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VOLUME 3, ISSUE 8 – OCTOBER 2014



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Exploring a viable, long-term win-win for LDCs

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Should LDCs seek renewal of the pharmaceutical-related extension at the TRIPS Council?

LDC

Addressing LLDCs' trade challenges through trade facilitation and Aid for Trade

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Are EPA negotiations on the finish line?



International Centre for Trade
and Sustainable Development

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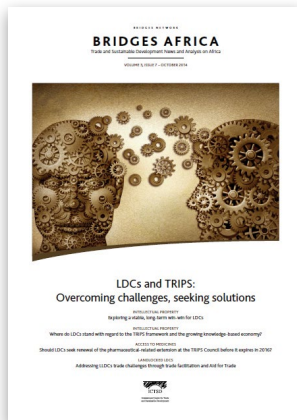
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LDCs and TRIPS: Overcoming challenges, seeking solutions



In today's knowledge-based global economy, innovation is one of the main engines of economic growth, as it enables countries to enhance their productivity and to move up the value chain. In the context of this growth-through-innovation narrative, Least Developed Countries (LDCs) deserve particular attention because of the constraints they face in domestic innovation processes. These constraints manifest themselves also in the area of international trade.

In June 2013, WTO members decided to extend the transition period for LDCs to implement the organisation's rules on intellectual property rights (IPRs) until July 2021.

The extension decision recognises progress towards implementation of the TRIPS Agreement by LDCs. At the same time, it reaffirms their ability to make full use of the flexibilities provided by the Agreement to address their needs, including to create a "sound and viable technological base" and to overcome their capacity constraints.

This month, the Bridges Africa editorial team has chosen to feature various analyses that take a closer and fresh look at the unique challenges facing LDCs in the context of the trade-innovation nexus, including the following questions: Which are the constituent elements of innovation and how can they be harnessed? Where do LDCs stand with regard to the TRIPS framework and the growing knowledge-based economy? What kind of technology-promoting policies exist in LDCs and is there scope for improvement – both at the national and multilateral level? Finally, how can progress with regard to the establishment by LDCs of a "sound and viable technological base" be measured in a more consensual manner?

The dynamics underpinning the IPR and public policy debate are often epitomised by the topic of the protection of patented drugs by LDCs. In 2001, the latter obtained a separate waiver to implement TRIPS provisions on pharmaceutical products until January 2016. Should LDCs seek the renewal of this waiver before it expires, or does the general extension for the TRIPS Agreement until July 2021 already allow for exemptions from patent protection motivated by public health concerns? These and related questions will be addressed in one of the articles of this edition.

Also, in anticipation of the next month's Second United Nations Conference on Landlocked Developing Countries (LLDCs) in Vienna, Austria, this edition sheds light on the kind of deliverables that the WTO has managed to secure for LLDCs.

As always, we welcome your valuable feedback and contributions. Write to us at bridgesafrica@ictsd.ch.

INTELLECTUAL PROPERTY

LDCs and the TRIPS Agreement: Exploring a viable, long-term win-win

Padmashree Gehl Sampath and Pedro Roffe

This article takes the view that a forward-looking approach is necessary to assist least developed countries (LDCs) in bridging their technological gaps and facilitating their transition to the world trading system. What role could the intellectual property system play in facilitating this transition and how could LDCs benefit from their current status in the TRIPS architecture?

Science, technology and innovation play an important role in development. All LDCs are lagging behind in these critical areas which are key drivers for transformation ... LDCs have often not been able to move beyond outdated technologies that characterise their production processes and outputs. Acquiring new technologies and building domestic capacity and a knowledge base to be able to fully utilize acquired technologies and promoting indigenous capacity on a sustainable basis for research and development are needed to enhance productive capacities in LDCs. Furthermore, development of this sector should help to bridge the digital divide and technology gap in support of rapid poverty eradication and sustainable development.❶

The TRIPS Agreement and the special needs of LDCs

As echoed in the LDC 2012 Istanbul Conference, LDCs face major challenges in effectively harnessing science, technology and innovation to advance sustainable development. Most notably, the lack of adequate physical infrastructure and human capital as well as weak institutional capacities undermine efforts by LDCs to take full advantage of the opportunities offered by advances in science and technology, diminishing their chances of becoming active players in the global economic system.

The Istanbul Conference reiterates several of the earlier commitments made in the areas of trade in general (e.g., the WTO Doha Development Round); health (WHO Global Strategy and Plan of Action on Health, Innovation and Intellectual Property (GSPHA)); climate change (the UNFCCC Technology Mechanism), and intellectual property (e.g., the TRIPS Agreement, the Doha Declaration on health and the WIPO Development Agenda).

Since the inception of the WTO's intellectual property framework, LDCs have campaigned for increased policy space given their particular circumstances and the difficulties they face in fostering technological development. These demands, articulated in terms of 'the special needs of LDCs', have received particular attention on several topics, including on the question of ensuring "maximum flexibility in the domestic implementation of laws and regulations in order to enable [LDCs] to create a sound and viable technological base." (TRIPS, Preamble)

The TRIPS Agreement further calls upon developed countries to provide incentives that encourage the greater transfer of technology to LDCs (Article 66.2). The TRIPS Council has made efforts to address this issue, with the result that regular reports have been solicited from developed countries, detailing the measures they have adopted to fulfill this requirement. However, much controversy surrounds the adequacy of the measures reported by these countries with regard to Article 66.2 TRIPS.

Additionally, and most importantly, the TRIPS Agreement granted LDCs an extended transition period of eleven years (until January 1, 2006) for the application and implementation of the Agreement. It also afforded LDCs the ability to request additional extensions to this transition period. Since then, the transition period has been extended twice. In June 2013, the TRIPS Council decided to extend the transition period for LDCs by an additional eight years (until July 1, 2021), or until such time as a the country ceases to

Capability-building stages:

- 1) Perform routine-based activities
- 2) Develop adaptive capabilities
- 3) Ability to reverse engineer
- 4) Conduct R&D-based innovation

be an LDC. It should also be noted that LDCs enjoy an additional special waiver until 2016 with respect to pharmaceutical products.

Furthermore, with respect to the August 30, 2003 Decision on the Implementation of Paragraph 6 of the Doha Declaration and the pending revision of Article 31 *bis*, establishing a special mechanism in benefit of countries "with insufficient or no manufacturing capacities in the pharmaceutical sector," LDCs are presumed "eligible importing countries" as a result of their special status with regard to the implementation of this mechanism.

A number of LDCs are having positive experiences with the use of IPRs (...) as illustrated by Ethiopia's success in commercialising coffee products.

The TRIPS Agreement has also acknowledged the special needs of LDCs in terms of technical and financial cooperation, upon request and on mutually agreed terms and conditions, from the time it gained particular momentum in the 2005 decision regarding the first extension.

Debates during the 2013 TRIPS extension revealed the existence of major information gaps on the practical situation within LDCs and their legal regimes on TRIPS standards. Discussions also exposed the lack of strategy and methodological tools in the TRIPS debates that would permit LDCs to benefit from the existing policy space and to take advantage of the current waivers in order to create a 'sound and viable technological base'.

Any attempt to assist LDCs in their legitimate aspirations to become fully integrated in the international trading system, needs to be cognizant not only of the state of their technological base and by extension, their innovation systems, but also of the existing intellectual property landscape in those countries. Notwithstanding the various provisions that recognise the special needs of LDCs, a large number of countries in this sub-category continue to face immense challenges in using TRIPS-related flexibilities, for gaining access to medicines, education and nutrition. But at the same time, a number of LDCs are having positive experiences with the use of IPRs in other areas, such as trademarks and geographical indications, as a means of protecting and increasing the value of their products as illustrated by Ethiopia's success in commercialising coffee products. There is a need to understand and articulate why and under which circumstances LDCs can make positive use of the TRIPS Agreement so that it is beneficial to their own industrial development. Failing this, discussions on extensions and special provisions are at best imprecise and run the risk of being ideologically tainted.

Measuring 'a sound and viable technological base'

The term 'sound and viable technological base' is not just appealing due to its occurrence in the TRIPS Agreement. It is a term that, in sum, denotes the ability of any economy to promote changes in productive capacity based on technological change. A sound and viable technological base is a pre-requisite for local actors to possess technological absorption capacity, and engage in activities that could lead to learning and knowledge accumulation within local contexts. Technological learning is the means whereby capabilities are built in firms. It involves not only technical learning, but also learning to build the right kinds of organisations and foster the institutional forms in which policies would have the desired impact. Defined in this way, the technological base of any economy would be comprised of the sum of its individual technological capabilities.

