



Contents

<i>Executive Summary</i>	2
<i>I. Introduction</i>	3
<i>II. Conceptualising IP Technical Assistance In Light of the Purpose and Objective of the LDCs Transition</i>	5
<i>III. Enhanced IP Technical Assistance for LDCs: Parameters and tools for Priority and Needs Identification</i>	6
<i>IV. The Implications of the “No Roll-back” Clause for Technical Assistance</i>	8
<i>V. Inter-agency Coordination in the Delivery of Enhanced and Targeted Assistance to LDCs</i>	10
<i>VI. Conclusion and Recommendations</i>	11
<i>Endnotes</i>	12

A Conceptual Framework for Priority Identification and Delivery of IP Technical Assistance for LDCs during the Extended Transition Period under the TRIPS Agreement

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Executive Summary

On 29 November 2005 the Council for Trade-Related Aspects of Intellectual Property Rights (Council for TRIPS) of World Trade Organization (WTO) extended, until 1 July 2013, the transition period for the Least-developed countries (LDCs) to implement the TRIPS Agreement. A key element of the decision (hereinafter, the extension decision) related to technical and financial cooperation. In particular, the extension decision requested LDCs, preferably by 1 January 2008, to provide as much information as possible on their individual priority needs for technical and financial cooperation. This exercise, it was envisaged, would facilitate the delivery of targeted and enhanced technical and financial cooperation for these countries.

This paper seeks to draw attention to the issues arising out of the extension decision with respect to technical assistance and provide ideas on how to conceptually think about the required assistance and how the priority assessment should be done. In this regard, the paper makes four main arguments, namely that:

- Though LDCs are expected to progressively make efforts to implement the TRIPS Agreement, the purpose of the LDC transition period including extensions is not simply meant to address administrative and financial constraints related with implementing the Agreement. A key purpose of the transition period is to provide these countries with maximum flexibility to enable them to build a sound and viable technological base and as such, the conceptual underpinning of the LDCs transition period and hence the required technical assistance is different from that for developed and developing countries.
- Taking into account the changes in the thinking about IP technical assistance, the needs identification and delivery of assistance should be underpinned by different parameters such as those being developed in the WIPO Development Agenda process. In addition, specific tools need to be developed for the purpose of identifying LDC priority needs. In this context, the International Centre for Trade and Sustainable Development (ICTSD) diagnostic toolkit for assessing IP technical assistance for LDCs is recommended as a useful tool for this task.
- The Council for TRIPS exceeded its mandate under Article 66.1 of the TRIPS Agreement in imposing a no roll-back clause on LDCs during the extended transition period. In the view of the author, the said condition, which is likely to have significant negative effects on the rights of LDCs, is therefore illegal and can not be enforced under the WTO dispute settlement system.
- Inter-agency cooperation, as foreseen under the extension decision, will be important both in the priority identification and in the implementation of assistance programmes to address the identified needs. One way to achieve sufficient coordination could be through developing common diagnosis tools - such as the ICTSD toolkit, elaboration of common guidelines and principles for design and delivery of programmes - such as the WIPO development agenda guidelines, and common evaluation tools. Such common tools, guidelines and evaluation criteria will ensure transparency and better accountability and hence better value for technical assistance resources.

The paper concludes that the extension decision, in seeking to have a bottom-up identification of technical assistance prioritises for LDCs, offers an important opportunity for these countries and technical assistance providers to not only to ensure enhanced and effective assistance but also an opportunity to address some of the weaknesses of IP technical assistance that have been identified over time. In light of this conclusion and the above arguments and findings, several recommendations are made for the considerations of LDCs and other stakeholders. There are five key recommendations. In summary, these are that:

1. The ICTSD diagnostic toolkit is a good starting point going forward and LDCs should seek resources from the WTO and WIPO Secretariats, which were mandated to help them undertake the needs assessment, to use the ICTSD toolkit and to start to identify their priority needs.

