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Implementing the Doha Declaration in OAPI Legislation: Do Transition Periods Matter?

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SOUTH CENTRE

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ABSTRACT

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) provided for a number of transition periods allowing countries to engage in a phased implementation of their TRIPS obligations. More specifically, transition periods targeted the patenting of pharmaceutical products. The original deadlines for transition periods have expired for developed and developing country WTO members. However, based on the Doha Declaration on the TRIPS Agreement and Public Health and subsequent TRIPS Council decisions, least developed countries (LDCs) continue to benefit from extended transition periods. In the African Intellectual Property Organization (OAPI), after an amendment in 1999, the legal framework has evolved with the amendment of the Bangui Agreement, i.e., the Act of Bamako of 14 December 2015. As for the previous text, the newly amended Bangui Agreement consecrates the unification on industrial property amongst its seventeen Member States. The main objective of such an amendment remains to adapt its legal framework to the international environment and to the economic and social development needs of Member States. Yet only five OAPI Member States are developing countries; the twelve others are LDCs. Then the question arises: do transition periods consecrated pursuant to the Doha Declaration still matter for LDCs who have agreed to be subjected to the OAPI legislation? This paper points out that transition periods remain relevant in OAPI countries by application of the more favorable rule between the Bangui Agreement and the WTO TRIPS Council decisions. It is however noted that the OAPI current legal framework is still problematic, while its LDCs members are underutilizing this flexibility.

El Acuerdo sobre los Aspectos de los Derechos de Propiedad Intelectual relacionados con el Comercio (Acuerdo sobre los ADPIC) establecía una serie de periodos de transición que permitían a los países aplicar gradualmente sus obligaciones en virtud del Acuerdo sobre los ADPIC. Más concretamente, los periodos de transición se centraban en las patentes de productos farmacéuticos. Los plazos originales de los periodos de transición han expirado para los países desarrollados y en desarrollo miembros de la OMC. Sin embargo, en virtud de la Declaración de Doha relativa al Acuerdo sobre los ADPIC y la Salud Pública y las posteriores decisiones del Consejo de los ADPIC, los países menos adelantados (PMA) siguen beneficiándose de periodos de transición ampliados. En la Organización Africana de la Propiedad Intelectual (OAPI), tras una modificación en 1999, el marco jurídico ha evolucionado con la modificación del Acuerdo de Bangui, es decir, el Acta de Bamako de 14 de diciembre de 2015. Al igual que el texto anterior, el Acuerdo de Bangui recién modificado consagra la unificación en materia de propiedad industrial entre sus diecisiete Estados miembros. El principal objetivo de tal modificación sigue siendo adaptar su marco jurídico al entorno internacional y a las necesidades de desarrollo económico y social de los Estados miembros. Sin embargo, sólo cinco Estados miembros de la OAPI son países en desarrollo; los otros doce son PMA. Entonces surge la pregunta: ¿siguen siendo importantes los periodos de transición consagrados en virtud de la Declaración de Doha para los PMA que han aceptado someterse a la legislación de la OAPI? Este documento señala que los periodos de transición siguen siendo pertinentes en los países de la OAPI por aplicación de la norma más favorable entre el Acuerdo de Bangui y las decisiones del Consejo de los ADPIC de la OMC. No obstante, se señala que el marco jurídico actual de la OAPI sigue siendo problemático, mientras que sus PMA miembros infrautilizan esta flexibilidad.

L'accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce (accord sur les ADPIC) a prévu un certain nombre de périodes de transition permettant aux pays de s'engager dans une mise en œuvre progressive de leurs obligations liées à l'accord

sur les ADPIC. Les périodes de transition visaient plus particulièrement le brevetage des produits pharmaceutiques. Les délais initiaux pour les périodes de transition ont expiré pour les pays développés et les pays en développement membres de l'OMC. Toutefois, conformément à la déclaration de Doha sur l'accord sur les ADPIC et la santé publique et aux décisions ultérieures du Conseil des ADPIC, les pays les moins avancés (PMA) continuent de bénéficier de périodes de transition prolongées. Au sein de l'Organisation Africaine de la Propriété Intellectuelle (OAPI), après un amendement en 1999, le cadre juridique a évolué avec l'amendement de l'Accord de Bangui, c'est-à-dire l'Acte de Bamako du 14 décembre 2015. Comme pour le texte précédent, l'Accord de Bangui récemment amendé consacre l'unification en matière de propriété industrielle parmi ses dix-sept États membres. L'objectif principal d'un tel amendement reste d'adapter son cadre juridique à l'environnement international et aux besoins de développement économique et social des États membres. Or, seuls cinq États membres de l'OAPI sont des pays en développement, les douze autres étant des PMA. La question suivante se pose dès lors : les périodes de transition consacrées en vertu de la Déclaration de Doha ont-elles encore de l'importance pour les PMA ayant accepté d'être soumis à la législation de l'OAPI ? Cet article souligne que les périodes de transition restent pertinentes dans les pays de l'OAPI par l'application de la règle la plus favorable entre l'Accord de Bangui et les décisions du Conseil des ADPIC de l'OMC. Il convient toutefois de noter que le cadre juridique actuel de l'OAPI reste problématique, tandis que ses PMA membres sous-utilisent cette flexibilité.

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I. INTRODUCTION

The Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) treats all the countries on an equal basis by providing for minimum standards of protection and enforcement of intellectual property rights (IPRs). However, it could not be overlooked during its negotiation that countries had different policies and levels of protection regarding IPRs. While developed countries had a strong tradition of protection of IPRs, it was the contrary for many developing countries and least-developed countries (LDCs). Developed countries had broadly benefited from a long period "to structure, develop, strengthen and diversify their technological, industrial and human capacities".[1] Since other countries needed more time to comply with the TRIPS provisions, a number of transition periods allowing countries to engage in a phased implementation of their obligations were provided[2]. The reception in 1994 by Member States of the TRIPS Agreement was thus mitigated.

