



WTO TWENTIETH ANNIVERSARY ACCESSIONS PROGRAMME

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Panel 4: Salient Features in WTO Accession Protocol

Geneva, Tuesday 29th September, 2015, 15:30-15:45, Room D

1. Thank you very much. It is indeed a privilege to be able to present in front of you during this 2nd Global Seminar on WTO Accessions.
2. My statement is based on the key elements and findings of the book chapter co-written with Joan Apecu - *Intellectual property rights protection: the plus/minus debate from a least developed country perspective* from the book "WTO Accessions and Trade Multilateralism: Case Studies and Lessons from the WTO at Twenty".
3. Please also allow me to also add that this statement is made in my individual capacity in the context of research undertaken specifically for this chapter and therefore does not represent the views of WIPO or its Member States.
4. The key question examined in the chapter was :Do distinctions exist between the original WTO LDC members and the seven Article XII LDCs in respect of their obligations under the WTO TRIPS Agreement? And if so, what are the implications at the domestic and multilateral level?
5. The core findings from the assessment of accession documentation including the Accession Protocols of the 7 Article XII LDC members reveal the following:
 - Distinctions do exist amongst the original and seven Article XII LDCs namely Nepal, Cambodia, Cabo Verde, Samoa, Vanuatu, Lao PDR and Yemen in context of TRIPS Agreement obligations.
 - The commitments accepted by Article XII LDCs, in some respects, go beyond the original requirements of the TRIPS Agreement and therefore beyond the TRIPS Agreement obligations of original LDC members.
 - The areas where distinctions exist with respect to IP obligations can be divided into: (i) Systemic Issues (particularly relating to transition periods) and (ii) Substantive intellectual property rights provisions/obligations.
 - And finally, the assessment of these intellectual property rights obligations by Article XII LDCs affirms the following outcomes:
 - There is "locking in" of positive institutional and structural reforms in the national intellectual property systems of Article XII LDCs which is facilitated by the provision of structured, needs based IP technical assistance which is seen as an integral part of the WTO accession process for LDCs.
 - Secondly, the IP obligations taken on by Article XII LDCs have resulted in the reinforcement and strengthening of the rules based multilateral IP system.
6. I will go in to greater detail on all of the above points.



Systemic Issues

7. Allow me to turn to the first area of assessment of intellectual property rights obligations which focuses on Systemic Issues:

8. The assessed systemic issues relate to the transition periods for the implementation of the TRIPS Agreement namely (i) Transition period relating to the full implementation of the TRIPS Agreement (except articles 3, 4 and 5) and (ii) Transition periods for the protection of pharmaceutical patents and undisclosed data.

9. The transition period for original LDC members with regard to the full implementation of the TRIPS Agreement is grounded in TRIPS Article 66.1 which includes the recognition of special needs and requirements of LDCs and an in built transition period until 1 January 2006 with the possibility of extension upon "duly motivated requests".

10. Two TRIPS Council transition period decisions in 2005 and 2013 resulted in further extensions of the transition period. The current transition period for full implementation of the TRIPS Agreement ends in 1 July, 2021.

11. Therefore, the total length of the transition period for TRIPS Implementation for original LDCs is 24.5 years as a result of these transition period extension decisions*

12. (1 January 1996 was used as the effective date of Agreement and 1 July 2021 as end of the transition period)

13. On the other hand, the transition periods for Article XII LDC members for full implementation of the TRIPS Agreement are individually negotiated and found in the Working Party reports.

14. The approx. average length of transition period for full implementation of the TRIPS agreement for Article XII LDCs is 2 years 9 months which is significantly less than the transition period for original LDCs.

- Further, Article XII LDCs have undertaken commitments during their transition periods, which can be seen as going beyond requirements of the TRIPS Agreement and that of original LDCs which do not have such obligations. Examples of such commitments include:
 - Not granting patents, trademarks or copyrights, or marketing approvals for pharmaceuticals or agricultural chemicals inconsistent with the provisions of the TRIPS Agreement (Cambodia, Vanuatu);
 - Ensuring that existing rates of infringement would not significantly increase and that any infringement of IP rights would be immediately addressed (all Article XII LDCs)
 - Making available all legislation in draft and promulgated form (Cabo Verde, Cambodia, Lao PDR, Nepal, Samoa and Yemen); and
 - And of course all Article XII LDCs have to implement the Action Plans geared towards full TRIPS Agreement implementation as found in the Working Party Reports during their transition periods.

