

Need for Extension of the LDC Transition Period Under Article 66.1 of the TRIPS Agreement Until Graduation and Beyond

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Abstract

Least developed country (LDC) Members of the World Trade Organization (WTO) have submitted a duly motivated request for the extension of the transition period under Article 66.1 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which exempts LDCs from implementing the obligations for protection and enforcement of intellectual property rights under the Agreement, in view of their vulnerabilities, special needs, economic, administrative and financial constraints, and the need for a sound and viable technological base. This request, submitted prior to the expiry of the current transition period on 1 July 2021, seeks a further extension for as long as those Members remain LDCs, and also for an additional period of 12 years after their graduation. This request is legitimate in view of the varied challenges that LDCs face, which have been aggravated through the reversal of development gains due to the public health and economic impact of the COVID-19 pandemic. These vulnerabilities will also continue to afflict the LDCs even after graduation, as recognized in several reports by different United Nations (UN) agencies as well as resolutions of the UN General Assembly. Therefore, WTO Members must display political will and translate global solidarity pledges into action and unconditionally support the request for extension of the transition period for LDCs under the TRIPS Agreement.

Les pays les moins avancés (PMA) membres de l'Organisation mondiale du commerce (OMC) ont présenté une demande dûment motivée de prolongation de la période transitoire prévue par l'article 66 alinéa 1 de l'accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce (ADPIC), qui permet aux PMA, étant donné leur vulnérabilité, leurs besoins et impératifs spéciaux, leurs contraintes économiques, financières et administratives et le fait qu'ils ont besoin de flexibilité pour se doter d'une base technologique viable, de ne pas appliquer les dispositions en matière de protection et de respect des droits de propriété intellectuelle prévues dans l'accord. Cette demande, qui a été soumise avant l'expiration de la période de transition actuelle fixée au 1^{er} juillet 2021, vise, pour les membres concernés, à obtenir une nouvelle prolongation aussi longtemps qu'ils demeureront des PMA, ainsi qu'une période supplémentaire de 12 ans après la perte de ce statut. Cette demande est légitime compte tenu des divers défis auxquels les PMA sont confrontés, qui ont été aggravés par la pandémie de COVID-19 dont les conséquences sur la santé publique et l'économie ont réduit à néant les acquis du développement. Comme le reconnaissent plusieurs rapports de différentes agences des Nations unies (ONU) ainsi que des résolutions de l'Assemblée générale des Nations unies, la perte du statut de PMA ne marque pas nécessairement la fin des vulnérabilités. C'est pourquoi il est essentiel que les membres de l'OMC fassent preuve de volonté politique et traduisent en actes leurs engagements en matière de solidarité internationale et soutiennent inconditionnellement la demande de prolongation de la période de transition formulée par les PMA au titre de l'accord.

Los países menos adelantados Miembros de la Organización Mundial del Comercio (OMC) han presentado un petición debidamente motivada para que se prorrogue el período de transición previsto en el párrafo 1 del artículo 66 del Acuerdo sobre los Aspectos de los Derechos de Propiedad Intelectual relacionados con el Comercio (ADPIC) de la OMC, por el que ninguno de los países menos adelantados Miembros está obligado a implementar las obligaciones de protección y aplicación de los derechos de propiedad intelectual en virtud del Acuerdo, habida cuenta de sus vulnerabilidades, necesidades especiales, limitaciones económicas, administrativas y financieras, y la necesidad de establecer una base tecnológica sólida y viable. Esta petición, presentada antes del vencimiento del actual período de transición previsto para el 1 de julio de 2021, pretende conseguir otra prórroga durante el tiempo que esos Miembros sigan siendo países menos adelantados, así como durante un período adicional de 12 años tras su graduación. Esta petición es legítima en vista de las amplias dificultades que afrontan los países menos adelantados, que se han visto agravadas por el retroceso en los logros de desarrollo debido a la repercusión de la pandemia de COVID-19 en la economía y la salud pública. Estas vulnerabilidades continuarán afligiendo igualmente a los países menos adelantados incluso después de la graduación, tal como se reconoce en varios informes de distintos organismos de las Naciones Unidas, así como en resoluciones de su Asamblea General. Por consiguiente, los Miembros de la OMC deben mostrar voluntad política y traducir las promesas de solidaridad mundial en medidas, y brindar su apoyo incondicional a la petición de prórroga del período de transición previsto en el Acuerdo sobre los ADPIC para los países menos adelantados.