2. While the 1 January 2008 deadline for needs identification is not mandatory, LDCs should strive to adhere to this deadline or in any case to undertake this exercise as soon as possible. At the same time, these countries should seek to establish in the Council for TRIPS a clear timetable and process that will ensure that there is eventual delivery of the targeted and enhanced assistance.
3. LDCs should also seek the implementation of the WIPO development agenda guidelines and parameters on IP technical assistance in the process of identifying their priority needs as well as in the eventual implementation of assistance to meet those needs.
4. These countries should in addition request and lead the Council for TRIPS to discuss the development of common evaluation tools which will be important in evaluating how the identified needs have been met by the WTO, WIPO and other agencies as well as developed countries under Article 67 of the TRIPS Agreement.
5. In parallel with field work, with the toolkit and any other available tools and the other activities in the Council for TRIPS, these countries should further seek a legal opinion from the Advisory Centre for WTO Law (ACWL) on how to address the limitations that the no roll-back clause places on their right to receive technical assistance that is tailored to ensure that they exercise maximum flexibility in any efforts to implement the TRIPS obligations. If it is found that the limitations imposed are significant, they should in the long-run seek to discuss this problem in the Council for TRIPS.

I. Introduction

On 29 November 2005 the World Trade Organization (WTO) Council for Trade-Related Aspects of Intellectual Property Rights (Council for TRIPS) decided to extend, until 1 July 2013, the transition period for Least-Developed Countries (LDCs) to implement the TRIPS Agreement.² One key element of that decision (hereinafter the extension decision) relates to technical cooperation.³ Among other things, the decision provides that:

With a view to facilitating targeted technical and financial cooperation programmes, all the least-developed country Members will provide to the Council for TRIPS, preferably by 1 January 2008, as much information as possible on their individual priority needs for technical and financial cooperation in order to assist them taking steps necessary to implement the TRIPS Agreement.

To gather the relevant information, the decision mandates the WTO Secretariat, through enhanced cooperation with WIPO and other organisations, to provide assistance to LDCs. To date, however, limited work has gone into gathering this information. It is also not clear whether there would be a vetting process of the identified needs by the Council for TRIPS and regarding the procedures that

will ensure the delivery of enhanced assistance focussing on these priority needs.

The identification and provision of the individual priority needs of each LDC as envisaged in the extension decision could serve at least three purposes. First, such information, as noted the extension decision, can help ensure that developed countries would more effectively provide technical and financial assistance under Article 67 of the TRIPS Agreement. Secondly, such information could also help shape the design and delivery as well as evaluation of technical assistance provided by the WTO Secretariat, the WIPO Secretariat and other organisations on intellectual property (IP). Finally, the focus on enhanced technical cooperation based on priority needs of LDC as identified by themselves responds to the recent discussions in the IP community, especially in the context of the WIPO Development Agenda, of the need for better tailored technical assistance in this area.

The decision, in seeking to have a bottom-up identification of technical assistance prioritises therefore offers an opportunity not only to ensure enhanced and effective technical assistance for LDCs but also an opportunity

to address some of the weaknesses of IP technical assistance that have been identified over time. However, while enhanced and targeted technical and financial assistance is a welcome development, and there are tools being developed to help with such priority identification⁴, it is crucial that such assistance is properly conceptualised focusing on the central purposes and objectives of the LDCs transition period in the TRIPS Agreement, which is to provide maximum flexibility to enable these countries to build a sound and viable technological base.

This as the central purpose of the transition period for LDCs under the Agreement dictates that the focus of technical assistance during the transition period should be on helping these countries put in place an innovation and creativity regulatory regime that would enable them create a sound and viable technological base. Only such a sound technological base could enable these countries to operate within the rigorous rules of TRIPS which is why the extension decision envisages that any country which ceases to be an LDC (presumably because non-LDCs are assumed to have a viable technological base) would cease to enjoy the benefits of the extension decision. In other words, looking at technical assistance from the standpoint of the central purpose and objective of the transition period means that the assistance should help LDCs meet their innovation and creativity objectives through the exploitation of IPRs (TRIPS compliance) and/or through the elimination of IPR obstacles by exercising maximum flexibility in their IP laws and policies.

To facilitate effective priority identification process and implementation of enhanced and targeted assistance, a number of issues need to be addressed urgently by LDCs and the IP technical assistance community. Among others, it is important that:

1. There is a better understanding of the purpose and objective of the LDC transition

period, including extensions envisaged under Article 66.1, and hence the technical assistance requirements during that period.

2. This exercise be undertaken with an understanding of the changing and evolving nature of IP technical assistance especially in light of processes such the WIPO development Agenda.
3. Tools are developed to help the LDCs and other stakeholders identify the real priority needs of these countries during the extended transition period.
4. Consideration is given to the implications of the no roll-back clause in the extension decision for priority identification and implementation of IP technical assistance during the extended transition period.
5. An appraisal of the inter-agency coordination in IP technical assistance design and delivery be undertaken and consideration given to the type of interagency cooperation that is needed to help LDCs in the priority identification process as well as in the implementation of assistance programmes during the extended transition period.