Transition periods are considered as a flexibility[3] of the TRIPS Agreement. They were initially provided for by part VI of the TRIPS Agreement.[4] However, transition periods are no longer

[1] Elangi Botoy Ituku, "From the Paris Convention to the TRIPS Agreement: a one-hundred-and-twelve-year transitional period for the industrialized countries", *The Journal of World Intellectual Property* (Volume 7, Issue 1, January 2004), pp. 115-130.

[2] The negotiations leading to TRIPS had been primarily driven by the trade and commercial interests of the industrialized nations. While developing country negotiators were able to preserve certain flexibilities in the Agreement, overall, it did not address the needs and conditions of developing and least developed countries. including in the area of public health. See, Ellen 't Hoen, Jonathan Berger, Alexandra Calmy, & Suerie Moon, "Driving a decade of change: HIV/AIDS, patents and access to medicines for all", in *Practical Applications of the Flexibilities of the Agreement on Trade-Related Aspects of Intellectual Property Rights Lessons Beyond HIV for Access to New Essential Medicines*, Ellen 't Hoen, (University of Groningen, the Netherlands, 2018), p. 31.

[3] On the notion of flexibility, see for example, Carlos M. Correa, "Interpreting the Flexibilities Under the TRIPS Agreement", in Carlos M. Correa and Reto M. Hilty (eds.), *Access to Medicines and Vaccines Implementing Flexibilities Under Intellectual Property Law*, (Springer, 2022), p. 3; WIPO, document CDIP/5/4 REV., 18 August 2010, available at https://www.wipo.int/edocs/mdocs/mdocs/en/cdip_5/cdip_5_4_rev-main1.pdf.

[4] Accordingly, article 65 states that:

1. Subject to the provisions of paragraphs 2, 3 and 4, no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement.
2. A developing country Member is entitled to delay for a further period of four years the date of application, as defined in paragraph 1, of the provisions of this Agreement other than Articles 3, 4 and 5.
3. Any other Member which is in the process of transformation from a centrally-planned into a market, free-enterprise economy and which is undertaking structural reform of its intellectual property system and facing special problems in the preparation and implementation of intellectual property laws and regulations, may also benefit from a period of delay as foreseen in paragraph 2.
4. To the extent that a developing country Member is obliged by this Agreement to extend product patent protection to areas of technology not so protectable in its territory on the general date of application of this Agreement for that Member, as defined in paragraph 2, it may delay the application of the provisions on product patents of Section 5 of Part II to such areas of technology for an additional period of five years.
5. 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 practice made during that period do not result in a lesser degree of consistency with the provisions of this Agreement.

applicable, at least as far as developed and developing countries are concerned.[5] For LDCs however, a special treatment remains still available.[6]

The main provision for LDC Members regarding transition periods is article 66.1 of the TRIPS Agreement. This article provides that:

> 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.

Before even reaching the end of this period, at the Doha Ministerial Conference of 2001, the extension of the transition period for LDCs was agreed. It remains currently valid, as examined below. Then, considering the specific membership of the African Intellectual Property Organization (OAPI), the question is whether those transition periods are applicable to its members.

IPRs in OAPI countries are governed by the New Bangui Agreement, Act of Bamako of 14 December 2015. This text consecrates the unification on industrial property amongst its seventeen Member States. As for the previous versions, the main objective of the Bangui Agreement remains to adapt its legal framework to the international environment and to the economic and social development needs of Member States. Before examining how they are implemented in OAPI countries, it is necessary to present the content of the adopted transition periods that may be of relevance, in particular, regarding public health.

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[5] For an overview of how they applied, see for example, Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis*, (2nd Edition, London, Sweet and Maxwell, 2003), p. 346-355; Sisule F. Musungu and Cecilia Oh, *The Use of Flexibilities in Trips by Developing Countries: Can They Promote Access to Medicines?*, (South Perspective, South Centre, 2006), p. 13-27; Pedro Marcos Nunes Barbosa, "Brazilian Superior Court Of Justice Stops Patent Term Extension Attempts", *Intellectual Property Watch*, 11 May 2018, available at http://www.ip-watch.org/2018/05/11/brazilian-superior-court-justice-stops-patent-term-extension-attempts/; Germán Velásquez and Pascale Boulet, *The Who "Red Book" on Access to Medicines and Intellectual Property – 20 Years Later*, (South Centre, 2015), p. 38.

[6] It should be noted that all the transition periods do not apply to Members' obligations under articles 3, 4 and 5 of the TRIPS Agreement. These articles are related to the National Treatment, the Most-Favoured-Nation Treatment (MFN) and Multilateral Agreements on Acquisition or Maintenance of IPRs. The reason for singling out national treatment and MFN for immediate implementation by all WTO Members is based on the perceived overall importance of those rules for the functioning of TRIPS. From a developed country perspective, immediate implementation of national treatment and MFN secures a level playing field in developing countries and LDCs for foreign IP holders . See UNCTAD-ICTSD, *Resource Book on TRIPS and Development: An authoritative and practical guide to the TRIPS Agreement*, (Cambridge University Press, 2005), p. 713.

II. THE CONTENT OF TRANSITION PERIODS UNDER THE TRIPS AGREEMENT

While the TRIPS Agreement already provided for a general framework still applicable to LDCs, considering their specific needs the Doha Declaration extended the application of the transition period.