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I. INTRODUCTION

The least developed countries (LDCs) benefit from an important provision under the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (see Box 1) – an extendable transition period during which they are not required to implement the provisions of the Agreement (except for Articles 3, 4 and 5 which contain provisions pertaining to national treatment and the most favoured nation treatment obligations). This flexibility was given to LDCs in recognition of their special needs and requirements, the economic, financial and administrative constraints faced by LDCs, as well as their need for flexibility to create a sound and viable technological base.

Article 66.1 of the TRIPS Agreement accorded the LDCs an initial 10-year transition period, which could be extended further by a decision of the TRIPS Council on the basis of a duly motivated request for such extension by any LDC. According to Article 66.1 of the TRIPS Agreement “[t]he Council of TRIPS *shall*, upon duly motivated request ... *accord* extensions of this period” (emphasis added). **The language used in Article 66.1 is compulsory, in that the TRIPS Council has no discretion to deny a request for extension of the transition period and nor does it have any legal basis to impose further conditions on LDCs.** However, in practice the terms of the extensions of the transition period that have been granted to the LDCs so far have been subjected to negotiations.

The initial transition period expired in 2005. On request of the LDCs, the transition period was extended in 2005 by a decision of the TRIPS Council¹ for 7 years and 6 months. A further extension of this transition period was granted by another decision of the TRIPS Council till 1 July 2021.²

As the current transition period nears its end, LDC Members have submitted a new duly motivated request to the TRIPS Council for a further extension of the transition period. In view of the impact of the COVID-19 pandemic on the economic and social development of LDCs in particular, including the reversal in the development gains towards achieving the Sustaina-

ble Development Goals (SDGs), **the LDCs have requested for such an extension of the transition period for as long as they remain LDCs.** Moreover, noting that the vulnerabilities of LDCs do not disappear merely due to graduation from LDC status, and requests made by the United Nations (UN) General Assembly to the WTO to consider the continuation of the flexibilities specifically available to LDCs upon their graduation (see below), the duly motivated request by LDCs **also proposed an additional period of 12 years after graduation, during which graduated LDCs will be exempted from implementing the provisions of the TRIPS Agreement other than Articles 3, 4 and 5.**

This brief explains the reasons behind the requested duration of the transition period by LDCs, in the light of their vulnerabilities, economic, administrative and technological challenges and the need for sustained availability of policy space through the use of the TRIPS transition period even after their graduation from the LDC status. The brief also explores the legal feasibility of such extension for the LDCs under TRIPS and the Agreement Establishing the WTO.

II. THE RATIONALE BEHIND THE TRANSITION PERIOD

Inclusion of the TRIPS Agreement as part of the WTO Agreements was the direct result of demands made by developed countries during the Uruguay Round, in response to the powerful lobby of a handful of industries (e.g. the entertainment industry, the chemical and pharmaceutical industry)³ that would greatly benefit from heightened intellectual property (IP) protection worldwide. Very few LDCs (only Bangladesh, Tanzania and the Democratic Republic of Congo) were actively involved in these negotiations.⁴

The TRIPS Agreement globalized minimum standards of IP protection that all Members of the WTO had to provide for, thus paving the way for an upward harmonization of substantive IP standards. As a consequence, developing country Members of the WTO had to amend their IP laws to provide stronger levels of IP protection. In order to facilitate implementation of the TRIPS Agreement, developing countries were given 5 years to comply with the Agreement (i.e. by 1 January 2000), with the pos-

BOX 1

TRIPS Part VI Transitional Arrangements

Article 66 Least-Developed Country Members

1. In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65.

The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.

sibility of delaying for another 5 years (i.e. until 1 January 2005) the grant of product patents in technology areas that were not patentable as on 1 January 2000, the date of entry into force of the WTO Agreement.