This paper, which was commissioned by the Quakers United Nations Office in Geneva (QUNO), hopes to draw attention to the issues above arising out of the extension decision and to provide ideas on how to conceptually think about the required technical assistance and how the priority assessment should be done.

Section II, focuses on the conceptualisation of IP technical assistance for LDCs in light of the purpose and objective of the transition period. Section III turns to the parameters and tools for priority and needs identification in these countries. Section IV addresses the implications of the no roll-back clause in the extension decision followed by a discussion on inter-agency coordination in section V. In the last section, section VI conclusions are drawn and recommendations made on the way forward.

II. Conceptualising IP Technical Assistance In Light of the Purpose and Objective of the LDCs Transition

The WTO legal framework is replete with transitional arrangements in the form of transition periods. The transition periods have different characteristics and objectives. Generally, however, these are meant to simply allow developing countries and LDCs extra time for the implementation their obligations.⁵ It is for this reason that these provisions, as a form of special and differential (S&D) treatment, have been criticised as being inadequate in addressing the real concerns and problems in developing countries and LDCs. The key issue, especially in the case of TRIPS, is that the obligations assumed by developing countries and LDCs are overly broad and burdensome and bear no relationship to the levels of development in these countries. Simply providing more time for implementation is not good enough.

The case of the transition period for LDCs under the TRIPS Agreement is, however, special and there was indeed an attempt to more closely correlate the transition period to development and technological needs. While giving extra time due to administrative and financial constraints was one aim, the central objective of the LDCs transition period under the TRIPS Agreement is different. Article 66.1 of TRIPS read together with the Preamble of the TRIPS Agreement⁶ and its objectives under Article 77 envisage the purpose and objectives of the LDCs transition period to be to respond and address: the special needs and requirements of these countries; and *the need for maximum flexibility to help these countries create a sound and viable technological base.*

Indeed, the extension decision explicitly acknowledges this interpretation in addition to underlining that technical assistance provided to LDCs must ensure that these countries achieve the development objectives of IP protection. In particular, the extension decision in the Preamble recognises the:

- Special needs and requirements of LDCs, the economic, financial and administrative

constraints that they continue to face, and their need for flexibility to create a viable technological base; and

- Continuing needs of these countries for technical and financial cooperation so as to enable them to realize the cultural, social, technological and other developmental objectives of IP protection.

Transitional arrangements meant to simply provide extra implementation time (for developed and developing countries) and arrangements intended to respond to special needs and requirements of LDCs including, in particular, the need for maximum flexibility to allow for the building of a sound and viable technological base clearly stem from different conceptual underpinnings and need to be implemented differently. As recognised by the Council for TRIPS, such assistance should first and foremost ensure that LDCs reap the cultural, social, technological and other developmental objectives of IP protection while reducing the social costs.

Technology development in LDCs is predominantly about technology acquisition from foreign sources or from foreign controlled entities in the country through imitation, reverse engineering and adaptation by local firms and institutions. There are questions which relate to IP and those which do not. The questions relating to IP include, for example, (1) how does IP (e.g., patents) affect the ability of a country (local firms) to acquire technology? (2) How does IP (e.g., copyrights and patents) affect the development of the necessary capabilities to absorb and adapt technology especially human resources development, science and technology education, and rollout of information and communications technology (ICTs)? The answers to these questions could be, as historical evidence suggests⁸, that IP is a negative factor in the quest of local firms and institutions to acquire technology through imitation and adaptation.

It follows that; the provision of technical assistance during the transitional periods needs to differ depending on the purpose and objective of the transitional period. While the technical assistance required by developing countries during the transitional period would naturally have been targeted at bringing these countries into strict compliance with TRIPS in line with the purpose of their transition period, for LDCs such assistance, first and foremost, must focus on the development of laws and policies that would provide maximum flexibilities to these countries to enable them to create a sound technological base. So, for example, during the transition period significant efforts could focus on ensuring the implementation of Article 66.2 and the development of relevant competition policies as opposed to say general enforcement provisions. Indeed, overall, special emphasis should explicitly be placed on the use of flexibilities such as compulsory licenses, the research exception, the early working exception, parallel imports as well as the flexibilities foreseen with respect to test

data protection under Article 39 of TRIPS and with respect to enforcement provisions. Work related to understanding the innovation systems and characteristics of various sectors in these countries and hence the relevance or otherwise if IPRs would also require special attention in the assistance programmes.