Technical change and innovation are largely incremental and vital in promoting growth in productivity. Technical change can generally be categorised into three different kinds:

- First, technical change that involves the introduction of new techniques (products and processes) into the economy through new investments in plants and machinery. This type of technical change broadens the industrial base of the economy.
- Second, technological change involving evolutionary (incremental) improvement to prevailing techniques by effecting technical change to existing products.
- Third, the generation of new knowledge through research within firms or within separate R&D institutions.

Each of these forms of technical change relies on a series of enablers, which are related to a country's knowledge, infrastructure and institutional framework.

Indicators for tracking this process therefore necessarily need to be associated with a set of variables designed to measure the individual and aggregate aspects of technological change in all these three dimensions. These indicators should reflect the requirements of an overall framework for technological change and technology acquisition. Such comprehensive measurements would include:

- Human skills – the number of people attaining secondary and tertiary education, conducting research and other study exchanges, and those returning from studies abroad, as well as the movement of people between enterprises, universities and industries.
- Scientific collaboration – movement between national and international universities and centres of excellence.
- Diaspora and migration of skilled labour – how many members of the diaspora return, in what capacity, and to which sectors of the economy.
- Productive use of remittances - how are diaspora remittances used to spur local entrepreneurship and in which sectors.
- Collaboration between local firms and universities and how IPRs are employed to facilitate commercialisation of products and processes.
- Collaboration between international and local firms, and in which areas - R&D, scientific collaboration or firm-level processes for production.
- Other technological indicators, such as licensing, royalty payments, joint ventures and the number of local patents and related IPR markers of creativity and innovation in general.
- Institutional infrastructure, such as the definition of property rights, contractual structures and other policies that influence the provision of physical and scientific infrastructure.

Table 1 attempts to establish these measurements, highlighting the links between the individual and aggregate indicators of technological change. National ecosystems should provide both sets of indicators as a basis for developing a technological base or in TRIPS parlance, a 'sound and viable base'.

However, the process of creating these capabilities is time-consuming, and countries, firms, and individuals all progress through several stages in the accumulation of knowledge. A starting point in the capability-building process is the ability to perform simple routine-based activities, of the type that for instance, would be entailed in running a production plant or related machinery. Adaptive capabilities are the next stage in this process, comprising the ability not only to perform routine tasks, but also to search for technologies, as required, to improve the efficiency of the routine activities and to apply

them to local needs. This, without being a perfect linear process, is followed by the ability to reverse engineer existing products and processes and create incremental innovations. A final stage in the accumulation of capabilities is characterised by the ability to conduct R&D and develop product and process innovations in-house.

Table 1: Individual and aggregate indicators of technological change

Capabilities	Individual	Aggregate (at the sectoral level)	Aggregate (at the national level)
Knowledge-based	- Successive enrolment rates in secondary and tertiary education	- Number of graduate engineers and scientists - R&D per million USD - Joint R&D projects and international exchange	- Number of graduate engineers and scientists
	- Number of skilled professionals employed locally - Movement of skilled labour	- Articles in scientific and technological journals - Provision of R&D centres of excellence - Public research infrastructure - Enterprise growth with greater focus on R&D	- Articles in scientific and technological journal - Provision of R&D centres of excellence - Public research infrastructure
	- Local patentees/ IPR holders - Licensing, joint ventures and royalty payments	- Per capita investment in R&D - Investments in products and processes Commercialisation - Exports based on local innovations	- Per capita investment into R&D
Infrastructure-based	- Local enterprise investments	- Trade in capital goods - FDI flows into local sectors	- Trade in capital goods - FDI flows into local sectors
		- Physical infrastructure (water, electricity, roads, access to ports and airports for exports)	- Physical infrastructure (water, electricity, roads, access to ports and airports for exports)
		- SEZs, specialised industry complexes, technology incubation and management services	- SEZs, specialised industry complexes, technology incubation and management services
Institutional	- Successive enrolment rates in secondary and tertiary education	- Presence of an overall framework for innovation, investment, IPRs, enterprise development, collaboration, education, research, S&T	- Presence of an overall framework for innovation, investment, IPRs, enterprise development, collaboration, education, research, S&T
	- Return and input from diaspora networks to promote best practices	- Ability to promote coordinated policy incentives	- Ability to promote coordinated policy incentives

In each of these capability-building stages, individuals or firms rely on the presence of the indicators shown in table 1. All three forms of investment – knowledge-based, infrastructure-related and institutional – create viable environments for innovation in a country. At the same time, innovation data and case studies from a wide variety of countries show, that although medium-income countries do not have perfectly functioning environments for innovation, they do have varying levels of innovation capacity, depending on which of the institutional indicators are functioning well. The same applies to LDCs, all of which show varying levels of innovation capacity.

Linking capabilities to the use of intellectual property rights

The prevailing view up until now, which has prevented reaching a consensus building in the WTO, is that LDCs are unable to use IPRs. However, in reality, a number of these countries have already implemented institutions and formal regimes at a level that is formally compatible with TRIPS. While some LDCs still possess antiquated IP laws inherited from the colonial era, others have taken progressive steps to promulgate new IP laws in addition to adopting IP strategies. It also seems that countries at each level of technical change and capabilities are able to either not make use of, or make partial use of the various intellectual property rights under the TRIPS Agreement. Therefore, a partial, gradual and consensual convergence based on the country's level of technological development, would be a fair means of promoting LDCs' inclusion in the TRIPS Agreement. LDCs could continue benefitting from special waivers, such as in the case of pharmaceuticals, or could be exempted from certain aspects of the Agreement, such as in the case of provisions for enforcement and in general with the dispute settlement system.

Simply put, at the first level of simple routine activities, a country would have limited capacity to make full use of the system. However, countries have used and are currently using such instruments as petty patents and other forms of protection to promote incremental and other adaptive innovations. A strong case can also be made for the protection of various forms of indigenous innovations, whether related to traditional knowledge of medicinal plants or other forms of indigenous expressions of art, or as the previously mentioned case of Ethiopia suggests, for making appropriate use of trademarks and geographical indications within global value chains. Countries would then make use of more sophisticated intellectual property rights, such as industrial designs and patents, only when they develop a significant innovation capacity at the local level. Otherwise, in the absence of solid institutions, which also need to be complemented by appropriate competition authorities or an independent and well-endowed judicial system, local firms tend to suffer, as they are unable to compete with large firms, thereby creating long-term barriers to economic catch-up.

Implementing the concepts: Concluding remarks

Implementing a 'sound and viable technological base' as laid out in this article is a feasible option. Most of the indicators listed in table 1 are already available within the countries or can be made available with minimal effort. Assessing the progress of a country's technological capacity would also provide for better information for reviewing and implementing national innovation strategies, in addition to determining a country's ability to gradually align itself with the TRIPS agreement in a way that local industry can also benefit.

By raising some of these issues, the article suggests an approach based upon the notion of 'a sound and viable technological base' of the TRIPS Agreement to assess the *dilemma* of determining the ideal time for a given LDC to be consistent with the TRIPS Agreement. The suggested approach calls for evidence-based deliberations on these matters, with the overarching goal of assisting LDCs in promoting technological change and building their corresponding knowledge, infrastructure and institutional-based components on their own terms.

The international system should encourage and support LDCs through appropriate technical cooperation to make use of intellectual property instruments for their own development and at their own pace. Ultimately, their full transition to TRIPS, if ever, should be transparent, evolutionary, and based on the ground conditions prevailing in those countries.



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① Paragraph 51, Programme of Action for the Least Developed Countries for the Decade 2011-2021, A/CONF.219/7, adopted on 13 May 2011, Istanbul

INTELLECTUAL PROPERTY

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

Arno Hold

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 seven and a half 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

9 OUT OF 33

Nine out of a total 33 LDC WTO members have so far been in a position to submit individual requests for technical and financial assistance (Sierra Leone, Uganda, Bangladesh, Rwanda, Tanzania, Senegal, Mali, Madagascar, and Togo).

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 July 1, 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.

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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INTELLECTUAL PROPERTY

Challenges facing LDCs with regard to TRIPS implementation: The case of Uganda

Elizabeth Tamale

Can Least Developed Countries effectively implement the WTO TRIPS Agreement?

