to LDCs. Most importantly, the Agreement did not entail any immediate economic cost and no direct action was required as it provided LDCs with a

generous transition period of ten years to meet the bulk of their new obligations (Article 66.1 TRIPS).

Establishment of a priority needs assessment process for LDCs in 2005

When the transition period of ten years ended in 2005, expectedly, most LDCs had not made substantial progress in implementing the Agreement. Consequently, the TRIPS Council extended the transition period for LDCs for another 7½ years till July 2013. The WTO members also established a process in which LDCs were requested to provide information on what they considered as priorities for technical and financial assistance that would enable them to successfully implement the TRIPS Agreement. Based on these self-assessments, it was thought that developed countries should then have been able to provide effective technical and financial assistance to LDCs. Some NGOs and other commentators criticised the priority needs assessment process as being merely a delaying tactic used by developed country members to further postpone honouring their promises of assistance. These critics also claimed that LDCs would be forced to spend already scarce resources on collecting data and information regarding the status of their implementation of the TRIPS Agreement.

Most WTO members, however, considered these self-assessments as a valuable exercise that allowed LDCs to table concrete and specific demands which could create the political momentum needed to mobilise potential international donors as well as raise awareness and commitment among the internal institutions and stakeholders in the beneficiary country. Unfortunately, the WTO members did not specify any formal requirements or a particular mechanism for the conduct and submission of these priority needs assessments by LDCs. Likewise, it was not specified who should be funding and conducting these stocktaking exercises. As a result, the priority needs assessments submitted thus far differ significantly in structure, quality, scope and analytical reasoning. From a development aid perspective, many of the proposed implementation plans did not meet the standards and principles of aid effectiveness that have been developed over recent decades (e.g. in the 2005 Paris Declaration on Aid Effectiveness). There also appears to be a certain disconnect, between LDCs and potential donors as to the overall objectives of the priority needs assessment. While the LDCs' requests mainly focus on the establishment of a national IP system that is beneficial to the country's socio-economic development, some donor countries believe that technical and financial assistance should be primarily targeted at bringing LDCs' intellectual property laws and institutions into compliance with the obligations under the TRIPS Agreement.

The vagueness and ambiguity of the priority needs assessment process has hampered its effectiveness. Only nine out of a total 33 LDC WTO members have so far been in a position to submit such individual requests for technical and financial assistance (Sierra Leone, Uganda, Bangladesh, Rwanda, Tanzania, Senegal, Mali, Madagascar, and Togo). On the other hand, these previous submissions did not trigger substantial technical and financial assistance from the industrialised countries, which led to some frustration among the potential beneficiaries.

A second transition period extension for LDCs till 2021

Shortly before the deadline of 1 July 2013 was about to expire, a hard-fought debate took place in which LDCs requested an unconditional extension with an unlimited time frame. There was also widespread support among developed countries for a further extension, but concerns were raised about an open-ended time frame. In the TRIPS Council meeting of 11–12 June 2013, WTO members granted LDCs a second extension of the transition period for another eight years till 2021. Interestingly, no reference was made to the priority needs assessment process or to the provision of technical and financial assistance.

Although the LDCs did not succeed with their request for an open-ended extension of the transition period, agreeing on another extension of the transition period seemed to be the only pragmatic next step, given that neither side had considered LDCs' TRIPS implementation as a priority. As most of the LDC WTO members have not yet addressed the issue domestically, it seemed premature to expect these countries to be ready to implement the TRIPS Agreement by mid-2013. Conversely, developed country members have to date mainly focused on shielding themselves from requests for unspecified technical and financial assistance (the first round of priority needs

assessments has revealed the extent of their unpreparedness). Instead, they targeted their efforts on encouraging full implementation of the TRIPS Agreement in emerging markets where powerful economic interests are at stake and where they could reap significant benefits from having a functional IP system in place. Granting all LDCs an unconditional extension of the transition period for another eight years was therefore a convenient way for all parties to buy time and to avoid potential conflicts in other areas of trade.