The reference in the extension decision to “technical and financial cooperation in order to assist them (LDCs) taking steps necessary to implement the TRIPS Agreement”⁹ may therefore erroneously suggest that the focus of the technical assistance should be to address only financial and administrative constraints. It is therefore critical that both in the information gathering and in the eventual implementation of assistance programme that this phrase be read and understood, as anticipated by the TRIPS Agreement and endorsed by the extension decision, in the context of the purpose of the transition period which is to provide maximum flexibility to allow LDCs to build a sound and viable technological base.

III. Enhanced IP Technical Assistance for LDCs: Parameters and Tools for Priority and Needs Identification

The extension decision, as already noted, mandated the WTO Secretariat in cooperation with WIPO and other international organisations to assist LDCs in gathering information about their priority needs. So far, however, not much work has been done in this direction only months to the 1 January 2008 deadline. An additional problem is that there is currently no tested methodology for IP technical assistance needs and priority assessment, especially the type that LDCs would require in the context of the purpose and objective of the transition period.¹⁰ The key priority question that needs to be addressed therefore relates to the parameters and tools that should be used in the needs and priority-setting.

A lot has changed in terms of the conceptualisation and implementation of IP technical assistance since 1995 when the TRIPS Agreement came into force. In addition to the

significant changes that have been introduced by various providers through normal lesson-learning and in response to significant criticism of their approach¹¹, an important new element is the February 2007 agreement on the reform of WIPO technical assistance in the context of the WIPO Development Agenda discussions.¹² The February 2007 WIPO Agreement is particularly important because the extension decision specifically envisages enhanced cooperation between WTO and WIPO in this area. WIPO being the largest IP technical assistance provider it means that changes in its approach should not just change the thinking in WIPO but should have broader applications. For instance, the WIPO principles should also apply to developed countries in the context of providing assistance especially under Article 6⁷ of the TRIPS Agreement.

Some of the relevant parameters agreed in WIPO, which reflect the changing nature and focus of IP technical assistance are that IP technical assistance:

- Shall be, *inter alia*, development-oriented, demand-driven and transparent, taking into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of the Member States.
- Will place particular emphasis on the needs of SMEs and institutions dealing with scientific research and cultural industries and assist Member States, at their request, in setting-up appropriate national strategies in the field of IP.
- Staff and consultants shall continue to be neutral and accountable, by paying particular attention to the existing Code of Ethics, and by avoiding potential conflicts of interest.
- Will promote measures that will help countries deal with IP related anti-competitive practices, by providing assistance in order to help countries to better understand the interface between IP and competition policies.

The reforms at WIPO and more broadly mean that for LDCs, in addition to recognising that the technical assistance directed at them needs to match the purpose and objective of the transition period, it is also important to take into account these new developments.

Other key parameters, also under discussion in WIPO that should guide the process include: ensuring that the implementation structures and system put in place for IP are administratively sustainable in the long-run and do not overburden scarce national resources; and that national IP institutions have the capacity and expertise to create a fair balance between IP protection and the public interest.

In the context of the above parameters, a critical first step in the information gathering efforts is the development of common needs assessment and prioritisation tools. It is for this reason that ICTSD diagnostic toolkit is both timely and important. The toolkit, which is specifically aimed at helping LDCs diagnose their technical assistance needs, suggests five

sets of parameters that could be used to assess IP technical assistance needs of LDCs. These are the:

- National development context with key factors and issues being the economic development status and structure, human development status and poverty profile and national development strategies and assistance programmes.
- IP policy framework with the key factors and issues being key national concerns and issues, national policy-making/legislative processes and stakeholder map, existing framework for IP including enforcement, protection of traditional knowledge, folklore and biodiversity, recent legal changes, planned legal changes, membership of international treaties, participation in IP standard-setting processes and technical assistance and capacity building programmes.
- IP administration regime with the key factors and issues being time series data on IP applications and grants, legal basis and mandate of IP institutions in the public and private sector, existing IP administration processes, human resources, automation and information management systems, physical infrastructure, financing and cost recovery from IP service delivery and modernisation plans and programmes.
- IP enforcement and regulation regime with the key factors and issues being the nature and status of IP infringement, levels of public awareness and awareness raising initiatives, administrative systems, judiciary, police, customs and competition policy and authorities.
- Promotion of innovation, creativity and technology transfer with the key factors and issues being institutions and initiatives for promoting innovation, creativity and technology transfer, mechanisms used by the IP office to enhance public awareness and understanding of IP, the targets for IP office public information and out-reach, opportunities to work with key partners and stakeholders and how successful examples of other domestic government programmes and foreign IP organisations are exploited for enhancing domestic IP awareness.