II.1 A General Overview of Transition Periods for LDCs

Article 66.1 allowed LDCs ten years to implement the TRIPS Agreement. They had until 1 January 2006 to comply with the TRIPS obligations, except the non-discrimination principles. "Recognizing the continuing needs of least developed country Members for technical and financial cooperation so as to enable them to realize the cultural, social, technological and other developmental objectives of intellectual property systems", the TRIPS Council further decided on a general extension of the transition period, until 1 July 2013,[7] and then until 1 July 2021.[8] Before the end of this last period, the LDC group at WTO submitted a document[9] seeking to extend the transition period for as long as the member remains categorized as a LDC, and for an additional period of 12 years from the date of graduation of a member from the LDC category.[10] The consensus found led to the adoption of a Decision of the TRIPS Council[11] extending the period until **1 July 2034**. As stated in paragraph 3 of the document, the Decision is without prejudice to the Decision of the Council for TRIPS on "Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for Least-Developed Country Members for Certain Obligations with respect to Pharmaceutical Products",[12] and to the right of LDC Members to seek further extensions of the period provided for in paragraph 1 of Article 66 of the Agreement.

Despite the initial general extension of the transition period, it should be noted that LDCs were obliged, in accordance with article 70.8[13] and 70.9[14] to provide for a registration system (mailbox) of patent applications for pharmaceutical and agricultural chemical products and for

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[7] WTO, document IP/C/40, 29 November 2005.
[8] WTO, document IP/C/64, 11 June 2013.
[9] WTO, document IP/C/W/668, 1 October 2020.
[10] All delegations supported the extension of the LDC transition period, but some expressed a preference for extending the period for a limited number of years, while others were concerned that a transition period for members that have graduated from LDC status went beyond the TRIPS Council's mandate under Article 66.1. See, WTO, "Members approach text-based discussions for an urgent IP response to COVID-19", 9 June 2021, https://www.wto.org/english/news_e/news21_e/trip_09jun21_e.htm.
[11] WTO, document IP/C/88, 29 June 2021.
[12] WTO, document IP/C/73, 6 November 2015.
[13] Article 70.8 of the TRIPS Agreement: "Where a Member does not make available as of the date of entry into force of the WTO Agreement patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Article 27, that Member shall:

(a) notwithstanding the provisions of Part VI, provide as from the date of entry into force of the WTO Agreement a means by which applications for patents for such inventions can be filed;
(b) apply to these applications, as of the date of application of this Agreement, the criteria for patentability as laid down in this Agreement as if those criteria were being applied on the date of filing in that Member or, where priority is available and claimed, the priority date of the application; and
(c) provide patent protection in accordance with this Agreement as from the grant of the patent and for the remainder of the patent term, counted from the filing date in accordance with Article 33 of this Agreement, for those of these applications that meet the criteria for protection referred to in subparagraph (b)."

[14] Article 70.9 of the TRIPS Agreement: "Where a product is the subject of a patent application in a Member in accordance with paragraph 8(a), exclusive marketing rights shall be granted, notwithstanding the provisions of Part VI, for a period of five years after obtaining marketing approval in that Member or until a product patent is granted or rejected in that Member, whichever period is shorter, provided that, subsequent to the entry into force of the WTO Agreement, a patent application has been filed and a patent granted for that product in another Member and marketing approval obtained in such other Member."

exclusive marketing rights. However, they further benefited from an exemption from the obligation to put in place a mailbox and grant exclusive marketing rights for pharmaceutical products until 2016, and then 2033.[15] This is precisely where the Doha Declaration played a core role.

II.2 An Extended Application of Transition Periods Pursuant to the Doha Declaration

The Doha Ministerial Conference of 2001 confirmed the principle of the extension of the transition period for LDC. Thus, Paragraph 7 of the Doha Declaration states that:

> We reaffirm the commitment of developed-country Members to provide incentives to their enterprises and institutions to promote and encourage technology transfer to least-developed country Members pursuant to Article 66.2. We also agree that the least-developed country Members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections until 1 January 2016, without prejudice to the right of least-developed country Members to seek other extensions of the transition periods as provided for in Article 66.1 of the TRIPS Agreement. We instruct the Council for TRIPS to take the necessary action to give effect to this pursuant to Article 66.1 of the TRIPS Agreement.

Pursuant to the instruction of the Ministerial conference, specifically the last sentence of this Paragraph 7, the TRIPS Council adopted a decision on the "Extension of the Transition Period Under Article 66.1 of the TRIPS Agreement for Least Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products".[16] The decision implements the extension referred to in paragraph 7, establishing that the transition period for LDC Members to implement their obligation relating to patents and marketing rights, and data protection for pharmaceutical products, is extended until 1 January 2016.

It is stated that "this decision is made without prejudice to the right of least developed country Members to seek other extensions of the period provided for in paragraph 1 of Article 66 of the TRIPS Agreement".[17] Accordingly, before the end of the extension granted in 2002, the TRIPS Council adopted another decision[18] according to which "Least developed country Members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections until **1 January 2033**, or until such a date on which they cease to be a least developed country Member, whichever date is earlier".[19] Consequently, LDC Members may, until 2033, disregard substantive TRIPS provisions on patents and undisclosed information with respect to pharmaceutical products. The new transition period could still be extended upon a duly motivated request from LDC Members.

