



7 | Intellectual property policy-making

The TRIPS Agreement

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is, to date, the most comprehensive multilateral agreement on intellectual property (IP). It provides for basic principles such as non-discrimination, sets forth minimum standards of protection in several areas of the law, contains provisions that deal with domestic procedures and remedies for IP enforcement, and makes TRIPS obligations and disputes between members subject to the WTO's dispute settlement procedures.

The TRIPS Agreement has catalysed updates or reforms to IP legal frameworks in certain WTO members, especially in developing countries. The Agreement's rules, although not currently binding on LDCs, have served as a basis to create opportunities for economic operators in Africa to enhance innovation and creativity within their countries and to expand globally. For example, the creative and entertainment industry in Rwanda has found ways to optimize the use of global platforms (ITC, 2019) existing within the framework of copyright law regimes in order to reach a global audience, and Rwanda continues to pursue an agenda for enhancing the digital economy and creative industries.

Beyond the creative industry, the implementation of TRIPS rules on geographical indications (GIs) has enabled economic operators in Morocco, for example, to register and market GIs both within and outside of Morocco. Thus, as of 2011, Argane, an oil typically used for culinary, cosmetic and medicinal purposes, has become a protected GI in the European Union.¹

However, notwithstanding IP legal and policy frameworks in place, many African countries face problems with counterfeit trademark and pirated copyright goods; for example, in 2009 it was estimated that up to 85 per cent of the Nigerian wax-resist textile market had been taken over by counterfeits (Castonguay, 2009). A more effective enforcement of IP rules could help to reduce the quantity of counterfeit and pirated goods in domestic markets.

At the multilateral level, the African Group at the WTO has taken an active role in IP policy discussions at the TRIPS Council, including on topics related to the following:

- IP and public health;
- IP and the public interest;
- IP and innovation;
- A proposed amendment to the TRIPS Agreement involving the disclosure of the source of genetic resources and associated traditional knowledge in patent applications;
- A multilateral GI register for wines and spirits;
- An extension of the protection of Article 23 of the TRIPS Agreement to GIs for all products; and
- Non-violation and situation complaints under the TRIPS Agreement.

The African Group at the WTO has taken an active role in IP policy discussions.

Transition periods under the TRIPS Agreement

Article 66.1 of the TRIPS Agreement gives LDCs an extended transition period to apply the TRIPS Agreement, except for non-discrimination principles. Following a TRIPS Council decision in 2013, this general transition period currently runs until 1 July 2021, or until a country ceases to be in the least-developed category, if that occurs before 2021.

Based on the Doha Declaration of November 2001 and on subsequent TRIPS Council decisions, LDCs will continue to benefit from an extended transition period until 1 January 2033 with regard to pharmaceutical patents and test data protection for pharmaceutical products (including enforcement procedures and remedies). The transition period potentially offers opportunities for these countries to attract investment for the local production of pharmaceutical products. A joint report of the WTO and the EIF (WTO and EIF, 2020) contains further information on transition periods under the TRIPS Agreement in the context of LDC graduation.

Some LDCs have taken measures or adopted policies to take advantage of the transition periods in order to foster local pharmaceutical production. For example, the 2013 EAC regional IP policy on public health-related TRIPS flexibilities encourages IP policies which would, in its view, facilitate local pharmaceutical production (East African Community Secretariat, 2013). EAC guidelines to facilitate the movement of goods and services during the COVID-19 pandemic also have as an objective encouraging the local production of essential products during the COVID-19 pandemic (East African Community Secretariat, 2020). Uganda, for example, undertook a legislative reform process which took into account public health objectives and local pharmaceutical production (UNCTAD, 2011).

The Doha Declaration on the TRIPS Agreement and public health

The African Group has historically played an important role in public health-related trade and IP policy discussions at the WTO. In 2001, the African Group proposed that the WTO convene a special session of the TRIPS Council to initiate discussions on the interpretation and application of the relevant provisions of the TRIPS Agreement, with a view to clarifying the flexibilities to which members are entitled and, in particular, to establish the relationship between intellectual property rights and access to medicines.

These discussions led to the adoption of the Doha Declaration on the TRIPS Agreement and Public Health at the WTO Ministerial Conference in 2001 ("the Doha Declaration"). Members affirmed in the text of the Doha Declaration that the TRIPS Agreement "can and should be interpreted and implemented in a manner supportive of Members' right to protect public health and, in particular, to promote access to medicines for all". The Doha Declaration also clarified certain flexibilities within the framework of the TRIPS Agreement.