LDCs, however, were treated differently due to their special circumstances and were given a separate transition period under Article 66, with the aim of providing them maximum flexibility to create a sound and viable technological base. The special status of LDCs is recognized in the preamble of the TRIPS Agreement, which recognizes "... the special needs of least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base".

Clearly, the negotiators of the TRIPS Agreement were mindful of the special needs of LDCs and the unique challenges they would face in the process of technological catch-up as latecomers to technological development. It was recognized that intellectual property rights (IPRs) cannot be effective as an incentive mechanism in the absence of a sound and viable technological base and generate more costs than benefits.⁵ In order to be effective, IPRs need to apply in a context where there is a significant market size, sufficient capital, qualified personnel at the firm level, and a productive sector that demands innovation, as well as a solid scientific and technological base. As noted by the United Nations Conference on Trade and Development (UNCTAD) (see also Box 2), "[w]ithout an adequate knowledge infrastructure and institutional framework to capture the potential benefits of new ideas and information, the benefits claimed for IPR-induced technology transfer are not likely to be forthcoming".⁶ Technological catching-up requires sufficient levels of absorptive capacity – the ability to assimilate and adopt technological know-how, which is substantially lacking in the LDCs.⁷ These primary conditions for benefiting

from stronger standards of IP protection are absent in the LDCs. Strong IP protection in such a context can actually stifle technological learning which can severely impede the development of a technological base.

It is for this reason that Article 66 was crafted to give LDCs maximum flexibility to develop a viable technological base, meet their special needs, and overcome their vulnerabilities, economic, financial and administrative constraints.

III. TRIPS COUNCIL'S DECISIONS ON EXTENSION OF THE TRANSITION PERIOD

Thus far, the TRIPS Council has granted five separate extensions of the transition period under Article 66.1. In 2002, the transition period was extended until 2016 only for certain obligations with respect to pharmaceutical products. In 2005, the TRIPS Council granted a general extension of the transition period for 2 years at the request of Maldives, until its scheduled graduation in 2007. Later in 2005, the transition period was extended generally until July 2013 for all LDCs, pursuant to a joint request by LDC Members. In 2013 the TRIPS Council further extended this general transition period till 1 July 2021. The transition period that was extended in 2002 in respect of pharmaceutical products was further extended in 2015 until 1 January 2033.

It should be noted here that both the extension of the transition period for pharmaceutical products in 2002, and the general extension in 2005, did not make the transition period expire early for an LDC upon graduation. This was consistent with the language of Article 66.1 which also did not make a transition period expire before its full term for a graduating LDC. Only in the extension decision of the transition period in 2013 and 2015 the condition of early expiry of the transition period upon graduation was inserted.

BOX 2

UNCTAD, Least Developed Countries Report, 2007, p.120

IPRs provide an incentive to innovate, but like any other incentive, it works only in certain contexts. IPRs are not a magic tool that can boost innovation without other essentials, such as a critical level of skills, information, capital and markets. Generally, it seems clear that patents stimulate innovation only marginally, if at all, in countries with weak scientific and technological infrastructure (at the initiation stage of technological learning).

UNCTAD, Least Developed Countries Report, 2015, p.138

Successful economic transformation also depends on making special and differential treatment more effective, beyond merely allowing longer implementation periods to LDCs for obligations under WTO agreements. LDC obligations in any future WTO agreements should be tailored to their particular circumstances and their needs for achieving the planned SDGs sustainably through structural transformation. **There should also be an unequivocal commitment to allowing LDCs the maximum flexibility available under existing and any future WTO agreements** (emphasis added).

UNCTAD, Least Developed Countries Report, 2020, pp.145-6

... adequate policy space continues to be necessary if LDCs are to foster structural transformation and break their dependence on primary products. ...**At the very minimum existing flexibilities relating to the obligations under the TRIPS Agreement should be renewed beyond 2021...**(emphasis added).