While the waiver of sections 5 and 7 of Part II of the TRIPS Agreement addressed substantive obligations, an issue that needed to be considered as well was the applicability to LDCs of article 70.8 and 70.9. The General Council issued a decision on "Least Developed Country Members – Obligations Under Article 70.9 of the TRIPS Agreement With Respect to Pharmaceutical Products"[20] approving the waiver submitted by the TRIPS Council concerning the obligation of LDC Members to provide for a mailbox and exclusive marketing rights during the extended transitional period. This decision follows the request of LDCs "for a waiver from

[15] See below, II.2 and p. 9-11.
[16] WTO, document IP/C/25, 27 June 2002.
[17] Paragraph 2, document IP/C/25.
[18] WTO, document IP/C/73, 6 November 2015.
[19] Paragraph 1, document IP/C/73.
[20] The first extension was approved in 2002. See, WTO, Document WT/L/478, 8 July 2002.

obligations under paragraph 8 of Article 70 of the TRIPS Agreement and a further extension of the waiver from obligations under paragraph 9 of Article 70 of the TRIPS Agreement with respect to pharmaceutical products".[21] The decision of the TRIPS Council, adopted on 6 November 2015,[22] stated that "The obligations of least developed country Members under paragraphs 8 and 9 of Article 70 of the TRIPS Agreement shall be waived with respect to pharmaceutical products until 1 January 2033, or until such a date on which they cease to be a least developed country Member, whichever date is earlier".[23] The decision is taken to make sure that obligations under paragraphs 8 and 9 of Article 70 of the TRIPS Agreement should not prevent attainment of the objectives of paragraph 7 of the Doha Declaration. As stated in the UNCTAD-ICTSD Resource Book on TRIPS and Development,

> [This waiver] considerably enhances the practical value of the extension of the transitional period under paragraph 7. If LDC Members had to honor exclusive marketing rights (EMRs), the availability of less costly generic copies of a drug would be seriously put into question. Depending on local law, the patent applicant might not be able to invoke EMRs against the making or the importation of the covered drugs. But the patent applicant would presumptively have the right to prevent the marketing of the less costly copies throughout the respective LDC Member.[24]

An interpretation of paragraph 7 of the Doha Declaration suggested that since it specifically refers to pharmaceutical "products", it would exclude pharmaceutical process patents. However, it is widely admitted that paragraph 7 covers both product and process patents with respect to pharmaceuticals. Thus, for the purpose of 31bis of the TRIPS Agreement,[25]

> "pharmaceutical product" means any patented product, or product manufactured through a patented process, of the pharmaceutical sector needed to address the public health problems as recognized in paragraph 1 of the Declaration on the TRIPS Agreement and Public Health (WT/MIN(01)/DEC/2). It is understood that active ingredients necessary for its manufacture and diagnostic kits needed for its use would be included.

Even if the definition was adopted in the particular context of paragraph 6 of the Doha Declaration, it can be considered that it also applies to paragraph 7. The purpose of both paragraphs is, indeed, to prevent the TRIPS patent rules from becoming an obstacle to Members' efforts to protect public health.

However, do these transition periods really matter for OAPI Member States?

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[21] WTO, document WT/L/971, 2 December 2015.
[22] WTO, document IP/C/73.
[23] Paragraph 1, document WT/L/971.
[24] UNCTAD-ICTSD (2005), p. 723.
[25] This article and the Annex of the TRIPS Agreement was introduced as an amendment after the entry into force, on 23 January 2017, of the permanent amendment resulting from the "TRIPS Amendment Decision" of the General Council, (WTO, Document WT/L/641, 6 December 2005). WTO, "WTO IP rules amended to ease poor countries' access to affordable medicines", 23 January 2017, https://www.wto.org/english/news_e/news17_e/trip_23jan17_e.htm. See also, W. New, "It's Official: TRIPS Health Amendment In Effect, First Ever To A WTO Agreement", *Intellectual Property Watch*, 23 January 2017, http://www.ip-watch.org/2017/01/23/official-trips-health-amendment-effect-first-ever-wto-agreement/. Regarding Members and dates of acceptance to date, see https://www.wto.org/english/tratop_e/trips_e/amendment_e.htm

III. IMPLEMENTATION OF THE TRANSITION PERIODS IN OAPI MEMBER STATES

The impact of transition periods on the implementation of the OAPI legislation is a consequence of the specific legal framework applicable to the status of OAPI Member States.

III.1 Legal Framework And Status of the OAPI Member States

In the beginning it was called the African and Malagasy Office for Industrial Property (OAMPI).[26] Created on 13 September 1962 by the "Libreville Agreement" which entered into force on 1 January 1964, OAMPI brought together twelve (12) French-speaking African countries who had decided to set up a common structure created to act as an office for industrial property for each of them. The Bangui Agreement of 2 March 1977, on the creation of an African Intellectual Property Organisation (OAPI[27]) came to replace the "Libreville Agreement". OAPI proceeded to a substantial modification of its texts with the amendment of the Bangui Agreement on 24 February 1999.[28]

Considering the evolution of the international context and critical observations made on its legal framework, the Bangui Agreement was revised by the Act of Bamako of 14 December 2015. The Revised Bangui Agreement of 2015 entered into force on 14 November 2020.[29]

Under the Bangui Agreement were adopted ten (10) annexes dealing respectively with Patent, Utility Models, Trademarks and Service Marks, Industrial Designs, Trade Names, Geographical Indications, Literary and Artistic Property, Protection against Unfair Competition, Layout-Designs (Topographies) of Integrated Circuits and Plant Variety Protection.[30]

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[26] For an overview of the history and evolution of IP in OAPI Countries, see for example, Paulin Edou Edou, *Les incidences de l'Accord ADPIC sur la protection de la propriété industrielle au sein de l'Organisation Africaine de la Propriété Intellectuelle (OAPI)*, (thèse de Doctorat en droit privé, Université Robert Schuman, Strasbourg III, 2005) ; René Kiminou, *Le brevet d'invention africain*, (Thèse de Doctorat en droit, Université de Montpellier I, T. 1, Avril 1990) ; Patrick Juvet Lowé Gnintedem, « L'Organisation africaine de la propriété intellectuelle (OAPI) en marche », (*International Business Law Journal (RDAI/IBLJ)*, n° 5, 2021), p. 713-719.