The diagnostic toolkit provides a good basis for assessing the LDCs needs and priorities. Being the first of its kind, however, constant review and refinement will be required as the tool is used. Because there is no tested tool for needs and priority assessment, it is also crucial that as this exercise is carried out the resulting priorities and needs should not be seen as exhaustive or conclusive. This is important because if this exercise is taken to be exhaustive and conclusive, then it will become very difficult for LDCs to ask for further extension after July 2013 as they are likely to be told that all their technical and capacity needs had been addressed and they therefore have no excuse not to comply fully with TRIPS.

There is also a case for expanding the factors and issues especially under the fifth indicator in the toolkit. In this regard, focus could also be placed on the broad scope of innovation and creativity framework that goes beyond IP and with a better link to the characteristics of innovation in these countries.¹³ So, for example,

many firms in LDCs operate in economic and innovation environments quite unlike the environments in developed countries and even developing countries. In these countries, government science and technology policies and programmes which are run outside the IP policy framework, may have a larger impact on innovation than the activities and strategies of the private sector.¹⁴ Additional factors and issues under this indicator could cover questions such as: what are the innovation characteristics of the various key sectors? What are the main sources of technology in various sectors? Has an innovation survey been carried out? If yes, what were the results? If no, is one planned?

Finally, in using the tool, technical assistance providers and other entities identifying LDCs priorities and needs should ensure that though the extension decision refers to assistance to help LDCs implement the TRIPS Agreement, the key underlying concept of ensuring maximum flexibility for these countries should not be lost.

IV. The Implications of the “No Roll-back” Clause for Technical Assistance

Paragraph 5 of the extension decision provides that:

“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”.

The provision seeks to prevent LDCs from ‘rolling-back’ the levels of IP protection. The implications of this provision are potentially significant including with respect to technical assistance provision. The clause raises both constitutional questions as well as practical problems.

The imposition of this condition on LDCs by the Council for TRIPS raises important constitutional questions because the clause carries substantive obligations for LDCs. It therefore has the effect of imposing new obligations on these countries. Though such an

obligation existed for developed and developing countries during their transition period under Article 65.5, it did not apply to LDCs.¹⁵ Three questions arise. The first question relates to the powers of the TRIPS Council and whether in imposing this condition on LDCs the Council exceeded its powers? The second question relates to whether a failure by an LDC to comply with this clause could be challenged by another WTO member in the dispute settlement system? The final question relates to the impact of this condition on the balance of obligations and rights in the TRIPS Agreement and whether it is consistent with the purpose of the transition period for LDCs as foreseen in the Preamble and Article 66.1?

Article 66.1 defines the powers of the Council for TRIPS with respect to the LDC transition period. It provides that in view of the special needs and requirements of LDCs, their economic, financial and administrative

constraints and their need for flexibility to create a viable technological base, LDCs shall not be required to apply the provisions of TRIPS, except Articles 3, 4 and 5 for a period of 10 years from 1996. The Article then goes on to provide that: “The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions to this period.” Under Article IV.5 of the Marrakesh Agreement Establishing the WTO, the Council for TRIPS responsibilities are to oversee the functioning of the TRIPS Agreement and to carry out any functions assigned to it by the Agreement (such as extension of transition periods for LDCs) as well as any other functions assigned to it by the General Council.

The provisions under the TRIPS Agreement and the Agreement Establishing WTO clearly show that the Council for TRIPS does not have the power to impose new obligations or grant new rights to WTO Members. New rights and obligations can only be created by the Ministerial Conference or, in the intervals between meetings of the Ministerial Conference, by the General Council.¹⁶ In extending the transition period under Article 66.1 of the TRIPS, the powers of the Council for TRIPS are therefore strictly limited to those specifically set out in the Agreement in this case ‘grant extension upon duly motivated request by an LDC member’. Provided there is a duly motivated request the Council for TRIPS must grant the request in light of the use of the mandatory “shall” without imposing any other modalities or conditions. Imposing the no ‘roll-back’ obligations to LDCs, an obligation from which LDCs were specifically excluded, is therefore illegal and *ultra-vires*.

While it is true that some LDCs were present when the extension decision was adopted by the Council for TRIPS and are considered to have consented to this clause, its insertion without immediate protest clearly reflects the lack of negotiating capacity on the part of these countries. It could also be argued that the transition periods granted with anticipation of eventual compliance carries positive obligation not to roll-back.