IV. REQUEST BY LDC MEMBERS FOR FURTHER EXTENSION OF THE TRANSITION PERIOD

The LDC Members of the WTO submitted a duly motivated request to the TRIPS Council on 1 October 2020 for further extension of the transition period under Article 66.1 of the TRIPS Agreement. The request by the LDCs points to the difficulties that LDCs continue to face in reaching their development goals and significant setbacks that they have experienced towards achieving the SDGs, which have been further aggravated by the COVID-19 pandemic, as acknowledged by the UN Secretary-General and a number of reports by the UN Department of Economic and Social Affairs (DESA).⁸ The request by LDC Members specifically notes that the COVID-19 pandemic will adversely impact the economies of all LDCs, including those LDCs that are on the verge of graduation, due to decline in exports, fall in commodity prices, supply chain disruptions and the bleak prospect of an impending balance of payments crisis.

For example, the 2020 UNCTAD LDC Report states that the economic growth forecast for LDCs has been revised due to the economic shock caused by the pandemic from 5 per cent to a negative growth rate of -0.4 per cent.⁹ This is estimated to lead to a substantial decline in average income levels in most LDCs. There has been a sharp decline in demand for goods and services from LDCs which depressed the price for their primary exports and slump in inflows of external resources. This has impacted all LDCs, including those on the anvil of graduation, including LDCs that are dependent on export of commodities such as fuels, metals and minerals, as well as those that depend heavily on exports of manufactured products such as textiles and garments.¹⁰ This threatens to increase the number of people living in extreme poverty in LDCs by about 32 million.¹¹

To address these aggravated challenges and increased vulnerabilities, LDCs need to enhance their productive capacities. The UNCTAD LDC Report suggests that "... the international community and LDCs should concentrate their future actions and policies for LDCs on the expansion, utilization and strengthening of productive capacities in these countries ...", adding that the productive capacity deficiency is at the root of the vulnerability of LDCs to external shocks, such as the COVID-19 pandemic.¹² The development of a sound and viable technological base is crucial for the productive capacity expansion of LDCs.

As Article 66.1 of the TRIPS Agreement seeks to support the LDCs in the establishment of a sound and viable technological base, extension of the transition period exempting LDC Members from implementing the substantive obligations under the TRIPS Agreement is necessary. As the development of such a technological base is a long-term process, progress towards which has been hampered and reversed by the COVID-19

pandemic, the LDCs need a long-term continuation of the transition period until their graduation and beyond. Thus, the LDCs have requested that the transition period be available to them until their graduation, and thereafter for a period of 12 years.

This period, as requested, is not undetermined, but based on definite criteria. If granted, it would ensure that all LDCs have an assured transition period until graduation, without the need to return periodically to the TRIPS Council to seek an extension of a fixed term period during which the LDCs are (unrealistically) presumed to have reached technological maturity. An additional period of 12 years is also requested after graduation, to ensure that the transition period remains available for a definite period after graduation. This is important because graduation from the LDC category is based on criteria that are not related to the development of a technological base or expansion of productive capacities (see below). The 2016 UNCTAD LDC report stated in this regard that LDCs need to develop productive capacities to achieve "graduation with momentum", through technological upgrading of existing productive capacities, and expansion into new productive sectors and activities.¹³ Hence, even after graduation, the need for developing a technological base will remain. This could be facilitated by an additional transition period after graduation, as requested by the LDCs.

The request also points out that sustainable and smooth transition to graduation for LDCs necessitates the continuation of flexibilities available to the LDCs beyond graduation, as acknowledged in the 2016 UNCTAD LDC Report. Two UN General Assembly Resolutions (resolution 59/209 of 20 December 2004 and resolution 67/221 of 21 December 2012) concerning smooth graduation of LDCs have also specifically requested the WTO to consider the possibility of continuation of the LDC flexibilities beyond graduation.

V. WHY EXTEND FURTHER THE LDC TRANSITION PERIOD?

As the current extension of the transition period is set to expire on 1 July 2021, the question arises whether there is a need to further extend the transition period. Since the rationale behind the transition period under Article 66 is to provide LDCs maximum flexibility (by exempting them from most TRIPS obligations) in view of their constraints, special needs and requirements including a viable technological base, the need to extend the transition period will continue to exist so long as these elements have not been addressed. Thus, it is important to see whether the economic conditions on the ground have improved for LDCs since the extension of the transition period in 2013.