[27] From its French acronym, Organisation Africaine de la Propriété Intellectuelle. See the website of OAPI, www.oapi.int.

[28] *Agreement Revising the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organisation*, Bangui (Central African Republic) February 24, 1999. The revised Agreement entered into force on 28 February 2002. This amendment aimed at:

- putting its provisions in conformity with international treaties related to intellectual property to which member States are parties, notably the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement) of the World Trade Organisation (WTO);
- the simplification of patent issuance procedures;
- extending the missions of OAPI which has, beyond its traditional missions, to promote the development of the member States notably through an effective protection of intellectual property, and to provide a relevant formation in IP issues;
- extending the range of items to be protected to new ones such as plant varieties or layout-designs (topographies) of integrated circuits.

[29] See, Decision n° 003/OAPI/PCA of 27 October 2020 Related to the Entry into Force of Some Annexes of The Bangui Agreement.

[30] Four of these annexes entered into force at the same time with the Bangui Agreement, that is on 14 November 2020. The four are: Annex VI on Geographical Indications, Annex VII on Literary and Artistic Property, Annex VIII on Protection against Unfair Competition and Annex X on Plant Variety Protection. Three annexes, Annex III on Trademarks and Service Marks, Annex IV on Industrial Designs and Annex V on Trade Names entered into force this 1 January 2022. Annex I on Patent, Annex II on Utility Models and Annex IX on Layout-Designs (Topographies) of Integrated Circuits are still governed by the Bangui Agreement of 1999.

OAPI has adopted a very particular system of integration, that is the **unification of IP law under its legal framework**. As a consequence,[31] of this key principle that demarcates a crucial difference[32] with other regional IP organisations, the originality of the OAPI regional IP system is shown through different elements.

First, the Bangui Agreement and its ten annexes are binding to all the Member States in which they constitute domestic law. As provided for in the Agreement, it "and its annexes shall serve as laws governing their intended subject matter in the Member States, where they shall rescind or prevent the entry into force of all contrary provisions. Annex VII relating to literary and artistic property is a minimum statutory framework".[33]

Furthermore, OAPI serves as the national industrial property service for each of the 17 Member States.[34] Accordingly, OAPI member countries do not have national industrial property administration systems coexisting with the regional system. For each Member State also party to the Patent Cooperation Treaty, the Organization serves as "national office", "designated office", "elected office" or "receiving office" within the meaning of the relevant articles of that Treaty.[35] OAPI has **National Connection structures** in every member State to maintain a continuous communication with the Organization. Applications can be deposited in those structures for transmission to the Organization.

Also, the Organisation centralizes all the procedures for issuing industrial property titles and acts as the central patent documentation and information body. Moreover, any filing or registration with the administration of one of the member States in accordance with the provisions of the Bangui Agreement and its annexes, or with the Organization, shall be equivalent to a national filing in each Member State.[36]

Another element of originality is that the courts of each Member State of OAPI are competent to rule on any infringement of IP. And according to article 20 of the Bangui Agreement, "final judicial decisions rendered in respect of the validity of titles in a Member State pursuant to the provisions of Annex I to Annex X of this Agreement shall be binding on all other Member States". Only decisions based on public order and morality are not concerned by this provision. Significantly, the unification of IP law in OAPI is done in such a way that there is no distinction between developing countries and LDCs.

OAPI is currently constituted of seventeen (17) Member States. These are: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Ivory Coast, Mali, Mauritania, Niger, Senegal, and Togo. Amongst these countries, only five are considered as developing countries: Cameroon, Equatorial Guinea,[37] Congo, Gabon and Ivory Coast. All the twelve others are LDCs.[38]

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[31] Souichirou Kozuka, "The Economic Implications of Uniformity in Law", *Uniform Law Review*, 2007, pp. 683-695.
[32] On the differences, see for example, Mart Leesti and Tom Pengelly, "Institutional Issues for Developing Countries in Intellectual Property Policymaking, Administration and Enforcement", Background Paper 9, (London, Commission on Intellectual Property Rights, 2002), p. 43.
[33] Article 5.2, Bangui Agreement (2015).
[34] Article 3.1, Bangui Agreement (2015).
[35] Article 3.2, Bangui Agreement (2015). OAPI also serves as "office of origin" and "designated office", within the meaning of the relevant articles of the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (Article 3.3, Bangui Agreement (2015).
[36] Article 9.1, Bangui Agreement (2015).
[37] The graduation of Equatorial Guinea from the LDC category took effect in 2017. See, UN General Assembly, document A/RES/68/18, 9 December 2013, https://undocs.org/en/A/RES/68/18; https://www.un.org/development/desa/dpad/least-developed-country-category-equatorial-guinea.html; https://unctad.org/fr/press-material/qui-sont-les-pays-les-moins-avances-1.
[38] Amongst the twelve, Comoros and Equatorial Guinea are not WTO members. Albeit, they have the status of observers. See, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm. In the case of ARIPO Member States, the status of the State raises a different issue. LDCs (and non-WTO States) that are signatories to the

Considering the status of its Member States, it is clear that more than two thirds are LDCs.[39] Consequently, it could seem natural to think that they can benefit from the transition periods flexibility allowed under WTO decisions mentioned above. However, the situation is not as simple.