The WTO TRIPS Agreement, which was concluded as part of the Uruguay Round in 1994, sets the international framework for the protection of intellectual property rights (IPRs). These include copyrights, patents, trademarks, industrial designs, plant varieties, and geographical indications among others. Uganda is a founding member of the WTO and is therefore expected to respect the rights and obligations of the TRIPS Agreement.

The Least Developed Countries (LDCs), including Uganda, were given a 10-year transition period from 1995 within which they were not required to implement the TRIPS Agreement other than Articles 3 on national treatment, 4 on most favored nation treatment, and 5 on multilateral agreements on acquisition or maintenance of protection. This means that once an LDC enacts intellectual property laws, any protection offered to one country has to be applied to all WTO members. This was in recognition of their economic, financial and administrative constraints and their need for flexibility to create a sound technological base. The transition period expired in 2005, but was extended by the TRIPS Council from January 1, 2006 to July 2013. The decision called on LDC Members to submit to the TRIPS Council before January 2008 their individual priority needs for technical and financial assistance. Under Article 66.2 of the TRIPS Agreement, developed countries are mandated to provide technical and financial assistance to LDCs to enable them implement the agreement.

Although a few LDCs, including Uganda, submitted their needs to the TRIPS Council, it was apparent that after seven and a half years of transitional period, they were still struggling to implement the TRIPS Agreement. This was mainly due to their limited technical and financial capacity to undertake legal reforms, weak institutions managing IP registration and limited knowledge about IP by the private sector and public agencies. Because of these challenges, the period was extended for another eight years and consequently will expire in 2021.

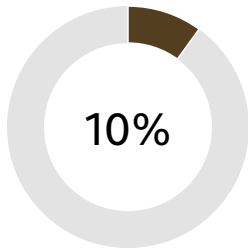
Implementation challenges

By accepting to improve the standards of protection of IPRs as provided for by the TRIPS Agreement, LDCs assume obligations in all areas of intellectual property, which pose financial and technical challenges. Prior to 2000, most of the IP laws in Uganda were dating back to the colonial era or the early sixties. Since 2005, Uganda has made great strides to put in place new intellectual property laws. However, there are still some implementation challenges. These include among others the following:

(i) Using IP for business and innovation

Intellectual property requires high levels of innovation and creativity. Despite considerable research from academic institutions, there has been limited commercialisation of these innovations. Linkages between the private sector and research institutions, which would have fostered the commercialisation of new innovations, are generally weak. As a result there have been limited commercial benefits from innovations.

Trademarks are the most common IPRs registered in Uganda. In 2007, 824 trademarks were registered compared to 85 patents. However, out of these, 565 trademarks (68



In 2011, nationals owned only 127 trademarks out of 1342 registered in Uganda, which represents less than 10 percent.

percent) and 83 patents (97 percent) were foreign owned. Even though the total number of trademarks increased in 2011, out of 1342 trademarks registered, nationals only owned 127, which represents less than 10 percent. Registration of trademarks is not enough to show the use of IPR by Ugandan companies. The data available reveal that there are low levels of renewals for local trademarks compared to foreign owned trademarks. This could mean that a lot of Ugandan business ventures cannot survive beyond the first two years.

(ii) IP policy, legal and regulatory reforms

In Uganda, there has been considerable progress in the process of updating laws and creating new ones. For example, the IP laws enacted since 2005 include the Copyright and Neighboring Rights Act (2006); Regulations 2010; the Trade Secrets Act (2009); the Trademark Act (2010); Regulations 2012; Geographical Indications (2013) and the Industrial Property Act (2012). The process of reviewing these laws was complex, expensive and often required technical and financial assistance. It consisted mainly in integrating TRIPS flexibilities into the revised laws. However having new laws alone may not be enough to help countries implement the TRIPS Agreement. They need to be complemented with measures to address the challenges that go with their enactment which include inadequate capacity to develop regulations, weak IP institutions, and weak enforcement among others. At the moment, some of these laws are yet to be fully implemented due to the absence of regulations such as the Industrial Property and Geographical Indications acts and of regulations guiding the operation of copyright collective management organisations.

IP is a cross-cutting issue and therefore complementary policies from other sectors have a bearing on the implementation process of the TRIPS Agreement.

IP is a cross-cutting issue and therefore complementary policies from other sectors have a bearing on the implementation process of the TRIPS Agreement. Notwithstanding this interdependence, an overarching national policy framework covering policy linkages between IP and other sectors such as public health, agriculture, environment, education, science and technology, culture and traditional knowledge, is still missing. Such a framework should have been developed first to guide the review process and the formulation of new laws. As a result of this omission, there are laws that may have to be reviewed such as the Copyright and Neighboring Rights Act, to ensure that they address the IP-related education concerns of the country such as the inclusion of compulsory licensing for educational materials. Studies were done to guide this process, and the World Intellectual Property Organization (WIPO) is to provide support to undertake the development of the policy.

(iii) Coordination

Whereas the Ministry of Trade, Industry and Cooperatives has the overall responsibility for WTO matters including TRIPS implementation, the Uganda Registration Services Bureau (URSB)—an autonomous body under the Ministry of Justice and Constitutional Affairs—is responsible for the administration of all IP legislation, reforms and policies. The URSB is also the focal institution for WIPO. Additionally, the Ministry of Water and Environment and the National Environment Management Authority (NEMA) handle environmental negotiations at the multilateral level, which also involve elements of IP. The Ministry of Health spearheads negotiations in the health sector. A coordinated national approach informed by an overarching national policy could help to harmonise these individual positions and reduce the risk of friction at the national, regional and multilateral levels.

The regional dimension also causes challenges for Uganda when implementing the TRIPS Agreement. There seems to be a disconnect between the national and regional processes. A study carried out by SEATINI in 2012 on the Implementation of the WTO declaration on TRIPS and Public Health in EAC revealed that Uganda is not effectively

using the TRIPS flexibility on pharmaceutical products. For example, patents have been granted for medicines including new anti retroviral drugs through the African Regional Intellectual Property Organisation despite the fact that as an LDC, Uganda is exempted from protecting patents on medicines until 2016. Legal challenges will arise and cause harm to local manufacturers of generic drugs.

(iv) Intellectual property rights administration

The URSB has a directorate that processes IP applications. Other divisions include business registration, civil registration (births, deaths and marriages) and liquidation. The IP division has eight technical staff including two examiners. The nature of work requires properly trained workers and a modern and efficient automated information system. There has been some improvement in the operation of this directorate with the automation of the trademark register and recruitment of patent examiners. However, the assessment of patent applications requires a high level of expertise, which may be well beyond the capacity of existing patent examiners. The budget has also increased from \$160,000 in 2012-13 to \$500,000 in 2014-15. Considering the amount of work and the complexity of the subject matter, there is a need to increase the number of staff and improve their technical capacity.

Since the URSB IP directorate partly depends on the revenue collected from the registration and licensing fees of IPRs, there is a danger that it fails to balance national and public interests with those of the right holders.

(v) IP enforcement

The enactment of IP laws come with challenges of enforcement. The establishment of an effective enforcement mechanism for IPRs is difficult and costly. Generally, there is a low awareness of IPRs in Uganda. The country still faces institutional challenges with its police, judicial system, collective management organisations, customs authorities and other border agencies. These imperfections coupled with an inadequate understanding and awareness of the available protection under the existing laws by the private sector render the IP enforcement mechanism ineffective. This ineffectiveness is exacerbated by delays in developing regulations for enacted IPRs.

There are different agencies that are involved in the enforcement of IP laws such as the Uganda Revenue Authority, the Uganda National Bureau of Standards, the commercial division of the High Court, the police as well as the private sector. These institutions require assistance to enable them support the enforcement of IPRs effectively.

Conclusion

There has been considerable progress in the implementation of the TRIPS Agreement in LDCs in general and Uganda in particular. However, this has come with extra obligations and responsibilities, which are beyond the existing capacities of LDCs. There is a need for the establishment of a funding mechanism which supports IP strategies as well as policies and institutions that will not only help LDCs like Uganda to be TRIPS compliant but also ensure that they can see actual development benefits from a functional IP system.



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ACCESS TO MEDICINES

The LDC medicines extension question: Contemplating next steps

Frederick M. Abbott

The WTO previously authorised least developed country (LDC) members not to implement or enforce patent and regulatory data rules until January 1, 2016. Should LDCs seek renewal of the pharmaceutical-related extension at the TRIPS Council before it expires, or does the recent “general” extension for LDC implementation of the TRIPS Agreement until July 1, 2021 already cover the necessary ground?