It is important to note that though the transition period for LDCs was extended only till 1 July 2021, the original request of the LDCs at the TRIPS Council in 2013 was to extend the transition period for as long as they remain

LDCs. Indeed, the 2011 Least Developed Countries Report from UNCTAD had stated that

... LDCs continue to play a very marginal role in the world economy, and that their growing integration in the global market was accompanied by very limited advances (if any) in their relative position compared with the rest of the world.... From a long-term perspective, **it appears that their marginalization is in many ways worse than in the early 1970s...** More generally, the picture that emerges ... is that the LDCs ... **have not been able to develop their productive capacities and beneficially integrate with the world economy** (emphasis added).

Besides the UNCTAD LDC Report, the Istanbul Programme of Action for the Least Developed Countries for the Decade 2011-2020 adopted by the Fourth UN Conference on LDCs stated that “[l]east developed countries’ productive capacity is limited, and **they have serious infrastructure deficits** (emphasis added).” The Istanbul Programme of Action also stressed the importance of science and technology for LDCs in this context and stated that

[a]ll LDCs are lagging behind in these critical areas which are key drivers for transformation and have great potential to change the development landscape of least developed countries if developed and harnessed properly. **Least developed countries have not been able to move beyond outdated technologies that characterize their production processes and outputs. Acquiring new technologies and building domestic capacity and 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 the productive capacities in least developed countries** (emphasis added).

Nevertheless, the LDCs were only granted a short extension until 1 July 2021. This approach of periodical extension of the transition period has proven to be unrealistic and impractical given the enormous hurdles that most LDCs have faced to reach the graduation level, a situation that has only worsened with the COVID-19 pandemic. The new proposed approach by the LDCs, establishing the extension for as long as a country remains an LDC and following graduation for a definite period, is the most rational in this context, and fully compatible with Article 66.1 of the TRIPS Agreement.

Indeed, even during this current transition period, the 2015 UNCTAD LDC Report stated that:

Successful economic transformation also depends on making special and differential treatment more effective, beyond merely allowing longer implementation periods to LDCs for obligations under WTO agreements. LDC obligations in any future

BOX 3

Excerpt from UNCTAD LDC report 2016: Graduation with momentum requires the development of productive capacities and structural transformation of the economy. This, not the fulfilment of the statistical criteria for graduation, should be the primary objective of graduation strategies.¹⁴

WTO agreements should be tailored to their particular circumstances and their needs for achieving the planned SDGs sustainably through structural transformation. **There should also be an unequivocal commitment to allowing LDCs the maximum flexibility available under existing and any future WTO agreements** (emphasis added).

Further, the 2016 UNCTAD LDC Report pointed to a widening of the gap between LDCs and other developing and developed countries in economic, social and productivity indicators, and noted in particular, that graduation from LDC category should be seen in the context of a broader and longer development process. It states that the achievement of the statistical criteria of graduation is not an end in itself. **In order to ensure that graduation is sustainable, all LDCs, including graduating LDCs, need to continue developing productive capacities and upgrading productive base. The report calls this a permanent need for all LDCs** (see Box 3).

When the conditions for graduation of an LDC are met is not determined within the WTO. It is based on the achievement of certain development criteria on a consistent basis over a period of time, as reviewed by the UN Committee for Development Policy (CDP).¹⁵ These criteria are: achievement of per capita gross national income (GNI) of \$1222 or higher, a human assets index (HAI) rating of 66 or higher, and economic and environmental vulnerability index (EVI) rating of 32 or lower. The HAI rating is based on sub-indices for health and education. The health index is determined on the basis of under-five mortality rate, prevalence of stunting, and maternal mortality ratio. The education index is determined on the basis of gross secondary school enrolment ratio, adult literacy ratio and gender parity for gross secondary school enrolment. Economic vulnerability of LDCs is assessed against the extent to which they are dependent on agriculture, forestry and fishery, remain dependent on concentrated merchandise exports, etc.