15. The second systemic issue relates to the transition period for the protection for pharmaceutical patents and undisclosed data protection.

16. The transition periods for original LDC members stems from the Declaration on the TRIPS Agreement and Public Health (2001) which reaffirmed that the TRIPS Agreement can and should be interpreted in a manner supportive of members' right to protect public health including the use of flexibilities and instructed member states to extend LDC transition period for protection and enforcement of patent rights and undisclosed information in the field of pharmaceuticals.



17. This led to the TRIPS Council Decision in 2002 which extended this transition period until 1 January 2016 along with a General Council Waiver decision dealing with exclusive marketing rights.

- With regard to Article XII LDC members, references to the Doha Declaration on the TRIPS Agreement and Public Health (2001) are found explicitly in the Working Party Reports of Nepal, Cabo Verde, Samoa, Lao PDR and Yemen.
- The right of Cambodia to avail itself of the benefits under the Doha Declaration on the TRIPS Agreement and Public Health was confirmed during the Cancún Ministerial by a statement.
- There is no explicit reference to the Doha Declaration on the TRIPS Agreement and Public Health (2001) in Vanuatu's Working Party Report.

18. Therefore, the transition period for pharmaceutical patent protection and undisclosed information (except for the case of Vanuatu) can be seen as similar to those of original LDCs that is until 1 January 2016 by virtue of the inclusion of the reference to the Doha Declaration on the TRIPS Agreement and Public Health.

19. These variations in context of systemic issues such as transition periods opens up potential avenues for further research and clarity particularly an assessment of the **hierarchy of norms** within context of Article XII LDCs and IP obligations.

For example, some issues which could be further analyzed include:

1. Is there automatic recourse to IP S&D provisions including TRIPS Council Decisions?
2. Is there automatic recourse to future S&D provisions and what are the implications of any post accession TRIPS Council Decision on the transition period deadline for an Article XII LDC?

Specific substantive IP Provisions

20. The second area of assessment of intellectual property rights obligations deals with the specific substantive provisions for IPR protection which are part of the legal commitments made during the accession process.

21. An overview of the working part reports reveals that in some instances, Article XII LDCs have undertaken specific legislative commitments, which differ from original LDCs who do not have such legislative commitments.

22. In particular, the working Party Report of Yemen includes a number of specific legislative commitments including on the interpretation of an article in the national Patent Law, the deletion of an article in its law "On Trademarks and Geographical Indications" and further four specific points regarding the specificities of the implementing regulations of its copyright law.

23. A second substantive issue relates to the accession to other international treaties which is seen as being "TRIPS plus" and therefore more stringent than the TRIPS Agreement obligations of original LDC members.

Some examples of specific commitments in this area include:

- Cambodia indicated to adhere to the WIPO Copyright Treaty (WCT) the WIPO Performances and Phonograms Treaty (WPPT) and the Patent Cooperation Treaty by 2005. Additionally, the membership of UPOV¹ "Not Later than 1 January 2006" is also included in the Working Party Report Action Plan.
- Vanuatu also committed to become a member of UPOV by no later than 1 December 2012.

¹ International Union for the Protection of New Varieties of Plants



All these treaties are seen as beyond the requirements of the TRIPS Agreement.

Therefore, the mentioned issues illustrate areas where Article XII LDCs are seen to have undertaken substantive IP commitments beyond those of original LDCs as part of their WTO accession process.

Domestic reform

24. After presenting this overview of the comparative assessment exercise I will now touch upon the national implications of these IP commitments and particularly how they relate to the intellectual property domestic reform process in Article XII LDCs.