Towards a more gradual and development-oriented IP reform in LDCs

An ongoing TRIPS waiver without considerable efforts to bring LDCs into compliance with the Agreement would lead to a further postponement of LDC's integration into the international IP system. As a consequence, LDCs would be further excluded from international investment and technology transfer flows and continue to play a minor role in the global knowledge-based economy. Therefore, alternatives to simply offering further extensions of the transition period should be seriously discussed and adopted by the TRIPS Council.

WTO members should reinvigorate and refine the existing priority needs assessment process in order to make it more efficient, transparent and predictable. LDCs can only be expected to undergo such an internal stocktaking exercise if they have reasonable expectation to actually receive technical and financial assistance under Article 67 related to technical cooperation. There is still a need for greater coordination on the national and multilateral levels in order to provide further incentives for all WTO members to engage in this process and to trigger increased technical and financial assistance for LDCs. Most developed country WTO members seemed to recognise this fact, with many delegations expressing their concern that without adequate coordination there was the very real risk of duplication of effort and, ultimately, a lack of sustainable impact. The establishment of a coordination mechanism as well as the creation of a multilateral fund for IP-related technical and financial assistance would play a crucial role in this regard. The TRIPS Council has already identified the Enhanced Integrated Framework (a multi-donor initiative of the IMF, ITC, UNCTAD, UNDP, World Bank, and WTO), as a potential multilateral mechanism for the coordination of IP-related technical and financial assistance. It will now require much effort as well as some additional fine-tuning to further promote this promising avenue.

As the establishment of an effective national IP system requires a broad consensus among various national stakeholders, LDCs should align their national IP policies with their national development plans. While substantial IP-related technical and financial assistance has been provided to emerging economies in recent years, the track record in LDCs is still very limited. Additional studies on the socio-economic impact of TRIPS in LDCs and the development of best practices in technical assistance would be crucial in convincing national development cooperation agencies to redirect development aid to IP-related projects. Future research should also focus on collecting empirical data about the IP systems of the world's poorest countries as well as on adapting existing IP policies to serve the needs of LDCs.

Taking into account that most LDCs do not have the resources to implement the TRIPS Agreement in its entirety, and the legitimate question of whether this would even be desirable given their limited innovative and administrative capacity, it is unrealistic to expect LDCs to establish a functioning fully-fledged IP system similar to the ones operating in developed or even middle-income countries. Hence, it might be more practicable to apply a gradual and development-oriented approach. IP-related technical and financial assistance should primarily focus on those areas that are essential for the countries' socio-economic development and that pave the way to a more stable, innovative and productive economy. Several LDCs have already taken this into account in their national IP policies and these efforts should be further strengthened. Introducing a basic but efficient system for the protection of national trademark holders, for instance, would support the establishment of non-informal small enterprises in LDCs, while a basic mechanism for collecting and disbursing copyright royalties would strengthen the position of domestic artists. Given the limited resources of LDCs, the implementation cost of each reform step needs to be carefully considered as well. The management of a sophisticated patent examining system, for example, would overstretch the capacities of most LDCs.

A development-oriented and properly sequenced IP reform will reduce potential negative socio-economic effects and

allow LDCs to integrate more smoothly into the global IP system. It will also contribute to a sound business environment and increase LDCs' ability to attract foreign investment, know-how and modern technology. This would allow the poorest countries to increase their productivity, to build up their domestic technological base, to achieve market diversification and to shift towards higher value-added products and services.

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This text is partly based on the following more comprehensive book chapter: Hold, Arno and Bryan Mercurio, 'A Second Extension of the Transition Period: Can the WTO Better Integrate LDCs into TRIPS?', in: Mercurio, Bryan and Ni, Kuei-Jung (eds.), Science and Technology in International Economic Law: Balancing Competing Interests, Routledge, 2014.

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