Significantly, the CDP may recommend to the UN Economic and Social Council the graduation of an LDC if it meets at least two of the three criteria consistently for 2 triennial reviews by the CDP. Thus, a country may be recommended for graduation even if it has a high economic and environmental vulnerability rating, if it consistently meets the other two criteria. Moreover, none of these criteria include an assessment of the technological capacities of LDCs. Thus, LDC graduation is a statistical achievement of certain indicators over a period of two triennial reviews (6 years). While this statistical achievement is a significant milestone for the LDCs, this does not necessarily imply

that the economic and other vulnerabilities of such LDCs, or their need for developing a technological base are resolved. This has been unequivocally recognized by the UN development agencies. For example, UNCTAD acknowledges that

[t]he economies of graduating LDCs, while demonstrating forms of structural economic progress, often remain little diversified and dependent on a small number of products or commodities for export. The transformation these countries aim to achieve or pursue implies a range of structural economic changes, notably from lower to higher levels of productivity and value addition. **Most graduating countries with an agenda for such progress will need post-LDC support measures, possibly new forms of special treatment after LDC status** (emphasis added).

Thus, if developing productive capacities is a permanent need for all LDCs, including graduating LDCs, the availability of a sound and viable technological base is critical for the same. Therefore, there is substantial rationale for seeking an extension of the transition period for LDCs and ensuring that they obtain maximum flexibility to develop a sound and viable technological base.

VI. IMPORTANCE OF THE TRANSITION PERIOD IN LIGHT OF THE COVID-19 PANDEMIC

The vulnerabilities faced by LDCs have been aggravated by the COVID-19 pandemic. A study by UN DESA on the impact of COVID-19 on LDCs states that COVID-19 threatens to undo the progress made towards sustainable development by LDCs in recent decades, and unless bold policy actions are taken by the international community, achieving the SDGs by the 2030 deadline will likely slip out of reach.¹⁶ The number of infections is still increasing in the LDCs. As the pandemic unravels in Africa,¹⁷ many of the LDCs will be most adversely impacted.

The lockdown and slump in global demand has also particularly impacted LDCs that are dependent on export of commodities or finished products. In this context, UN DESA recommends, among others, the need to adopt measures that go beyond addressing the immediate hardships caused by the pandemic and build back better by including policies to expand productive capacities to address root causes of limited economic resilience, lack of economic diversification and failure to create decent and productive jobs. It states that such policies should focus on "... industrial and technological upgrading while ensuring social and environmental protection."¹⁸

UN DESA has also noted that a prolonged global slump will likely reverse the gains from poverty reduction and undermine structural transformation of LDC economies, and a balance of payments crisis looms large.¹⁹

In this context, LDCs need to take measures to expand and diversify their productive capacities into sectors for manufacturing higher value-added products, increase investment in research and development, train their workforce and technicians, etc. in order to overcome their vulnerabilities.

This need is also there for LDCs that are in the process of graduation. In a statement released in May 2012, the UN CDP expressed concern about the possible negative impacts of COVID-19 on LDCs, and its impact on the preparations of LDCs that are graduating or are expected to be considered for graduation at the next triennial review. In this respect, the CDP noted that in addition to the LDC criteria scores (GNI per capita, HAI, economic and environmental vulnerability index) till 2019, it will also consider supplementary information that will include an assessment of the impact of COVID-19 for ensuring smooth transition after graduation, in case any LDC is recommended for graduation at the next triennial review.²⁰ Moreover, on 11 February 2021, the UN General Assembly adopted a resolution to grant Angola, which was scheduled to graduate in 2021, an additional preparatory period of three years before its effective date of graduation, in view of the negative impact of the COVID-19 pandemic on Angola.²¹

At a time when even the UN body that determines the LDC status of a country is considering moving beyond the generally followed criteria and includes consideration of the impact of COVID-19 on LDCs, and even the General Assembly has adopted exceptional measures to defer the graduation of an LDC to mitigate the impact of COVID-19, it is imperative that some WTO Members do not give primacy to narrow political and commercial interests and address the real situation that all LDCs (including potentially graduating LDCs) face. It is time for WTO Members to translate pledges of global solidarity into action.

VII. FEASIBILITY OF THE EXTENSION REQUESTED BY LDCS

Term of Extension

An extension until graduation is fully within the scope of Article 66.1 of the TRIPS Agreement. Article 66.1 only set the period of the initial extension and did not lay down any limitation, including in terms of duration, on subsequent extensions to be granted by the TRIPS Council upon a duly motivated request by any LDC.

