

EXTENSION OF TRIPS TRANSITION PERIOD FOR THE LEAST DEVELOPED COUNTRIES (LDCS): NEW OPPORTUNITIES, NEW CHALLENGES

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Abstract

This article examines the new opportunities and challenges emanating from the second extension of Trade Related Aspects of Intellectual Property Rights (TRIPS) transitional period for the Least Developed Countries (LDCs). TRIPS has been adopted in 1994 for the protection of Intellectual Property (IP). TRIPS agreement is based on the principles of 'Most Favoured Nation' (MFN) and 'Nationality Treatment'. However, given the socio-economic conditions of the least developed countries TRIPS has included the provision for the period of transition and flexibilities for its effective implementations in those countries. The transitional period of TRIPS has so far extended for two times. The last extension was adopted in 2013 for the LDCs to implement the TRIPS agreement by 2021. This article attempts to explore the politico-economic context for providing transitional extension to LDCs, the basic issues of TRIPS flexibilities, major new opportunities emanating from TRIPS extensions to the LDC countries. The paper also discusses about the new challenges that LDCs will face after the adoption of second extension. And finally, the paper presents some recommendations about how to best utilize the second TRIPS extension period with regard to the implementation of TRIPS provisions in the Least Developed Countries (LDCs).

Introduction

On June 11, 2013, members of the World Trade Organization (WTO) agreed to extend eight years of deadline for the Least Developed Countries (LDCs) to implement the TRIPS agreement for the protection of Intellectual Property. The new deadline for LDCs to implement TRIPS is July 1, 2021. The new extension is highly critical for LDC countries which has been the outcome of the intensive consultations and heated debates over the years among developed and LDC countries and members of TRIPS council.¹ Article 66 of the TRIPS agreement

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¹ The Council for TRIPS is the body, open to all members of the WTO, that is responsible for administering the TRIPS Agreement, in particular monitoring the operation of the Agreement. Article 68 of TRIPS stipulates the mandate of TRIPS council is that: The Council for TRIPS shall monitor the operation of this Agreement and, in particular, Members' compliance with their obligations hereunder, and shall afford Members the opportunity of consulting on matters relating to the trade-related aspects of intellectual property rights. It shall carry out such other responsibilities as assigned to it by the Members, and it shall, in particular, provide any

during its inception has provided additional time to the developing and LDC countries to adopt national legislations and practices and develop institutions in order to administer intellectual property protections. Since the adoption of TRIPS agreement in 1995, the first transition period has given until 2000. After the expiry of the first extension in 2000, developing countries were entitled to implement the TRIPS agreement. The second transition period from 2000 to 2005 allowed certain developing countries in the rank of LDCs to delay providing product patent protection in the areas of technology that had not been so protected at the time of the TRIPS Agreement coming into operation in that country. The year of 2005 marked the expiry of transition period for many developing countries. The TRIPS transition has also expired for the competent pharmaceutical sectors in many developing countries that are engaged in competition in the medicine markets in regard to the supply of generic versions of patented drugs to the LDCs. For LDCs, TRIPS granted the transition period until 2006 to implement their obligations under the TRIPS agreement. On the issue of pharmaceutical products and rights in using pharmaceutical test data, the LDCs were given a further extension time until 2016. It is evident that, the new extension period for TRIPS Transition is for eight years which is longer than the extension period provided in 2005. This is regarded as triumphal achievements for the LDCs. This has happened mainly because of the intensive negotiations by LDCs group led by Nepal. The proposal was fully supported by the developing countries and civil society groups from all around the world. In November 5, 2012 a communication from Haiti on behalf of the LDC group titled as "Request for an Extension of the Transitional Period under Article 66.1 of the TRIPS Agreement" submitted in WTO TRIPS Council argues that:

The least developed country Members of the WTO represents the poorest and weakest segment of the international community. The economies of least developed country Members are extremely vulnerable, with large segments of their population living in poverty. The situation of LDCs has not changed significantly since the last extension decision in 2005. LDCs continue to play a very marginal role in the world economy, and their growing integration in the global market has been accompanied by very limited advances (if any) in their relative position compared with the rest of the world.²

assistance requested by them in the context of dispute settlement procedures. In carrying out its functions, the Council for TRIPS may consult with and seek information from any source it deems appropriate. In consultation with WIPO, the Council shall seek to establish, within one year of its first meeting, appropriate arrangements for cooperation with bodies of that Organization. Visit <http://www.wto.org/english/docs_e/legal_e/27-trips_09_e.htm> (accessed on May 13, 2014).

² WTO, Council for Trade-Related Aspects of Intellectual Property Rights, Communication No: IP/C/W/583, November 5, 2012, available at <http://www.wto.org/english/tratop_e/trips_e/ta_docs_e/7_1_ipcw583_e.pdf> (accessed on May 12, 2014)

In this communication, LDCs also requested for an extension of the transitional period (that ended on July 1, 2013) for as long as the WTO Member remained as least developed country.³ However, TRIPS council rejected that proposal and has granted eight years of extension. The TRIPS Council argued that the extension was justified as the TRIPS Agreement (Art. 66) states that the TRIPS council shall grant LDCs further extension of the transition period, upon due request. The decision on June 11, 2013 was significant as it has removed the condition introduced in the earlier 2005 decision for TRIPS extension that LDCs cannot roll-back. This means that the LDCs cannot roll-back⁴ the level of implementation of the TRIPS agreement that they have already undertaken in their national legislations. The exclusion of roll-back clause was objected by the developed nations and as a compromise the LDCs will express their determination to preserve and continue the progress towards implementation of the TRIPS Agreement.

In this backdrop, this article explores the benefits that LDCs can get from the TRIPS extension. This article also examines the challenges LDCs will have to deal for the full exploitations of these benefits. Therefore, the article is divided into four sections including introduction. Section 1 explores conceptual aspects regarding the least developed countries and the political economy context for providing transitional benefits under TRIPS Agreement. Section 2 discusses about the opportunities and benefits to LDCs emanating from the new extension of TRIPS. Section 3 explores new challenges to LDCs to get full benefit from the TRIPS extension and finally the last section provides some recommendations for the utilization of new extension for the LDCs.

Defining Least Developed Countries (LDCs) and Political Economy Context for Providing Transitional Benefits to these Countries under TRIPS Agreement

In the face of increased counterfeiting of intellectual property and copyright piracy all over the world in the 1980s, industrial sectors from developed countries have become concerned about their losses and wanted to introduce adequate protection of their intellectual property rights abroad. Industries like computer software, microelectronic, entertainment, chemicals, pharmaceuticals and biotechnologies had been developed their network in many developed and developing countries to adopt protection of IP in the multilateral trade negotiation under the General Agreement on Tariffs and Trade (GATT) framework. GATT was

³ *ibid*, p. 2.

⁴ “Rollback” would be when a least developed country that already complies with intellectual property protection under the TRIPS Agreement in some form (for example protecting trademarks) reduces the level of compliance (for example no longer protecting trademarks). Use of flexibilities allowed under the TRIPS Agreement — such as introducing “compulsory licensing” to bypass some rights of patent holders — would not be “rollback”.