Paragraph 7 of the World Trade Organization Doha Declaration on the TRIPS Agreement and Public Health adopted in 2001 recognised the special situation of least-developed WTO members and directed the TRIPS Council to take the necessary action to assure that LDCs would not be obligated with respect to pharmaceutical products to implement or enforce those parts of the TRIPS agreement relating to patent and regulatory data protection. The TRIPS Council approved a decision extending until January 1, 2016, the transition period during which LDCs do not have to provide or enforce patent and regulatory data protection for pharmaceuticals. As a related matter, on July 8, 2002, the WTO General Council acted to waive any obligation on the part of LDCs to grant “exclusive marketing rights” on newly approved patented drugs during the period until January 1, 2016 (hereinafter collectively the “2016 medicines extension”).

Why was and is the 2016 medicines extension important from a public health standpoint? Access to antiretroviral treatment for a large number of individuals in LDCs was and is made possible because of the availability of low-cost generic drugs the procurement of which is funded mostly by international donors through the Global Fund to Fight AIDS, Tuberculosis and Malaria, the President's Emergency Plan for AIDS Relief and similar organisations. Donor organisations and their supply chain partners are reluctant to purchase and distribute antiretroviral and other drugs when faced with the possibility of patent infringement lawsuits. Prospective patent infringement issues for suppliers to LDCs had arisen before adoption of the Doha Declaration. Almost immediately following WTO implementation of the Paragraph 7 extension the World Health Organization organised the preparation of forms that could be used by LDC public health officials to provide assurance to international suppliers that patents would not be enforced based on the 2016 medicines extension. Such assurances have been provided by LDCs many times and assist to allay concerns of producers and intermediary supply chain enterprises that are reluctant to supply under threat of infringement claims.

There are also efforts by LDCs to maintain their own antiretroviral drug manufacturing capacity, such as in Uganda. Continuation of these efforts may depend on the absence of corresponding patents that may otherwise preclude operations.

The no-rollback matter

LDCs might have been obligated to extend patent protection to pharmaceutical products as early as January 1, 2006, based on the transitional arrangement incorporated in article 66.1 (TRIPS). While article 66.1 expressly contemplated extension of an initial 11-year LDC transition arrangement based on a “duly motivated request” by an LDC, when the Doha Declaration was adopted in 2001 there was no assurance that a duly motivated request would be made. Moreover, at the insistence of certain developed members, the LDC general TRIPS extension that was requested and adopted on November 29, 2005 (running until July 1, 2013) (hereinafter the “2013 general extension”) included conditions that, absent special acknowledgment, would have substantially interfered with the options available to LDCs under the 2016 medicines extension. Notably, the 2013 general extension included a “no-rollback” clause that appeared to preclude LDCs from reducing IP protections already in place. It provided:

WTO TRIPS Agreement

The World Trade Organization Doha Declaration on the TRIPS Agreement and Public Health adopted in 2001 was intended to provide assurance that intellectual property rules in force among WTO members would not be interpreted or enforced in a way that would interfere with the protection of public health and the promotion of access to medicines for all. It was adopted following a period of intense international concern and conflict regarding the misguided invocation of TRIPS agreement rules in an attempt to limit access to lower-cost medicines needed to treat HIV-AIDS in Sub-Saharan Africa. (Author's views)

"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." (Paragraph 5)

Whether the TRIPS Council had the authority to condition the 2013 general extension on the no-rollback clause is debatable, and whether the terms of the commitment are sufficiently clear to be enforceable is open to question. Nonetheless, the no-rollback clause — if it applied to patents on pharmaceutical products (which it certainly did not further to Paragraph 6 of the 2013 general extension) — would have precluded LDCs from "disapplying" existing patent rules or refusing to enforce pharmaceutical patents that may have been granted. Many LDCs make pharmaceutical patent protection available, *inter alia*, because patent laws were put in place by colonial authorities. In that regard, to make importation of generic products for LDC markets secure from a legal standpoint, it is not sufficient only to put off an obligation to implement patent protection for pharmaceuticals; existing protections must be waived.

As the end of the 2013 general extension, i.e. July 1, 2013, approached, and as LDCs made a duly motivated request for an additional extension, the question whether such an extension would again be conditioned on a no-rollback commitment was actively debated. On this occasion, LDCs were well-prepared to address the question, and objected to the inclusion of such a commitment.

On June 11, 2013, the TRIPS Council adopted a further general extension in favor of LDCs. It provides that LDCs are not required to apply the provisions of the TRIPS agreement, other than those relating to national and most favored nation treatment (and certain procedural matters), until July 1, 2021. That is, an 8 year extension from July 1, 2013 (hereinafter the "2021 general extension"). Despite pressure from some developed country members, the new extension does not include a no-rollback commitment. It includes a statement in Paragraph 2 that "least developed country Members express their determination to preserve and continue the progress towards implementation of the TRIPS Agreement". (The decision also explicitly provides that nothing in it "shall prevent least developed country Members from making full use of the flexibilities provided by the Agreement to address their needs (...)")

There is no mandatory language or language of legal obligation as found in Paragraph 5 of the 2013 general extension. (The earlier no-rollback language was that LDCs "will ensure that any changes...do not result in a lesser degree of consistency".) The expression of a "determination" to do or not do something is a statement of preference or hopeful intent, but it is not a statement of a legal obligation. It can be foregone. The 2021 general extension expressly provides that it is without prejudice to the 2016 medicines extension, and the right of LDCs to seek further extension of the latter's January 1, 2016 deadline.

The question

Assuming that the extension until 2021 is properly interpreted as providing maximum flexibility to LDCs, including the potential to roll back existing IP commitments, is there a need to further extend the 2016 medicines extension? Or, are all the flexibilities that LDCs enjoy under the 2016 medicines extension included within the scope of the 2021 general extension? If under the 2021 general extension LDCs are authorised to roll back existing protections, they can presumably disapply existing pharmaceutical patents and regulatory data rules, and make whatever changes to their pharmaceutical-related patent and regulatory data laws they choose from the standpoint of the TRIPS agreement.

The answer(s)

The foregoing analysis suggests that further action to extend the 2016 medicines extension is not necessary because the subject matter has already been covered by the 2021 general extension.

Regrettably, on a number of prior occasions various lobbies, whether public or private sector, have strived to exploit even the remotest ambiguities for their own purposes, and

some governments promote the objectives of those lobbies. This practice has certainly affected the medicines sector.

It appears that the LDC extension issue may be subject to this type of "uncertainty generation". By way of illustration, the EU delegation to the WTO made public comments following adoption of the 2021 general extension suggesting that LDCs would be required to initiate pharmaceutical patent protection in 2016 notwithstanding that LDCs are generally exempt from TRIPS compliance until 2021. The EU delegation also suggested that the 2021 general extension includes a no-rollback commitment, a legal matter addressed to the contrary earlier in this note. While it did not allude to a no-rollback commitment, the United States Trade Representative included similar language to that used by the EU delegation regarding an LDC pharmaceutical patent and regulatory data implementation deadline in its 2014 Special 301 Report, stating "the LDC Members have until 2016 to implement their TRIPS Agreement obligations for patent and data protection for pharmaceutical products, as proposed by the United States at the Doha Ministerial Conference of the WTO" (at page 27).

The key point is in the absence of a firm basis of legal security, LDCs and suppliers to LDCs may find that doubts are raised as the January 1, 2016 deadline approaches regarding whether flexibility to import low-cost generic drugs will continue after that date. Legal insecurity imposes a cost, and in this case the cost may be an adverse impact on public health. To put it plainly, suppliers of medicines, including intermediaries and funding agencies, have a strong bias against being the subject of patent infringement litigation. The 2016 medicines extension provided legal security for these suppliers. Will these same suppliers find sufficient assurance in the 2021 general extension if doubts are raised about its interpretation, such as were raised by the EU Delegation and USTR?

There is no "easy answer" to this diplomatic and real world question. It is a question that the LDCs will have to answer prior to January 1, 2016 so that they may make an informed decision about whether to seek extension of the 2016 medicines extension from the TRIPS Council and General Council of the WTO. It may be useful at this stage to consider a few options.

A few options for LDCs

LDCs could rely on an informed legal conclusion that the 2021 general extension provides all of the flexibility that was incorporated in the 2016 medicines extension. Armed with a sufficiently robust advice memorandum, they could effectively "do nothing" in respect to formal WTO decision-making.