Group Extension for all LDCs

The LDC Members have submitted a request for a common extension that will apply to all current LDC Members. This extension is the most appropriate for LDCs as it will give the most flexibility to accommodate the diversity of LDCs needs. If an LDC is in a position to implement TRIPS or certain aspects of the Agreement before others, they could still do so, without constraining other LDCs from benefiting from the full term of the extension. All the past extensions of the transition period have also been granted as group extensions for all LDCs.

Conversely a country specific extension is not a desirable option for LDCs. This will require each individual LDC to make a specific duly motivated request for extension, and it will be very difficult if not impossible to get fair terms for the extension in the negotiations, as each LDC will have to negotiate on its own with developed countries. Similarly, a thematic extension may not address the diverse needs of all LDCs.

No conditions

The request submitted by the LDCs seeks an extension of the transition period without conditions. This is fully consistent with Article 66.1 of TRIPS which does not place any condition for LDCs to comply with during the transition period. However, in the instance of the first general extension of the transition period that was granted in 2005, conditions to not roll-back the existing levels of IP protection during the transition period was introduced as part of the extension decision following negotiations, at the insistence of the developed countries. This condition was designed to prevent LDCs from taking full advantage of the transition period and reverse, where necessary, levels of IP protection that were inappropriate to their circumstances. This obligation, however, was subsequently withdrawn under the 2013 decision to further extend the transition period. It will be important for the WTO Members to ensure that the new extension of the transition period also does not include any obligation on the part of LDCs to preserve or not roll back existing levels of IP protection.

Extension beyond Graduation

A narrow reading of Article 66.1 could suggest that the transition period only applies for countries while they are designated as LDCs. However, there is no limitation under Article 66.1 for an LDC to seek an extension of the transition period for a specific period following its graduation. An informal note by the WTO Secretariat states that “[w]hile there are no particular measures in place in order to smoothen the transition for graduating LDCs, a graduating LDC can always make a request in this respect to the TRIPS Council.”²²

The request for extension of the transition period beyond graduation is also not unprecedented. Before the end of the initial transition period in 2005, Mauritius had submitted a request for extension of the transition period beyond graduation for a specified term. Though the TRIPS Council had agreed to only grant an extension to Mauritius until its graduation (a decision that subsequently became redundant as the graduation of Mauritius was postponed by the UN CDP), the TRIPS Council did not question the admissibility of a such a request under Article 66.1.

Even if some members in the TRIPS Council were of the view that an extension beyond graduation would be out of the scope of Article 66.1, such an extension could still be granted as a waiver under the Agreement Establishing the WTO. Any waiver decision pertaining to a covered agreement is first required to be consid-

ered by the relevant body of Member States. Thus, a waiver from TRIPS would have to be also considered by the TRIPS Council. Hence, what is more pertinent at this stage is whether the TRIPS Council recognizes the need for extension of the transition period beyond graduation. If there is agreement that such an extension is required, but could only be operationalized through a waiver, the TRIPS Council could itself recommend the adoption of such a waiver to the General Council.

Ultimately, the most important question before the WTO Members is whether there is political will to extend the transition period for LDCs until graduation, and for an additional period of 12 years thereafter. If there is political will, the issue of how to concretize the waiver for the graduation extension is merely procedural.

Conclusion

The TRIPS Agreement fully recognizes that LDC Members need maximum flexibility to address their special needs, and overcome their vulnerabilities, administrative and financial constraints, and establish a sound and viable technological base, before they are bound to implement the TRIPS Agreement. Article 66.1 of the Agreement thus granted an initial period of 10 years during which the LDCs were exempted from implementing the TRIPS obligations, and also guaranteed further extensions of the transition without any conditions or limitations, upon a duly motivated request made for such extension by any LDC. In practice, the transition periods have been extended for a specified number of years, though the LDCs have requested extensions until graduation.

As the current transition period nears its end on 1 July 2021, LDCs have again requested an extension until graduation. In addition, LDCs have also requested for an additional extension of the period for 12 years following graduation. This is consistent with the reality that graduation is merely a statistical achievement of certain indicators determined outside the WTO which do not necessarily reflect improvements in technological capacities, and that the challenges that an LDC confronts, including the lack of a sound and viable technological base and other vulnerabilities, continue to remain after graduation.