III.2 Impact of Transition Periods on the Implementation of the OAPI Legislation in the Member States

The recognition of transition periods as a flexibility leaves several options to LDCs. During the said period, if pharmaceutical products or processes did not fall under the IP protection, a WTO Member could not successfully challenge the LDC Member for not implementing patent rights in its territory. This option can no longer be implemented in OAPI countries. For several decades, OAPI already provided for patent protection on pharmaceutical products.[40] Contrarily to what was done till 1977, the successive Bangui Agreement adopted and amended under the OAPI framework does not expressly mention pharmaceutical products as excluded from the patentable subject matter. According to the Bangui of Agreement (2015), invention "means an idea that permits a specific problem in the field of technology to be solved in practice".[41] An invention is patentable, amongst other conditions, if its object can be made or used in **any kind of industry**. The term "industry" shall be understood in its broadest sense, including handicrafts, agriculture, fishery and services.[42] Despite the fact it is not expressly specified, the term industry includes pharmaceuticals.

What options may exist if an LDC already provides for patent protection, as is the case for OAPI countries? In principle, LDC Members are not prevented under TRIPS to adopt during the transition period new laws lowering the standards of patent protection for pharmaceutical products.[43] In this case, they would still need to take action to incorporate these changes into their national laws.[44] The amendment of the Bangui Agreement in 2015 does not show a clear will of the OAPI legislator to adopt this option. It has been suggested that, instead of modifying domestic law, LDC member governments could alternatively take steps to allow their enforcement authorities, whether those are administrative authorities or courts, to reject

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Harare Protocol, are required to recognize the pharmaceutical patents granted through the ARIPO filing mechanism, even where their domestic laws exclude the patenting of pharmaceuticals, unless they notify the ARIPO office otherwise. See, Yousuf A Vawda and Bonginkosi Shozi, "Eighteen Years After Doha: An Analysis of the Use of Public Health TRIPS Flexibilities in Africa", Research Paper, No. 103, (South Centre, February 2020), p. 15.

[39] For an overview of LDCs and criteria used, see the UNCTAD website, https://unctad.org/topic/least-developed-countries. See also, Yousuf A Vawda and Bonginkosi Shozi, "Utilising Public Health Flexibilities in the Era of COVID-19: An Analysis of Intellectual Property Regulation in the OAPI and MENA Regions", Research Paper, No. 141, (South Centre, November 2021), p. 5-6.

[40] For an overview of the history of pharmaceutical protection in OAPI, see for example, Patrick Juvet Lowé Gnintedem, *Droit des brevets et santé publique dans l'espace OAPI*, (Aix-en-Provence, Presses Universitaires d'Aix-Marseille (PUAM), 2014), pp. 47-51.

[41] Article 1.1, Bangui Agreement (2015).

[42] Article 5, Bangui Agreement (2015).

[43] WHO, WIPO and WTO, *Promoting Access to Medical Technologies and Innovation Intersections between public health, intellectual property and trade*, (2nd edition, Switzerland, World Trade Organization, World Health Organization and World Intellectual Property Organization, 2020), p. 94.

[44] This is what happened in Rwanda in 2009, when a new law on the protection of IP was adopted. It excludes from patentability "pharmaceutical products, for the purposes of international conventions to which Rwanda is party" (Article 18(8), Law No. 31/2009 of 26/10/2009 on the Protection of Intellectual Property). Under Rwanda's previous patent legislation, pharmaceutical products were patentable subject matter. The 2018 Revised Policy on Intellectual Property in Rwanda expressed the desire to create an environment that enabled more local manufacturing of pharmaceuticals, including an enabling IP environment for investments in pharmaceuticals in Rwanda (see, Republic of Rwanda, Ministry of Trade and Industry, *Revised Policy on Intellectual Property in Rwanda*, adopted in November 2018, available from http://www.minicom.gov.rw/fileadmin/minicom_publications/policies/Revised_Policy_on_Intellectual_Property.pdf)

requests for patent right enforcement,[45] at least during transition periods. At the same time, it is admitted that by acting in advance the government can save itself and its procurement authorities from the potential delay and expense involved in legal battles with IPR holders, and potential political pressure from the home governments of IPR holders.[46] In any case, the observation of the judicial and administrative environment in OAPI countries does not permit to say that a country has ever tried to make obstacle to the implementation of the Bangui Agreement in respect of its provisions related to pharmaceutical products/processes.

Considering the specific character of OAPI as a regional organization, another option would have been to consider that the provisions of the Bangui Agreement are not binding for LDC member states if they are contrary to the most favorable international arrangements, including paragraph 7 of the Doha Declaration and the decisions implementing successive extension of the transition period. This was the option adopted by the former version of the Bangui Agreement (1999). Under this version of the Agreement, it was provided that

> Nationals may claim application for their benefit of the provisions of the Paris Convention for the Protection of Industrial Property (1967 Act), the Berne Convention for the Protection of Literary and Artistic Works (1971 Act), the Universal Copyright Convention, the Agreement on Trade-Related Aspects of Intellectual Property Rights and also the Agreements, additional acts and closing protocols that have amended or will amend those Conventions or that Agreement, **in all cases where such provisions are more favorable** than those of this Agreement and its Annexes in protecting the rights deriving from intellectual property.[47]

This provision was an important flexibility, to leave any Member State to use, if needed, the flexibilities consecrated under international law. Concerning transition periods, this meant that a developing country member could benefit from it till 1 January 2005. Considering that developing countries are no longer covered by transition periods, it meant that LDC Member could benefit for any transition period **existing or to exist** after the adoption of the Bangui Agreement. However, this provision has been eliminated in the amendment of the Bangui Agreement adopted in 2015.