As a somewhat more proactive approach, LDCs also could issue a joint statement setting out their interpretation of the 2021 general extension. Such a joint statement could be presented to the TRIPS Council and the General Council of the WTO. If presented sufficiently in advance of 2016, the LDCs could see what reaction comes from non-LDC members. An unfriendly reaction might indeed inform the LDCs regarding potential next steps.

LDCs could formally approach the TRIPS Council and General Council with a duly motivated request for an extension of the 2016 medicines extension. In this regard, LDCs might consider seeking an extension until a member is no longer an LDC to avoid the need for similar action in the future.

Alternatively, LDCs could seek a declaratory or interpretative statement from the TRIPS Council and General Council that the 2021 general extension covers pharmaceutical patents, regulatory data and exclusive marketing rights, including non-enforcement, and that further action regarding the 2016 medicines extension is not needed.

These are some options available to LDCs. It would probably be wise for LDC diplomats to begin working through the options because action, if it is decided upon, might best be taken well before January 1, 2016.



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LDC

Addressing landlocked developing countries' challenges: The role of trade

Raul Torres

Ahead of the 10-year review of the Almaty Programme of Action (APOA), it can be highlighted that the WTO has managed to secure deliverables for Landlocked Developing Countries (LLDCs) in two main areas, namely trade facilitation and Aid for Trade. The new programme of action must contain concrete measures in all areas of interest to LLDCs, and particularly in the field of international trade that will help these countries integrate into the multilateral trade system.

The main challenge for LLDCs to participate in international trade is their very high trade costs. When trade costs are measured as costs to import and export, LLDCs as a group present an average total cost to export a container of US\$2630 and to import a container of US\$3252. These figures are higher than those for Least Developed Countries (LDCs) which have export and import costs per container of US\$1860 and US\$2294 respectively. By isolating the effect of landlockedness on trade transaction costs it can be observed that both landlocked LDCs and landlocked non-LDCs face higher costs than coastal LDCs. The conclusion that can be drawn from this analysis is that landlockedness and not the development level is the major determinant of high trade costs. In this environment trade facilitation measures at the border have a high potential for cost reduction.

Similarly, time spent in transit can also act as a barrier to trade. Time delays and depreciation costs can reduce trade flows even more significantly than tariffs. Each day saved in shipping time is worth 0.8 percent ad valorem for manufactured goods. Time-sensitive products (perishable, just in time) are even more affected by delays at the border. When times to export and import are measured LLDCs also perform poorly with an average of 37 days to export and 42 days to import.

Table 1: Trade transaction costs and LLDCs - a comparison with LDCs (based on 2012 World Bank data)

	Cost to export (US\$ per container)	Cost to import (US\$ per container)	Time to export (days)	Time to import (days)
Landlocked LDCs	2977	3720	42	48
Coastal LDCs	1244	1508	27	30
All LDCs	1860	2294	32	37
Non-LDC LLDCs	2015	2421	26	31
All LLDCs	2630	3252	37	42

The poor performance of LLDCs in these measurements shows the urgency and importance for LLDCs to implement the Trade Facilitation Agreement (TFA). Trade facilitation is important for LLDCs because it lowers trade transaction costs, improves efficiency and competitiveness, eases integration into global value chains, and reduces time as a trade barrier. Additionally, there is an increased awareness and more attention being paid to integrating into local, regional and global value chains, in both industrial and agricultural sectors. Multi-country production chains offer developing countries a way of breaking into world markets without having to produce sophisticated final products. This integration into regional and global value chains is now seen as a key component of trade-led economic growth. In this context, it has been recognised that for integration into global value chains, efficient importation is as important as exportation. Inefficient customs practices and complex procedures significantly reduce the ability to successfully integrate into global value chains.

US\$ 2630

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Trade facilitation agreement and the LLDCs

The Ministerial Decision of 7 December 2013 reached at the WTO Bali Ministerial Conference concluded the negotiations on the TFA. A Preparatory Committee was also established which has concluded its first task of performing a legal review of the agreement. Unfortunately, further progress in the implementation of the TFA has stalled over some developing country concerns that other areas of the Doha Development Agenda would not be addressed and in particular, India's demands to secure a more permanent exemption from challenges to public stockholding schemes for food security purposes.

Trade facilitation is important for LLDCs because it lowers trade transaction costs, improves efficiency and competitiveness (...)

As a result, the TFA missed its first implementation deadline on 31 July 2014, which called for the adoption of a protocol amending the Marrakesh Agreement that creates the WTO. This will likely delay the internal ratification process that members need to go through for the agreement to enter into force, which according to WTO rules will happen only once two thirds of the WTO members have ratified the new agreement. Nevertheless, even with this delay the TFA could still enter into force on the target date of 31 July 2015 which was set by the ministers in Bali.

The TFA contains several provisions which should be of benefit to LLDCs, with the main one being Article 11 on Freedom of Transit in whose negotiations LLDCs were heavily involved. Article 11 clarifies and strengthens the disciplines in Article V of the GATT including the non-discrimination principle for goods in transit. Under Article 11, any regulations and formalities covering goods in transit shall not be maintained if they constitute a disguised restriction on trade or are more cumbersome than necessary. Traffic in transit shall also not be conditioned on collection of fees, except when these fees are cost-based, transport and administrative expenses. Article 11 contains a prohibition of the imposition of voluntary restraints on traffic in transit. Goods cleared for transit should also not be subject to any further charges, delays, restrictions or the application of technical barriers to trade measures. Guarantees for the transit of goods shall be limited to ensuring transit requirements are fulfilled and shall be discharged without delay once the goods have completed transit. Guarantees may also cover multiple transactions and allow for their renewal. There is also a transparency obligation on customs authorities to publish all information used to set guarantees. Finally, the article prescribes that convoys or escorts can only be required in high-risk cases. Article 11 also contains a series of best endeavours provisions which, while not binding if implemented, should further benefit transit of goods. These provisions cover the use of separate facilities for goods in transit, cooperation between customs authorities to enhance transit and appointment of a national transit coordinator.

The TFA also contains several other provisions that should be of benefit to LLDCs. One of them calls for the expedited release of goods transported by air cargo. Another mandates customs authorities to further facilitate trade – through less documentation and inspections, rapid release, and deferred payments – to selected authorised operators. The TFA also encourages the use of single window operations, i.e. the submission of documentation for import and export to a single electronic point. Another measure that should be of benefit to LLDCs, whose trade is mostly conducted by overland freight, is increased border agency cooperation. This should ensure cooperation and coordination between authorities and agencies responsible for border controls on issues such as alignment of working days, hours, procedures and formalities; joint controls and sharing of common facilities; and establishment of one-stop border post controls.

Keeping in mind the lack of capacity and the implementation costs, the TFA also contains very innovative special and differential treatment provisions for developing

countries. These provisions are based on the principle that the extent and the timing of implementation will be related to the capacity of each WTO member and implementation will not be required until sufficient capacity has been acquired. The TFA thus allows developing countries to schedule commitments into three categories according to what they consider is their capacity to implement them. Category A is for those measures to be implemented upon entry into force of the agreement for developing countries, or within one year after entry into force for the LDCs. Category B is those provisions which will be implemented after a transitional period of time of the determined by each country, and Category C is for those provisions requiring the acquisition of implementation capacity through technical assistance and capacity building. There are also other flexibilities for developing countries such as the possibility of switching measures from category B to category C, an early warning mechanism in case transition periods may be missed and a grace period for challenges under the WTO's dispute settlement mechanism.

(...) the TFA also contains very innovative special and differential treatment provisions for developing countries.

Thus, the TFA is the first trade agreement to rely in part on development assistance for its implementation. In order to ensure that this assistance is provided to all those that require it the WTO has launched the Trade Facilitation Agreement Facility (TFAF). The primary objective of this facility is to support LDCs and developing countries to assess their specific needs and identify possible development partners to help them meet those needs. Furthermore, to make the agreement work, additional actions in terms of transport corridor upgrading and improvement of other economic infrastructure should be programmed, as this has proven to be of great value for LLDCs.

Other benefits of the Bali package for LLDCs

Although the TFA is a very important outcome from Bali for the LLDCs, this is not the only one. In Bali, Members took a decision on the implementation of the services waiver for LDCs which should help those LLDCs that are also LDCs to diversify their economies into areas that are not affected by being landlocked. In July 2014, the LDC Group at the WTO, submitted a collective request regarding the preferential treatment they would like to see for their services and service suppliers.

Electronic commerce, another type of trade that is less affected by landlockedness, was also the object of a decision in Bali. This decision calls for the substantial invigoration of the Work Programme on Electronic Commerce of WTO, especially under the initiatives taken in relation to commercial issues, development and evolving technology.