The Doha Declaration was also the basis for an amendment to the TRIPS Agreement that took effect in 2017. This amendment, which responds to a request by the African Group, was the first ever amendment to the WTO multilateral trade agreements. The additional flexibility, referred to as the Special Compulsory Licensing System, establishes a secure and permanent legal pathway for developing countries with insufficient or no local manufacturing capacities to access affordable medicines from third-country generic suppliers. In the only case of use so far, the special compulsory licence for export was used by a Canadian company to deliver medicines to Rwanda.

The Special Compulsory Licensing System expressly provides for the possibility of harnessing economies of scale in the context of its provisions on regional trade agreements. The purpose is to enable parties to a regional trade agreement that meets certain criteria to pool their needs in order to enhance purchasing power and to reduce costs, as well as facilitate local manufacturing of pharmaceutical products. It also refers to the possibility for parties to such agreements to make joint notifications.

The Special Compulsory Licensing System is one legal pathway that can be followed, but, as with any compulsory licence, it does not in itself make the production of a medicine economically viable. Sufficient scale and predictability of demand are prerequisites for making it attractive for companies to take the regulatory, industrial and commercial steps required to produce and export a medicine under such a licence. Regional approaches to procurement and joint notifications by countries with similar needs for accessible medicines offer pathways to aggregating demand under the Special Compulsory Licensing System and can provide incentives to establish local production capacities, thus enabling an effective response to the needs identified. For example, after accepting the amendment to the TRIPS Agreement, South Africa expressed an intention to engage with regional partners to make effective use of the regional waiver contained under the Special Compulsory Licensing System.²

The WTO Secretariat, recognizing the intersection between IP and public health, offers regional and sub-regional capacity-building activities. For example, a new pilot regional workshop on public health, intellectual property and public procurement for UEMOA members was held in July 2019 in Dakar, Senegal. This workshop focused on the relationships between health-related government procurement, international trade and IP systems. The objective was to build capacity to enhance access to medicines needed in the region. This activity brought together representatives from trade and health ministries, IP offices and procurement agencies, as well as experts from multilateral and regional organizations. The workshop notably covered the special compulsory licence system and concluded with a roundtable discussion on regional efforts for the procurement of and access to health technologies.

IP law and policy capacity-building

The TRIPS Agreement specifically addresses the issue of capacity-building in the area of IP law and policy. Article 67 of the TRIPS Agreement requires developed-country members to provide, on request and on mutually agreed terms and conditions, technical assistance for the benefit of developing-country and LDC members. Developed-country members present descriptions of their relevant technical and financial cooperation programmes and update them annually. Members from the African region are generally included among the beneficiaries of these programmes. For example, in 2019, the European Commission funded a programme at the Organisation Africaine de la Propriété Intellectuelle (OAPI), which aimed to promote IP to foster the creation of new plant varieties adapted to the African market and to provide an incentive to make superior varieties existing elsewhere available to the OAPI member countries.³

The WTO Secretariat, often jointly with the World Intellectual Property Organization (WIPO), has held activities to enhance IP law and policy-making capacity in the African region. Two jointly held Geneva-based IP technical assistance activities, the WIPO-WTO IP Advanced Course for Government Officials and the WIPO-WTO Colloquium for Professors of IP, regularly include participants from the region; for example, in 2019, the combined participation from the 12 participating African countries comprised on average around 26 per cent of all participants.

To foster the contribution of IP scholarship to IP law and policy-making in the regional context, in 2018 WIPO and the WTO held a “Colloquium for IP Teachers and Researchers in Africa” in South Africa. The regional nature of the colloquium emphasized the importance of building indigenous policy capacity and facilitated the inclusion of African perspectives on IP policy-making and development in the region.

The WTO Secretariat, often jointly with WIPO, has held activities to enhance IP law and policy-making capacity in the African region.

The WTO Secretariat has been involved in multi-stakeholder initiatives to support an effective and balanced IP enforcement system in Africa.

A TRIPS Council decision of 2005 included a call for LDCs to provide information on their priority needs for technical and financial cooperation in order to assist them in taking the steps necessary to implement the TRIPS Agreement. In response, between 2007 and 2013, African LDCs Madagascar, Mali, Rwanda, Senegal, Sierra Leone, Tanzania, Togo and Uganda submitted information on their individual priority needs.⁴ Numerous follow-up WTO workshops have been held to help LDCs to initiate contact with developed countries as a means to begin addressing the priority needs identified by those LDCs. These included two regional workshops in 2010 for government officials.⁵

The WTO Secretariat has also been involved in multi-stakeholder initiatives to support an effective and balanced IP enforcement system within the region. For example, in 2017 a conference, at which African countries were well-represented and which was jointly organized by South Africa's Companies and Intellectual Property Commission (CIPC), INTERPOL (the International Criminal Police Organization), the World Customs Organization (WCO) and the WTO, explored issues such as the economic value of IP, the public interest rationale for IP protection and enforcement and a number of the specific challenges that various actors face regarding effective and balanced IP enforcement.