25. In this context, it is pertinent to recall that the average length of the 7 Article XII LDCs' accession process is 13 years which signifies that accession commitments are linked to a wide ranging domestic legal, institutional and administrative reform process. In particular, the IP reform process is comprehensive includes issues ranging from IP administration, creation of institutions, enforcement, and human resource training.

26. There is also evidence that post accession IP reform was anchored in National Development plans of the Article XII LDC members for example in Lao PDR's Seventh Five Year National Socio-Economic Development Plan and Cambodia's National Strategic Development Plan.

27. Further, the assessment of the accession documentation including the Protocols of Accession in context of intellectual property Rights obligations reveals in built and locked in tools in the accession process for domestic reform in IP.

28. These tools include:

- (i) Action Plans for TRIPS Agreement Implementation which are found in the Working Party reports and are part of the legal commitments undertaken by the Article XII LDCs in the area of intellectual property.

The Action Plans provide a policy and legal framework for domestic implementation and include a specific action and timeframe for implementation, for example the approval of legislation and training. The dates for the implementation of the specific action are negotiated during the accession process.

These Action plans include individual areas of emphasis (e.g. establishment of IP offices (Nepal) and also common areas of emphasis for all Article XII LDCs which include building public awareness for the protection of IP rights, capacity building for key IP personnel and training of enforcement authorities.

- (ii) Additional documents such as the Checklists on TRIPS Implementation also serve as tools and aside from Vanuatu all Article XII LDCs have action plans as separate and more detailed documents. These documents include more detailed assessment of implementation and include details of the technical assistance provider (e.g., IGO, member state)
- (iii) Assessment of compatibility of IP legislation:
 - Question and Answers documents; and,
 - Submission of newly enacted IP legislation.



Technical Assistance

29. A second issue tied to the domestic reform process is technical assistance which is a salient element in the accession process for Article XII LDCs.

30. The IP focused technical assistance in the working party reports is structured, individual and needs based and these provisions are included in all Article XII LDC members Working Party Reports.

31. The Reference that the acceding LDC will seek out all available technical assistance to ensure full implementation of the TRIPS Agreement upon expiry of the transition period is found in all the Working Party Reports of the Article XII LDCs. These provisions ensure that linkages exist between the provision of the technical assistance and the appreciation of the differences in the capacity of the acceding LDCs and the domestic reforms undertaken in the area of IP during and after accession.

32. Further, the Action Plans for TRIPS Agreement implementation include identification of specific areas where technical assistance maybe required based on the individual and specific needs of the acceding country. The inclusion of IP Technical Assistance within the accession process enables a structured and smooth domestic reform process and the integration of LDCs into knowledge economy whilst boosting investor confidence and a stable legal environment in the area of IP.

Multilateral Implications

33. The multilateral implications of the accessions commitments undertaken by the Article XII LDCs have already been discussed by previous speakers but let me just briefly point out the general finding in this area which is that:

34. The commitments undertaken by the Article XII LDCs result in the reinforcement and expansion of multilateral IP rules by in some instances increasing the substantive minimum standards of the TRIPS Agreement whilst simultaneously also setting the scene for potential systemic evolution of the multilateral intellectual property system.

Final Thoughts

35. This assessment of the intellectual Property Rights obligations of LDCs is by no means complete and there is still further room for research and the scope of the research can be greatly expanded as has been mentioned particularly as more LDCs accede to the WTO. In the future, it would also be pertinent to undertake a post transition period assessment and comparison of Article XII LDCs and the original LDCs particularly in context of the developmental impact of their IP obligations.

36. Finally, the "more onerous" or "stringent" IP obligations undertaken by Article XII LDCs can serve as a "testing ground" for their regional neighbors in terms of IP reform and implementing an IP framework. It may serve as a source of encouragement. The experience of the Article XII LDCs can be utilized by other countries with similar socio economic conditions in order to undertake IP reform.

37. In a way, the findings points to the fact that LDCs can undertake obligations to implement the TRIPS Agreement if it is "packaged" the right way and therefore all LDCs would need to be encouraged to constructively engage in building capacity including by utilizing all available technical assistance.