Yet, the amended Bangui Agreement (2015) has opted for a neighboring formula to the previous article 3.2 of the Bangui Agreement (1999). It rather gives the LDC members of OAPI the possibility to decide that, until the end of the transition period, they will not enforce legal provisions relating to test data protection or patents in the area of pharmaceuticals. Such a legal provision was adopted in line with the implementation of Paragraph 7 of the Doha Declaration and subsequent decisions under the WTO framework. Thus, the amended Bangui Agreement (2015) consecrates specific “transitional provisions relating to pharmaceutical products” under article 46:

> Until 1 January 2033 or on the date on which they cease to be classified as Least Developed Countries, Member States that have such status are no longer required to apply the provisions of Annex I regarding patents consisting in or relating to a pharmaceutical product and the provisions of Annex VIII relating to confidential information.

The adoption of such a provision follows directly the decision of the Council for TRIPS[48] taken on 6 November 2015 extending the transition period for LDCs with regard to pharmaceutical

[45] UNCTAD-ICTSD (2005), p. 721.
[46] Ibid.
[47] Article 3.2, Bangui Agreement (1999) (emphasis added).
[48] WTO, document IP/C/73.

patents and test data protection for pharmaceutical products. This article 46 of the Bangui Agreement (2015) however raises some concerns.

One of the concerns is that contrary to the previous Bangui Agreement (1999) in its article 3.2, the possibility of extension of the transition period is not introduced. Yet, the WTO decision of 6 November 2015 "is made without prejudice to the right of least developed country Members to seek other extensions of the period provided for in paragraph 1 of Article 66 of the TRIPS Agreement". What will happen if such a hypothesis is realized? A restrictive interpretation of article 46 of the Bangui Agreement could lead to the conclusion that for LDC Member States of OAPI, there will be no other extension after 1 January 2033, even if there is an extension admitted under the WTO framework. However, an extensive interpretation of article 19 may lead to a more favorable application of the Bangui Agreement. Indeed, this article provides that: "Where the provisions of this Agreement or its annexes diverge from those of the international agreements to which the Member States or the Organization are party, the international agreements shall prevail." Hence, any difference between the Bangui Agreement and an international agreement shall be interpreted in favor of the latter. This can lead, as stated above, to a favorable application of additional transition periods for OAPI LDCs. The risk with such an interpretation is that the international agreement can provide for more restrictive rules than the Bangui Agreement. Thus, even by putting together article 46 with article 19 of the Bangui Agreement, the text remains less favorable than that of 1977.

Another concern is related to the general extension of the LDCs transition period, which covers all TRIPS obligations except the non-discrimination principles until 1 July 2034. Does deleting article 3.2 of the previous Bangui Agreement (1999) excludes an LDC Member State of OAPI from the benefit of the general transition period? Before the amendment, it was possible to consider that any provision of the Bangui Agreement prescribing an upper obligation to a Member State, even if in accordance with the TRIPS Agreement, could be avoided.[49] Currently, the only transition period suggested by the amended Bangui Agreement is that of 1 January 2033 for pharmaceuticals. Hence, no Member State would be allowed to adopt a national measure contrary to the Bangui Agreement, even if the litigious provision is compliant with the TRIPS Agreement.

Notwithstanding the above interpretations, it should be noted that the Bangui Agreement (2015) is deeply intended to be implemented in the most favorable way for its Member States.[50] The Preamble affirms their attachment to international treaties and texts, noting specifically that "the Doha Declaration of 14 November 2001[51] [states] that the Agreement on

[49] Reference made by article 3.2 of the Bangui Agreement (1999) to "provisions (…) protecting *the rights deriving* from intellectual property" could give the impression that only IP owners was concerned. It should however be considered that provisions related to the protection of public health often derive also from IP. At the same time, another formula can be adopted. For example, the reference to provisions "protecting the interests at stake in intellectual property law" is more open, and give the authorities a large power of appreciation of the interests to balance.

[50] According to Article 31.1 of the Vienna Convention on the Law of Treaties, a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". On rules of interpretation on treaties, see for example, Jon H. Currie, *Public International Law*, (2nd edition, Irwin Law Inc., 2008), p. 162-168; Malcolm N. Shaw, *International Law*, (8th edition, Cambridge University Press, 2017), p. 706-711.

[51] On the use of the Doha Declaration as a source of interpretation, see for example, Frederick M. Abbott, "The Doha Declaration on the TRIPS Agreement and Public Health: Lighting A Dark Corner at the WTO", (*Journal of International Economic Law,* 2002), p. 469–505; Carlos M. Correa, "Interpreting the Flexibilities Under the TRIPS Agreement", *op. cit.*, p. 23-25. In the Australia – Tobacco Plain Packaging Case (*Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging,* WT/DS458 and WT/DS467 adopted on 27 August 2018; WT/DS435 and WT/DS441 adopted on 29 June 2020), the Panel clearly reminded that "the Doha Declaration may, in our view, be considered to constitute a "subsequent agreement" of WTO Members within the meaning of Article 31(3)(a) of the Vienna Convention". See also, the US – Clove Cigarettes Case (*United States – Measures Affecting the Production and Sale of Clove Cigarettes*, 24 April 2012).

Trade-Related Aspects of Intellectual Property Rights "does not and should not prevent members from taking measures to protect public health".