While this argument could hold in normal circumstances, there are a couple of reasons why it is inapplicable in this case.

First, as noted, since there is a specific clause on no roll back in the TRIPS Agreement from which LDCs were specifically excluded, it is difficult to argue that somehow there was an assumption that LDCs would also observe a no-roll back obligation. Nothing would have been easier for the drafters of the TRIPS Agreement to apply the clause to all WTO Members. Secondly, the Council for TRIPS itself has demonstrated, through the extension of the transition period with respect to patent and test data protection for pharmaceuticals, that the maximum flexibility anticipated under Article 66.1 indeed permits roll-back for LDCs. There is no dispute that in enjoying the extension with respect to pharmaceuticals LDCs could roll-back their laws, regulations and practices as part of exercising maximum flexibility.

It follows that since the no roll-back clause in the extension decision does not have legal standing under the constitutional rules of WTO it can not be enforced against LDCs under the dispute settlement system. This interpretation is consistent with the purposes of the dispute settlement system. The provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) apply to disputes relating to the TRIPS Agreement pursuant to Article 64 of TRIPS. However, “the recommendations and rulings of the Dispute Settlement Body (DSB) cannot add to or diminish the rights and obligations provided in the covered Agreements”.¹⁷ This means that unless an obligation exists in the TRIPS Agreement or is subsequently added through the constitutional channels, the DSB can not read the Agreement to add such an obligation. Apart from the no roll-back clause not being imposed on LDCs under the Agreement, the TRIPS Agreement is also very clear that for purposes of compliance and dispute settlement LDCs, as long as the transition period is still in force only have obligations under Articles 3, 4 and 5 of the Agreement.

In terms of the balance of rights and obligations, the clause obviously works to the disadvantage of LDCs in significant ways. The TRIPS Agreement acknowledges unequivocally that the obligations under the Agreement are onerous for LDCs. Nevertheless LDCs agreed to make efforts to integrate into the TRIPS framework on the condition that it is recognised (which is done in the Preamble) that they have special needs “in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them create a sound and viable technological base”. It is this aspiration in the Preamble that is concretised in Article 66.1. There is no doubt therefore that part of the balance *vis-à-vis* LDCs in the TRIPS Agreement was to exclude them from the application of the no roll-back clause imposed on developed and developing countries under Article 65. Such a clause negates the idea of maximum flexibility. The imposition of the clause on LDCs under the extension decision therefore significantly unbalances the rights and obligations under the TRIPS Agreement to the disadvantage of LDCs.

Beyond the legal and constitutional questions the no roll-back clause also raises practical problems for LDCs. First, as in the case of public health, many LDCs had initiated changes in IP law that do not necessarily correspond to their needs and that may not be conducive for efforts to build a sound technological base. These laws were introduced during earlier periods before the IP and development critique had some traction in the

international debate. With the debate such as that taking place at WIPO on the development agenda, LDCs have much better information to make decisions. The imposition of the no-roll back clause causes practical problems in that LDCs will not be able to experiment with different approaches.

Secondly, though the clause according to this author is illegal and can not be enforced through the DSB, its very existence will have a chilling effect on LDC governments. A final practical question relates to why this condition was imposed on this extension and not the earlier extension under the Doha Declaration on the TRIPS Agreement and Public Health¹⁸ as well as the specific extension for Maldives¹⁹? Does this mean that LDCs are allowed more flexibility in the pharmaceutical sector but not in other vital sectors such as agriculture, environment and education? What is the rationale for the distinction? For the purpose of technical assistance the no-roll back clause could mean that assistance to consider alternatives in these other vital areas is closed down.

It should also be borne in mind that LDCs are still entitled to seek further extensions to the transition period without limitation. Indeed, as long as there are no objective indicators to demonstrate that LDCs have established a viable technological base, there would be no justification for challenging the need for such extensions for LDCs or imposing conditions on extensions such as the no-roll back clause.

V. Inter-agency Coordination in the Delivery of Enhanced and Targeted Assistance to LDCs

The decision envisages interagency coordination and cooperation in both the identification of priority needs and in the eventual delivery of the enhanced technical and financial cooperation. Inter-agency cooperation is important because it will ensure that the maximum levels of both technical and financial resources are directed towards assisting LDCs in an efficient and effective manner. There are two key considerations, however, that need to

be kept in mind when thinking about inter-agency activities in this area.