Aid for Trade, especially for trade facilitation, is another element that LLDCs have identified as being of particular importance in the WTO's sphere of work. This is because LLDCs receive comparatively less foreign direct investment than coastal states; and they have a limited diversification, both of their product base and export markets, which needs to be expanded to take advantage of market access opportunities. At the WTO Bali Ministerial Conference, ministers agreed on the continuing need for Aid for Trade of developing countries, and in particular of LDCs. The Ministerial Declaration reaffirms the commitment to Aid for Trade and reiterates the mandate given to the Director-General to pursue actions in support of Aid for Trade. It also frames the new Aid for Trade Work Programme within the post-2015 development agenda.

The WTO's efforts on Aid for Trade shall be conducted through a new Work Programme for 2014-2015. The organising theme of the new Work Programme is "Reducing trade costs for inclusive, sustainable growth". Putting trade costs at the heart of the new Work Programme speaks to the implementation of the Bali Package, especially in the context

of the TFA, and the ongoing work on connecting developing countries, and in particular LLDCs, to value chains.

LLDCs should call for an early ratification of the TFA, so that it can enter into force in 2015 as planned.

The way forward

The APOA has contributed in highlighting the challenges faced by LLDCs in their development efforts. Work in this direction should continue in any new programme of action for the LLDCs. Additionally, the new programme should call for concrete deliverables in all areas of interest to the LLDCs, and particularly measures in the field of international trade that would help LLDCs integrate into the multilateral trade system.

In the area of trade facilitation, LLDCs should call for an early ratification of the TFA, so that it can enter into force in 2015 as planned. LLDCs should also call upon developing countries, particularly transit countries, to make commitments on as many provisions as possible under Category A, especially those in Article 11 on freedom of transit. LLDCs should also urge donors to make available the necessary funding for technical assistance and capacity building for the implementation of Category C provisions, in both LLDCs and transit countries.

Regarding Aid for Trade, LLDCs should continue to push for increased commitments to be made by donors. Synergies can be achieved between TFA implementation and Aid for Trade. LLDCs should call for the execution of integrated hardware and software solutions. The software is mostly rapid implementation of trade facilitation measures and the hardware should take the form of infrastructure projects such as transit corridors, road improvements, and border crossing upgrades.

In the area of services, LLDCs must remain active participants in the negotiations, just as they were in the trade facilitation negotiations. They should push for further liberalisation of trade in services at the multilateral level. LLDCs should also call for the operationalisation of the services waiver for LDCs and explore the adoption of similar measures for all LLDCs. Work in this area should be complemented with further analysis of the benefits of e-commerce for LLDCs.

LLDCs should also urge the WTO to launch a dedicated Work Programme for the LLDCs, similar to those already in place for the small economies and the LDCs. The objective of this work would be to arrive at concrete responses to help LLDCs integrate into the multilateral trading system and overcome the trade-related challenges derived from their geographical situation.

Lastly, links should be made between the programme of action for LLDCs and the post-2015 development agenda. The initiatives that have been deployed to achieve the MDGs and the APOA have provided valuable lessons that must be carried forward, as attention turns to work on the post-2015 development agenda and the new programme of action for LLDCs. LLDCs should participate actively as a group in the negotiations taking place at the UN. They should make it clear that the role of trade in the post-2015 agenda process should not be reduced simply to trade liberalisation. Rather, trade should be recognised as a development policy instrument. It is important for the multilateral trading system to be referenced in the emerging framework of the post-2015 development agenda and for clear goals and targets to be set that will measure the increased participation of LLDCs in international trade.



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ECONOMIC PARTNERSHIP AGREEMENT

EU, East Africa sign trade deal, bringing EPA process near close

The five members of the East African Community (EAC) – Burundi, Kenya, Rwanda, Tanzania, and Uganda – signed the draft version of their Economic Partnership Agreement (EPA) with the EU on 20 September. With Brussels having already concluded two other such agreements involving African country blocs in July, this latest deal brings to a close a long negotiation process between the main African regional economic communities and Europe.

"We were able to agree and all of us were able to sign on to the economic partnership draft," Kenyan Foreign Affairs Cabinet Secretary Amina Mohamed told reporters following the signing, which occurred after a ministerial meeting of the EAC bloc in Arusha, Tanzania. Further meetings are scheduled this week to finalise the agreement, Mohamed added.

The process to establish EPAs between the EU and various regional groupings of African, Caribbean and Pacific (ACP) countries began over a decade ago, with the goal of ensuring trade reciprocity, promoting sustainable development, and advancing integration between the parties involved. In the case of Africa, two regional EPAs – those involving the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC), respectively – were concluded this past July.

"SADC has signed and ECOWAS has signed so we're the last ones to it but it's also safe to say that we probably got a very good deal," Mohamed said. Even with the EAC signing, however, some uncertainty remains regarding how the EU will treat East African exporters from 1 October onward. This date is the deadline that the European Commission established three years ago for withdrawing the market access regulation "MAR 1528," which currently provides duty-free, quota-free (DFQF) market access to ACP countries.

Some analysts have warned of an elimination of preferential margins between 1 October and the ratification of the EAC EPA, which is the next step in the process. Others have suggested that it would be enough for these East African countries to have initialled the agreement before the deadline in order to preserve their DFQF access to the European market.

Export taxes as sticking point

A week before the signature of the EPA, the EAC's chief negotiator Karanja Kibicho said that the Eastern African bloc "will remain firm on the issue of taxes on exports." In this context, he affirmed that the EAC was planning to negotiate with Brussels how long it will be allowed to maintain export taxes. Moreover, Kibicho specified that the proceeds from the taxes on raw materials would be channelled to the development of infant industries, food security, and currency stabilisation.

The political dimension of export taxes was one of the most contentious issues in the EPA talks. Export taxes are perceived to be trade-distorting by some countries, while others insist on maintaining some policy space for their use, given their potential as a tool for industrial development. The latter position has been questioned by some experts, who argue that there is little evidence on the welfare effects of export taxes. Since the text of the draft EAC EPA is not yet publicly available, it could not be determined how negotiators resolved this contentious issue. As an indication of how export taxes were addressed in other agreements, the European Centre for Development Policy Management's (ECDPM) comparative analysis of the SADC and ECOWAS EPAs shows that both agreements contain flexibility provisions for countries to apply export taxes in exceptional circumstances – such as for specific revenue needs, the promotion of infant industries, or for environmental protection.

While the ECOWAS deal allows for temporary export duties on a limited number of products after consultation with the EU, the SADC version contains more specific provisions on export taxes which can be levied during a maximum of 12 years and for up to eight (HS6 tariff line level) product categories. However, the SADC partners have also committed to ensuring that their export taxes do not reduce supply on the European market below current levels in the first six years and below 50 percent of current levels in the remaining six years. Therefore, the ECDPM concludes that – at least in the short term – export taxes “may have only little effect to retain inputs for local production.”

Non-execution clause

Until recently, sources indicated that East African leaders were hesitant to sign a trade agreement that includes a non-execution clause – in other words, a clause that permits the deal's suspension in instances of proven human rights violations. A non-execution clause would entitle the European Commission to take trade measures against partner countries failing to abide by the principles of human rights, democracy, and good governance. These measures are aimed at strengthening criminal justice both at the domestic level in Africa and globally with the International Criminal Court (ICC).

Lately, the East African region has been confronted with a series of allegations of human rights violations. For example, in 2011 the ICC decided to press charges against current Kenyan President Uhuru Muigai Kenyatta for crimes against humanity in the aftermath of the election-related violence seen in December 2007. A hearing on how to proceed with the trial is scheduled for early October in the Hague, though whether Kenyatta would attend was still unclear at the time of this writing. Based on the documents available, it could not be assessed whether human rights issues are explicitly addressed in the draft EAC-EU EPA. With respect to the SADC and ECOWAS agreements, the ECDPM found that both EPAs “do not contain an explicit non-execution clause,” noting instead that the deals refer to the Cotonou Agreement “with no specific [mention of] human rights or the rule of law.”

High stakes for Kenya

The pressure for concluding the EPA negotiations was particularly high for Kenya, which is the only economy in the region that is not a least developed country (LDC). If the European and East African negotiators had not managed to secure a deal, Kenya would have incurred high costs due to the elimination of preferential margins, given that it would have shifted to the EU's Generalised System of Preferences. Meanwhile, LDCs would have continued to benefit from DFQF access to the EU under the Everything But Arms regime.