The TRIPS Agreement and technology transfer to African LDCs

The TRIPS Agreement recognizes that LDC members have special needs for maximum flexibility for their domestic implementation of IP laws and regulations. Article 66.2 of the TRIPS Agreement requires that developed-country members provide incentives to enterprises and institutions within their territories for the purpose of promoting and encouraging technology transfers to LDC members, to enable LDCs to create a sound and viable technological base.⁶ In 2003, the TRIPS Council adopted a decision on the "Implementation of Article 66.2 of the TRIPS Agreement" that put in place a mechanism for ensuring the monitoring and full implementation of the obligations in question. Under this decision, developed-country members annually submit reports on projects or programmes taken or planned in pursuance of their commitments under Article 66.2.⁷

From 2003 to 2016, African LDCs were mentioned as beneficiaries in at least one of these reports (Watal and Caminero, 2018). This indicates which LDCs benefit most regularly from projects implemented under TRIPS Article 66.2. The projects and programmes in these reports cover a range of sectors, such as the environment, public health, IP, agriculture and food, energy and education.

For example, a project funded by Australia in 2019 included the Green Climate Fund, an international fund for assisting countries' responses to climate change. This programme listed the following WTO LDC members and observers as beneficiaries: Angola, Benin, Burkina Faso, Burundi, Cabo Verde, the Central African Republic, Chad, the Democratic Republic of the Congo, Djibouti, The Gambia, Guinea, Guinea-Bissau, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Niger, Rwanda, Senegal, Sierra Leone, Tanzania, Togo, Uganda and Zambia.⁸ As reported by Australia, one of the outputs of this activity was to support beneficiaries in limiting or reducing their greenhouse gas emissions and in adapting to the adverse impacts of climate change.

In another example, the European Union has contributed funding via the EU Horizon 2020 research and innovation programme to WATERSPOUTT, a project that aims to provide safe drinking water to communities that rely on unsafe sources by using technological applications based on solar disinfection. The LDC beneficiaries are Ethiopia, Malawi and Uganda.⁹

Since 2008, the WTO Secretariat has held workshops for LDCs and developed-country members to discuss the implementation of Article 66.2 of the TRIPS Agreement, to improve the practical effectiveness of the TRIPS technology transfer transparency mechanism, and to facilitate related policy dialogue in the TRIPS Council.

In 2019 and 2020, these workshops involved the participation of 26 government officials with particular expertise on intellectual property and technology transfer issues from 14 African LDCs. LDC participants discussed their priority needs for technological development and their experience with technology transfer projects. Developed-country participants discussed the main aspects of their programmes to incentivize technology transfer to LDCs. The African Regional Intellectual Property Organization (ARIPO) and the OAPI played a key role in these workshops by presenting their respective initiatives to facilitate technology transfer and technological development in the region and exploring possible ways to enhance collaboration among stakeholders. ARIPO also offered a number of possible suggestions related to the implementation of TRIPS Article 66.2.

During the workshops and subsequent TRIPS Council discussions, LDCs and developed-country members exchanged various suggestions to help enhance the dialogue on the implementation of TRIPS Article 66.2, including the idea of designated focal points in LDCs to carry out the tasks of surveillance of and follow-up on the implementation.

African LDCs have benefited from projects aimed at promoting technology transfer from developed to developing WTO members.

1 See the European Commission's eAmbrosia GI register at <https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/geographical-indications-register/>.

2 See the keynote address by Dr Rob Davies, Minister of Trade and Industry of South Africa, available at WIPO/IPDA/GE/16/T3.

3 See WTO official document number IP/C/W/655/Add.6.

4 See "Responding to least developed countries' special needs in intellectual property", available at https://www.wto.org/english/tratop_e/trips_e/lcdc_e.htm.

5 See "Responding to least developed countries' special needs in intellectual property", available at https://www.wto.org/english/tratop_e/trips_e/lcdc_e.htm.

6 Watal and Caminero (2018) examine the background to Article 66.2 of the TRIPS Agreement, the nature of this obligation for developed-country members pertaining to the promotion of technology transfers to LDC members, how this obligation is being implemented and how such implementation is being monitored in the TRIPS Council.

7 These reports are publicly available from the WTO Documents Online database (<https://docs.wto.org/>) and from the e-TRIPS Gateway (<https://e-trips.wto.org/>). Via the e-TRIPS Gateway, it is possible to search the reports according to the beneficiary LDC mentioned in the report, the year of the report and the reporting developed-country member, among other criteria.

8 See WTO official document number IP/C/W/656/Add.3.

9 See WTO official document number IP/C/W/656/Add.5.