As noted, several reports by multiple UN agencies and two resolutions of the UN General Assembly have requested the WTO to consider the continuation of the international support measures that LDCs have under various WTO Agreements, including the TRIPS transition period, after graduation. Moreover, the public health and adverse economic impact of the COVID-19 pandemic has been most severe on the LDCs, including graduating LDCs. Hence, the request for extension of the transition period under Article 66.1 of the TRIPS Agreement by the LDCs is merited, pragmatic, evolutionary and duly motivated. Such extension is also legally feasible under the TRIPS Agreement. Thus, all WTO Members should be expected to unconditionally support the request for extension of the transition period by LDCs.

Endnotes:

¹ WTO document IP/C/W/40.

² WTO document IP/C/W/668.

³ See generally, Carlos M. Correa, *Intellectual Property Rights, the WTO and Developing Countries* (Zed Books, 2000), p. 4.

⁴ See Jayashree Watal and Leticia Caminero, "Least-developed countries, transfer of technology and the TRIPS Agreement", WTO Staff Working Paper, No. ERSD-2018-01, 22 February 2018, p. 4. Available from <https://www.econstor.eu/bitstream/10419/176766/1/1016547994.pdf>.

⁵ Ibid.

⁶ UNCTAD, *Least Developed Countries Report 2007: Knowledge, Technological Learning and Innovation for Development* (United Nations, New York, 2007), p. 118. Available from https://unctad.org/system/files/official-document/l2c2007_en.pdf.

⁷ The need for these conditions being in place for effective transfer of technology is also recognized by developed countries. See e.g., the submission of the European Union on the provision of incentives for transfer of technology to LDCs in Watal and Caminero, "Least-developed countries, transfer of technology and the TRIPS Agreement".

⁸ See United Nations, Covid-19 and the LDCs - resources, monitoring, articles. Available from <https://www.un.org/ldcportal/covid19-and-the-ldcs/>.

⁹ UNCTAD, *The Least Developed Countries Report 2020: Productive Capacities for the New Decade* (United Nations, New York, 2020), p. 7. Available from https://unctad.org/system/files/official-document/l2cr2020_ch1_en.pdf.

¹⁰ Ibid., p. 9.

¹¹ Ibid., p. 13.

¹² Ibid., p. 17.

¹³ UNCTAD, *The Least Developed Countries Report 2016: The Path to Graduation and Beyond: Making the Most of the Process* (United Nations, New York, 2016), p. 41. Available from https://unctad.org/system/files/official-document/l2c2016_en.pdf.

¹⁴ Ibid., p. 46.

¹⁵ See United Nations, Graduation from the LDC category. Available from <https://www.un.org/development/desa/dpad/least-developed-country-category/ldc-graduation.html>.

¹⁶ United Nations, "COVID-19 and the least developed countries", UN/DESA Policy Brief #66, 1 May 2020. Available from <https://www.un.org/development/desa/dpad/publication/un-desa-policy-brief-66-covid-19-and-the-least-developed-countries/>.

¹⁷ See World Health Organization Regional Office for Africa, Coronavirus (COVID-19). Available from <https://www.afro.who.int/health-topics/coronavirus-covid-19>.

¹⁸ United Nations, "COVID-19 and the least developed countries".

¹⁹ United Nations, "COVID-19 pandemic deals a huge blow to the manufacturing exports from LDCs", UN/DESA Policy Brief #71, 14 May 2020. Available from <https://www.un.org/development/desa/dpad/publication/un-desa-policy-brief-71-covid-19-pandemic-deals-a-huge-blow-to-the-manufacturing-exports-from-ldcs/>.

²⁰ United Nations, "Covid-19 and graduation from the LDC category", statement by the Committee for Development Policy, 12 May 2020. Available from <https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/CDP-Covid-graduation-statement.pdf>.

²¹ United Nations, G.A. RES/75/259. Available from <https://undocs.org/en/A/RES/75/259>.

²² See WTO, "LDC Graduation and the WTO", Informal Note, 2018. Available from https://www.gradjet.org/wp-content/uploads/2018/03/LDCGraduation_WTOissues-1.docx



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