Analysts suggest that the potential move to the GSP could have exposed Kenya to an immediate 12 percentage point surge in duties for all products entering the EU. The Kenyan flower industry, which accounts for approximately 25 percent of national GDP, was reported to be highly concerned about a potential failure of the EPA negotiations.

Challenging transition to implementation

Given the protracted nature of the negotiations, along with the results seen in the case of more mature agreements such as the CARIFORUM-EU EPA, experts have suggested that the implementation of the trade deals may pose its own series of challenges. The CARIFORUM group, which is made up of 15 Caribbean countries, signed an EPA with the EU in 2008. In the years since, only some member states in both regions have ratified the agreement. In addition to this asymmetry, several years passed before the envisaged development cooperation was put into operation through programmes and projects.

Sources: “EAC Five sign EU trade deal,” THE STAR, 22 September 2014; “EAC strikes economic partnership deal to join EU,” CAPITAL NEWS, 21 September 2014; “Global court orders Kenyan president to attend hearing,” REUTERS, 20 September 2014; “Civil Society raises concerns over EAC-EU trade deal,” THE STAR, 16 September 2014; “Region gets closer to deal on trade with EU,” THE EAST AFRICAN, September 13, 2014; “Africa in the News: EAC Debates EU Trade Agreement,” BROOKINGS, 12 September 2014; “Roundup: Kenya says EAC-EU trade talks to conclude before deadline,” XINHUA NEWS AGENCY, 11 September 2014.

HEALTH

Ebola outbreak threatens food security in West Africa

Disruptions in cross-border trade and marketing in the three West African countries most affected by the Ebola outbreak – Liberia, Sierra Leone and Guinea – have sent food prices soaring, threatening food security in the region, according to an alert issued early September by the UN's Food and Agriculture Organization.

The Ebola virus disease is a severe, often fatal illness, with a death rate of up to 90 percent. The current outbreak has seen a case fatality rate of 51 percent, according to the latest World Health Organization (WHO) report released on 29 August. A total of 3052 cases have been recorded in West Africa, causing 1546 deaths. There is no known cure for the illness.

Cereal harvest at risk due to labour shortage

In an effort to combat the deadly virus, the governments of Guinea, Liberia and Sierra Leone have established quarantine zones and imposed restrictions on the movement of people. Although required to stem the spread of disease, these restrictions have had the unwanted side effect of exacerbating food security concerns, according to the special alert released by the Food and Agriculture Organization (FAO).

The main harvest season for key crops – maize, cassava and rice – is due in a “few weeks” time, the UN agency notes, and labour shortages on farmhouses due to movement limitations and migration to other areas will “seriously” impact cereal production.

Harvest across most of West Africa had initially been forecast at above average levels, due to adequate rainfall during this past year. Food production is now expected to drop drastically, especially since the areas affected by the outbreak in Sierra Leone and Liberia are known to be the most productive.

“With the main harvest now at risk and trade and movements of goods severely restricted, food insecurity is poised to intensify in the weeks and months to come. The situation will have long-lasting impacts on farmers’ livelihoods and rural economies,” said Bukar Tijani, the FAO’s regional representative for Africa.

In addition, cash crops such as oil, cocoa, and rubber are also expected to suffer, which could in turn impact household incomes, “thus reducing purchasing power and inhibiting food access,” the report predicts.

The origin of the virus is still unknown, but some experts argue that human consumption of bush meat has been linked to the transmission of the disease to people.

According to the WHO, fruit bats are considered the likely host of the Ebola virus, based on available evidence. As part of the preventive measures aimed at combating the virus, a ban on bush meat was also introduced which, the FAO says, could deprive some households of a substantial source of nutrition and income.

Food price surge

“Closure of some border crossings, isolation of borders areas where these three countries intersect and reduced trade from seaports are resulting in tighter supplies and a sharp rise in food prices,” the FAO has said.

For example, in Liberia cassava prices increased by up to 150 percent within the first two weeks of August, according to a recent market assessment.

All three countries cited in the report are net cereal importers; therefore, the recent depreciation of their currencies is likely to apply inflationary pressure on domestic food prices, particularly for Sierra Leone and Liberia where exchange rates are more volatile and where food consumption is heavily reliant on imported cereal.

The UN agency has thus called for measures to improve internal trade, calling these "essential" in preventing additional price increases and resolving supply-side constraints.

Falling GDP

The suspension of operations by several multinationals and airlines operating in the region have also caused commercial and transport disruptions which, according to some observers, might hamper the overall region's economic growth.

Bloomberg has reported that Sime Darby, the world's leading palm oil producer, has cut back its output in Liberia, while steel manufacturing giant Arcelor Mittal has slowed down its efforts to expand its plant in the same country.

Air travel has also taken a hit, with British Airways among those to halt flights to Liberia and Sierra Leone over public health concerns. Several international shipping lines are also considering whether to avoid West African ports temporarily until the health crisis shows signs of abating.

Some experts say it is premature to evaluate how much Ebola and its consequences will affect sub-Saharan Africa's economic growth – estimated by the International Monetary Fund (IMF) to hit 5.5 percent this year – while noting that damage seems certain.

However, given the low connectivity of these economies, some experts argue that the crisis is unlikely to threaten the rest of Africa or the global economy as a whole.

Hinting at the narrative about Africa's strong growth and resilience, a subject of recent attention from the international community, some observers have suggested that this situation could again reinforce the negative stereotypes about the continent, and may in turn deter short-term foreign investment.

The current outbreak in west Africa (first cases notified in March 2014) is the largest and most complex Ebola outbreak since the Ebola virus was first discovered in 1976.

There have been more cases and deaths in this outbreak than all others combined from the past. It has also spread between countries starting in Guinea then spreading across land borders to Sierra Leone and Liberia, by air to Nigeria, and by land to Senegal.

The most severely affected countries, Guinea, Sierra Leone and Liberia have very weak health systems, lacking human and infrastructural resources, having only recently emerged from long periods of conflict and instability. On August 8, the WHO Director-General declared this outbreak a Public Health Emergency of International Concern.

Sources: "Ebola Virus Puts West Africa's Shipping Trade Under Threat," THIS DAY LIVE, 24 August 2014; "Ebola Threatens West Africa GDP as Companies Slow Production," BLOOMBERG, 14 August 2014; "Ebola outbreak puts harvests at risk, sends food prices shooting up," FAO, 2 September 2014, "Ebola threatens W. Africa food supply amid movement controls," BLOOMBERG, 2 September 2014.

WTO

Azevêdo warns WTO Members of “precarious” situation as TFA, food stockholding talks resume

A resolution to the deadlock over whether to link the implementation of the WTO's Trade Facilitation Agreement (TFA) to finding a permanent solution on public food stockholding is still “far from evident,” Director-General Roberto Azevêdo told ambassadors in Geneva on 15 September.

The informal meeting at the level of Heads of Delegation held on September 15 – HoDs, in trade shorthand – kicked off what is expected to be a busy period of consultations as WTO members try to break through the impasse, which caused them to miss a key deadline for ratifying the Protocol of Amendment for the TFA in late July.

The Protocol is necessary in order to bring the TFA – a global deal aimed at easing customs procedures and reducing red tape at the border – into the WTO's legal framework. From there, WTO members will then be able to individually ratify the agreement, which was finalised at their ministerial conference in Bali, Indonesia last December, in their domestic legislatures.

Azevêdo: “strict parallelism” impossible

Advancing the TFA protocol, however, now appears to be intrinsically linked to finding some sort of deal between India and its fellow WTO members that answers both New Delhi's concerns regarding public food stockholding while at the same time preserving the integrity of the Bali package.

India has insisted that it will not back the adoption of the TFA protocol unless it sees significant progress on a permanent solution on food stockholding. India said in July that it hopes to see this permanent solution by end-December of this year.

An interim solution is currently in place, having also been agreed at December's WTO ministerial conference in Bali. This solution was meant to serve until a permanent one could be negotiated, with the understanding that the latter should be ready in time for the WTO's 11th ministerial conference in 2017.

The interim solution essentially involves the adoption of a due restraint mechanism, or “peace clause,” which commits members not to file legal challenges on subsidised purchases of farm goods under existing public food stockholding programmes. In turn, those WTO members wishing to use the flexibility provided by the peace clause would need to provide more information on the scale and type of support being provided to their farmers.