The first consideration relates the relevant international organisations. This issue takes us back to the purpose and objective of the transition period. If you take the purpose of the transition period as being simply to allow more time for LDCs to fully comply with the TRIPS Agreement then relevant organisations will likely be those organisations

that deal with the protection of IPRs such as those which WIPO refers to as Industrial Property Organizations in category B of its intergovernmental observers.²⁰ On the other hand, if one takes the purpose and objectives of the transition period to be broader and to include allowing maximum flexibility for measures that promote the development of a sound and viable technological base, then the relevant organisations may be quite different and would include organisations such as United Nations Industrial Organisation (UNIDO), United Nations Development Programmes (UNDP), United Nations Conference on Trade and Development (UNCTAD), World Health Organization (WHO) as well as a range of other development and public interest focused organisations.

The second consideration relates to inter-agency coordination and coherence. While it is easy to say that the WTO Secretariat should enhance its cooperation with WIPO and other relevant organisations, actual cooperation that leads to better outcomes for the recipient countries is a challenge. Even when the relevant organisations are identified based on the broader understanding of the purpose and

objectives of the transition period, due to the different institutional mandates, philosophy and various inherent limitations, complete cooperation can not be expected. However, in a case such as the envisaged enhanced technical assistance for LDCs, improvements are required.

One way to achieve sufficient coordination, while maintaining the mandate and philosophy of the different agencies, could be through the development of common needs and priority assessment tools, such as the ICTSD diagnostic toolkit, elaboration of common principles and guidelines on design and delivery, such as those agreed under the WIPO Development Agenda as well as the development of common evaluation tools. Such common tools and guidelines will ensure transparency and better accountability. Better transparency and accountability, in turn, will ensure that while each organisation is able to leverage its strengths and mandate to provide assistance to the LDCs, there is sufficient coordination and conversation across the organisations and that over time comparative evaluations can be undertaken.

VI. Conclusion and Recommendations

The extension decision, in seeking to have a bottom-up identification of technical assistance priorities for LDCs, offers an important opportunity for these countries and technical assistance providers to not only ensure enhanced and effective assistance but also an opportunity to address some of the weaknesses of IP technical assistance that have been identified over time. Considering the amount of time that has lapsed since the adoption of the decision, urgent work is needed to develop tools for needs and priority assessment, to undertake the assessment and to present the results to the Council for TRIPS.

In order to take forward this process, LDCs could therefore consider the following recommendations:

1. The ICTSD diagnostic toolkit is a good starting point going forward in terms of tools

to use in the needs and priority assessment. LDCs should therefore seek resources from the WTO and WIPO Secretariats, which were mandated to help them undertake the needs assessment, to start using the ICTSD toolkit and to identify their priority needs. In this context, LDCs could also seek from the two secretariats information regarding any concrete steps and activities that have been undertaken by them or other organisations to implement the technical assistance part of the extension decision. Due to limited resources duplication should be avoided.

2. While the 1 January 2008 deadline for needs identification is not mandatory, LDCs should strive to adhere to this deadline or in any case to undertake this exercise as soon as possible. While presenting the needs, or once the individual needs have been presented to the Council for TRIPS, LDCs

- should seek a clear timetable and process that will ensure that there is eventual delivery of the targeted and enhanced assistance.
3. In addition to the toolkit, and in light of the development in WIPO with respect to technical assistance reform, LDCs should also seek the implementation of the WIPO guidelines in the process of identification of priorities and needs as well as in the eventual implementation of assistance to meet those needs.
 4. LDCs should in addition request and lead the Council for TRIPS in discussing the development of common evaluation tools which will be important in evaluating how the identified needs have been met by the assistance that will be provided by WTO, WIPO and other agencies as well as developed countries. The results of such evaluations will come in handy in 2013 especially if LDCs seek another extension. It is most likely that developed country Members of the WTO will oppose further extension after 1 July 2013 which means that concrete evidence will be required by LDCs to secure further extensions.
 5. In parallel with operationalising the toolkit and any other available tools and the other activities in the Council for TRIPS, LDCs should seek a legal opinion from the Advisory Centre on WTO Law (ACWL) on how to address the limitations that the no roll-back clause places on their right to receive technical assistance that is tailored to ensure that they exercise maximum flexibility in any efforts to implement the TRIPS obligations so as to build a sound and viable technological base. If it is found that the limitations imposed are significant, LDCs should in the long-run seek to discuss this problem in the Council for TRIPS.

Endnotes

- 1 The author is a legal researcher and policy analyst on innovation for development, access to knowledge and intellectual property. He also has research interests in human rights law especially on economic, social and cultural rights. He is currently a PhD candidate at the University of Bern in Switzerland. The author can be reached at smusungu@gmail.com. The author would like to thank Frederick M. Abbott, Carlos Correa, Hunter Nottage, Pedro Roffe and Martin Watson for their comments and suggestions on an earlier version of the paper. The author is, however, solely responsible for the views and opinions in the paper as well as any errors.
- 2 Para 1 of the extension decision (see WTO document IP/C/40: 30 November 2005), in particular, provides that "Least-developed country Members shall not be required to apply the provisions of the Agreement, other than Articles 3, 4 and 5, until 1 July 2013, or until such a date on which they cease to be a least-developed country Member, whichever date is earlier." The Council for TRIPS made this decision under Article 66.1 of the TRIPS Agreement which envisages further extension of the transition period for LDCs upon request. The shorter period for this extension does not affect, nor do its conditions apply to the earlier extension accorded to LDCs with respect to patent and test data protection for pharmaceuticals (WTO document IP/C/25: 27 June 2002). For a detailed discussion of the decision see e.g., South Centre and CIEL (2006), *Intellectual Property Quarterly Update, First Quarter 2006*, South Centre and CIEL, Geneva.
- 3 See Part II of the extension decision, *id.*
- 4 An example of such a tool is the ICTSD's diagnostic toolkit for assessing IP technical assistance for LDCs. Available at <http://www.iprsonline.org>.
- 5 There are also transitional periods for developed countries, some as long as ten years, as in the case of the Textile Agreement. For a detailed discussion of the transition periods under the TRIPS Agreement including the negotiating history of Article 66.1 see UNCTAD & ICTSD, (2005) *Resource Book on TRIPS and Development*, Cambridge University Press, New York, Part 6, Chapter 33.
- 6 Para 6 of the Preamble to the TRIPS Agreement recognises the special needs of LDCs which necessitate maximum flexibility in the domestic implementation of laws and regulations in these countries with a view to enabling them establish a sound and viable technological base.
- 7 Article 7 of TRIPS provides that: "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."
- 8 See e.g., Chang, Ha-Joon, (2002) *Kicking Away the Ladder – Development Strategy in Historical Perspective*, Anthem Press, London; and Dutfield, Graham and Uma Suthersanen (2005) "Harmonisation or Differentiation in Intellectual Property Protection? Lessons from History" QUNO Occasional Paper 15.
- 9 See para 2 of the extension decision, *supra* note 1.
- 10 However, as noted, work in this direction is currently underway. See e.g., the ICTSD draft diagnostic tool, *supra* note 3.
- 11 See e.g., the critique of IP technical assistance in Commission on Intellectual Property Rights, (2002) *Integrating Intellectual Property Rights and Development Policy*, Commission on Intellectual Property Rights, London.
- 12 See Summary by Chair of the WIPO PCDA for the meeting of February 2007. Available at <http://www.wipo.int>.
- 13 For a discussion on the characteristics of innovation systems in developing countries including LDCs see e.g., OECD & Eurostat (2005) *OSLO Manual – Guidelines for Collecting and Interpreting Innovation Data, 3rd Edition*, OECD Publishing, Paris.
- 14 See OECD & Eurostat, *id.* Also see Mani, Sunil and Henny Romijn (eds.), (2004) *Innovation, Learning, and Technological Dynamism of Developing Countries*, United Nations University, Tokyo for some relevant sectoral analysis.
- 15 The provision provides that: "A Member availing itself of a transitional period under paragraphs 1, 2, 3 or 4 shall ensure that any changes in its laws, regulations and practices made during that period do not result in a lesser degree of consistency with the provisions of this Agreement." Paragraphs 1 – 4 of Article 65 only apply to developed countries, developing countries and transition economies.
- 16 See Articles IV.2 and IX.1-4 of the Marrakesh Agreement Establishing the World Trade Organization.
- 17 Article 3.2 of the DSU.
- 18 See WTO document IP/C/25: 1 July 2002.
- 19 See WTO document IP/C/35: 17 June 2005.
- 20 See Annex 2 in Musungu, Sisule F., and Graham Dutfield (2003), "Multilateral Agreements and A TRIPS-plus World: The World Intellectual Property Organization", *TRIPS Issues Papers 3*, QUNO, Geneva & QIAP, Ottawa.