“On the issue of the Bali decisions, there seems to be a clear interplay between concerns relating to the negotiations on public stockholding for food security purposes and the adoption of the protocol of amendment on the Trade Facilitation Agreement,” Azevêdo commented during the HoDs meeting.

“However, we know that strict parallelism is not possible,” he continued, noting that the different Bali components were designed with their own individual timetables.

US and EU back peace clause “clarification”

In his intervention during the informal meeting, US Ambassador Michael Punke confirmed that his country would be willing to provide some clarifications to India regarding how long the interim solution would hold, should a permanent solution not be ready by the original 2017 target.

"If the issue is one of clarification, the United States is ready – as we were in July – to clarify ambiguity concerning the duration of the due restraint mechanism, so long as such clarification occurs coincident with adoption of an appropriate [Trade Facilitation] protocol of amendment and does not entail a reopening of the Bali package," Punke said.

The US will not, however, accept anything that would entail linking TFA implementation with determining a permanent solution on food stockholding. "We and many others would see it as fundamentally rejecting the Bali package," he said. "That is untenable."

The US ambassador highlighted, however, that it is still not clear to all WTO members what India actually wants – and knowing the answer to that question is key to determining "whether breaking the current deadlock is possible."

"The simple, threshold question is, which position does this member hold?" he asked.

Separately, the EU confirmed that it too would be open to backing a "confirmation of the open-ended nature of the interim solution," if that is what India seeks. However, the EU added, the only "realistic way" to move forward will require a clear understanding that the TFA Protocol will be adopted "without links or conditions."

TNC meeting on 6 October

An informal meeting the following day of the Committee on Agriculture also failed to yield significant advances, with members reportedly differing on whether talks on the "post-Bali" issues could continue if the TFA protocol had not been adopted.

Sources say that members were also at odds over which forum to use for the food security discussions. At the WTO, discussions on agriculture are held either in the regular Committee on Agriculture, which deals with implementing the existing Agreement on Agriculture as well as monitoring members' commitments, or in the "special session," which involves agriculture-related negotiations.

The agriculture special session is slated to meet next week, and the Preparatory Committee on Trade Facilitation will be meeting on 29 September. Negotiating group chairs have also been directed to hold consultations of their own. (See Bridges Weekly, 10 September 2014)

The results of these upcoming meetings will be reviewed at a 6 October meeting of the Trade Negotiations Committee (TNC), Azevêdo said during the HoDs meeting. The TNC is tasked with the overall Doha Round trade talks, and is chaired ex-officio by the Director-General.

In the meantime, the WTO chief told members, the upcoming weeks of consultations should show a "sense of real commitment and real urgency," cautioning them against pursuing a business-as-usual approach.

The negotiations are still in a "very precarious" situation, the global trade chief said, noting that he was "not sure that the scale of the risk is fully appreciated by all."

The newsroom

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Seychelles to become the 161st WTO member

The government of Seychelles signed a final bilateral agreement with the United States in Geneva, which clears the way to joining the World Trade Organization.

The WTO's Working Party for the examination of Seychelles' accession request was established in July 1995. Negotiations gained momentum in 2008, when the government of the island state started to enact new legislations on sanitary and phytosanitary measures and on the protection of copyright and industrial property.

Subsequently, Seychelles concluded bilateral agreements with eight interested WTO members, namely Canada, the European Union, Japan, Mauritius, Oman, South Africa, Switzerland and Thailand.

With the approval by the US as the last interested party, Seychelles' Ministry of Finance, Trade and Investment is optimistic that the country will become the 161st member of the WTO during the WTO General Council meeting in December this year.

Strategic funding unveiled at UN island conference

Financial commitments of up to US\$1.9 billion were pledged across almost 300 sustainable development partnerships last week at a United Nations gathering focused on small islands. Over one-third of these partnerships were unveiled for the first time at the event.

The four-day international meet held in Apia, Samoa, known formally as the Third UN Conference on Small Island Developing States (SIDS), brought together a range of actors to discuss and galvanise international action around the specific vulnerabilities and economic challenges presenting a group of 30-plus small-island countries.

Spread across three geographic regions, the group is home to some 63.2 million people, with a combined GDP of approximately US\$575.3 billion.

South Africa suspends citrus exports to the EU

South Africa has suspended its exports of citrus fruit to the European Union. The voluntary decision by the South African Citrus Growers' Association (CGA) occurred on September 8, 2014.

The voluntary suspension follows the detection of the citrus black spot (CBS), a fungal disease, on lemons exported to the EU in July this year. After the interception, Dutch officials spoke of a case of phytosanitary non-compliance.

Deon Joubert, the CGA's envoy to the EU, affirms that the association has opted for voluntary suspension because of its overarching goal to maintain "the ongoing trade with the EU in the medium to long term."

On average, the EU imports every third citrus fruit from South Africa. South Africa, in turn, depends in varying degrees on the European market, with export shares destined for the old continent ranging from 17 percent (lemons) to 64 percent (soft citrus).

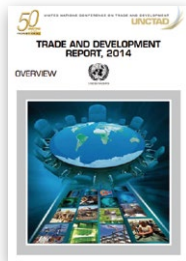
Ethiopia calls for entry into the COMESA FTA

The government of Ethiopia is calling for an entry into the free trade area (FTA) of the Common Market for Eastern and Southern Africa (COMESA). Although Ethiopia is a member of COMESA, the country has not ratified a special FTA arrangement.

According to the national newspaper Addis Fortune, this decision follows the recommendation of a study conducted by COMESA and the Ethiopian Ministry of Finance and Economic Development. The study finds the 93-million people country ready to compete and prosper on the liberalised markets in Eastern and Southern Africa.

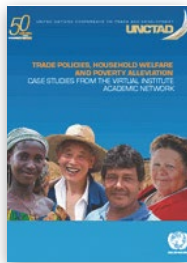
Ethiopia's integration into the COMESA FTA is part of the country's two-tiered approach to trade liberalisation: Beside the engagement on the preferential track, the government in Addis Ababa is involved in accession talks with the World Trade Organization.

Publications and resources



Trade and Development Report 2014 – United Nations Conference on Trade and Development (UNCTAD) – September 2014

The report emphasizes the role that proactive trade and industrial policies can play in the post-2015 development agenda. On trade, it argues that negotiations on rule making need to refocus on multilateral agreements recognizing the legitimate concerns of developing countries. It also highlights that developing countries should carefully consider the loss of policy space when engaging in bilateral and regional trade and investment agreements.
<http://bit.ly/1uB9wqN>



Trade policies, household welfare and poverty alleviation – United Nations Conference on Trade and Development (UNCTAD) – September 2014

The studies collected in this volume examine the welfare and poverty consequences of external trade shocks and domestic trade-related policies for households in a range of developing countries. One set of studies examines the welfare impact of the recent increases in global food prices. The other set analyses the welfare effects of trade policy and exchange rate changes.
<http://bit.ly/1uLL9c3>



Improving access to international climate finance within sub-Saharan Africa – Overseas Development Institute (ODI) – September 2014

This paper provides an overview of how international public funding is accessed by recipient countries in order to secure public policy goals, and in particular the national response to climate change. It focuses on the concept of direct access, as it applies to funding originating from multilateral sources and considers how access might be improved and made more efficient. The paper takes a regional approach and examines how these issues are playing out in sub-Saharan Africa.
<http://bit.ly/1samUWp>



Unleashing the Potential of the Mining Sector as a Contributor to Rwanda's National Development – World Bank Group – August 2014

In its sixth economic update for Rwanda, the World Bank Group forecasts a growth rate of 5.7 per cent in 2014 and 6.6 per cent in 2015. The update highlights the mining sector's potential to generate revenue and create more higher paying jobs. To maximize the benefits from mining, the report recommends a focus on improving the enabling legal and regulatory environment for investment, building geological knowledge, ensuring prudent revenue management as well as enhancing recovery and labour conditions.
<http://bit.ly/YXTwFW>



The Tripartite FTA: Background and overview of progress made in developing new harmonized Rules of Origin – Trade Law Centre (TRALAC) – June 2014

Rules of Origin (RoO) in African trade regimes span a wide range of methodological approaches in the determination of preferential origin status. The conditionalities that they impose are often influenced by protectionist attitudes and go well beyond one of the key objectives for RoO, being the avoidance of trade deflection. The (African) RoO history and experience, in the absence of any international or WTO multilateral best-practice standards, is likely to create difficulties for the realization of any practical benefits accruing to traders for example under regional trade agreements.
<http://bit.ly/1qQKeXH>

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