The concern related to the eventual exclusion of any extension of the 2033 transition period can be easily solved. Article 47.1 of the Bangui Agreement (2015) provides that "this Agreement may be revised from time to time". The revision may notably be done with a view to introducing amendments intended to improve the services rendered by the Organization, or to comply with the evolution of the international legal framework or context. Furthermore, if there is no amendment of the Bangui Agreement at the end of the said transition period, and in the case LDCs benefit for another extension, it will remain possible for a country to invoke this advantage. Indeed, the Bangui Agreement has the nature of an international (regional) agreement. At the same time, it is considered as the national law of its Member States, because of the unification of the IP laws introduced in States Members. For this reason, it enters into the legal order of the said members, and may be submitted to the compliance with **the principle of the hierarchy of norms**,[52] from an internal law[53] rather than from an international law[54] perspective. Under the hierarchy of norms as inspired from the French legal system[55] adopted by OAPI countries, the constitution is above, treaties and other international agreements right below, regular legislation below, followed by administrative acts (decrees, orders, decisions, circulars, and so on). Therefore, an international agreement shall prevail over national provisions (but not the Constitution),[56] the 2015 Bangui Agreement being considered as the national law of each Member State. Thus, for LDC Members of OAPI, it will be possible to invoke this principle to put into application the international flexibility rather than the agreement restricting its advantages.

As it stands now, it should be noted that Annex I on Patents, Annex II on Utility Models[57] and Annex IX on Layout-Designs (Topographies) of Integrated Circuits are still governed by the Bangui Agreement of 1999. Contrary to the other annexes, they are not yet in force. In fact, if it is clear that the Bangui Agreement shall "enter into force two months after the deposit of the instruments of ratification by at least two thirds of the signatory States",[58] there is no clear criteria defining the modality for entry into force of the annexes. The only indication given by the law is that "the date of entry into force of the annexes to this Act of the Agreement shall be fixed and notified to States by the Director-General or by the Chairperson of the Administrative Council".[59] Of course, they cannot enter into force before the Agreement

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[52] This principle, developed by Hans Kelsen, can be presented as follows: a legal norm exists if and only if it is valid pursuant to another legal norm; by way of exception, one basic norm (*Grundnorm*) exists without the support of any other norm and is the ultimate origin of legal validity. The structure of the legal order is a hierarchy of higher and lower norms, whereby the higher norm determines the creation of the lower one. H. Kelsen, *Pure Theory of Law*, (The LawBook Exchange, LTD, 5th printing, Clark, New Jersey, 2008), p. 206.

[53] From this perspective, the hierarchy of norms is organized as follows: Constitution, Treaties and International Agreements, National laws, administrative acts (decrees, arrêtés, administrative decisions, etc.). See, J.-M. Tchakoua, *Introduction Générale au droit camerounais,* (Presses de l'UCAC, 2008), p. 88-89 ; C. E. Wunde Anyangwe, *The Administration of Justice in a Bi-Jural Country - The United Republic of Cameroon*, (Thesis submitted for the degree of Doctor of Philosophy, School of Oriental and African Studies, University of London, August 1979), p. 782 and 795.

[54] J. A. Carrillo Salcedo, "Reflections on the Existence of a Hierarchy of Norms in International Law", (*European Journal of International Law (EJIL)*, Issue 8 (1997), No. 4), p. 583-595; Ch. Leben, "Hans Kelsen and the Advancement of International Law", (*EJIL*, Issue 9 (1998)), p. 287-305; M. Koskenniemi, "Hierarchy in International Law: A Sketch", (*EJIL*, Issue 8 (1997), No. 4), p. 566-582.

[55] L. de Gouyon Matignon, "The hierarchy of norms in the French legal system", (*Space Legal Issues*, 16 March 2019), https://www.spacelegalissues.com/space-law-the-hierarchy-of-norms-in-the-french-legal-system/

[56] For example, article 45 of the Cameroonian Constitution clearly provides that: "Duly approved or ratified treaties and international agreements shall, following their publication, override national laws, provided the other party implements the said treaty or agreement". See also, article 147, Constitution of Benin; article 87, Constitution of Ivory Coast; article 98, Constitution of Senegal; etc.

[57] Utility Models, also called "petty patents" or "second-tiers protection", are considered as a flexibility of IP.

[58] Article 42.1, Bangui Agreement (2015).

[59] Article 42.2, Bangui Agreement (2015).

itself.[60] After indicating in article 1 that “Bangui Agreement” means the Agreement Relating to the Creation of an African Intellectual Property Organization, done at Bangui, together with all its annexes”[61], the legislator adds that “the Agreement shall be applicable in its entirety to every State that ratifies or accedes to the Agreement”.[62] This rule is close to the rule of the “single undertaking” by which, under the WTO framework, the adhesion to the treaty establishing the WTO is interpreted as an adhesion to the whole legal instruments of the Organization[63]. That said, there is no material evidence to consider that the fact Annex I on Patents is not yet into force is due to the absence of consensus amongst the Member States on its appropriateness. Eventually, the OAPI Director-General or the Chairperson of the Administrative Council are the only authorized persons to explain the reason of such a postponement.

In practice, there is no clear data or information[64] showing that an LDC member of OAPI has taken advantage of the use of transition periods to improve access to medicines or develop its local pharmaceutical industry.[65]

[60] The issue of the binding nature of annexes, is often raised, but is generally addressed by the international instrument that includes them. R. Ranjeva et Ch. Cadoux, *Droit international public*, (EDICEF, 1992), p. 47.
[61] See also, article 6.3, Bangui Agreement (2015).
[62] Article 6.2, Bangui Agreement (2015).
[63] This includes the common institutional framework for the conduct of trade relations among WTO Members and, at least, Multilateral Trade Agreements. Article II.2 of the Agreement establishing the WTO provides that: “The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.” See also, H.-J. Blanke and S. Mangiameli (Eds.), *The Treaty on European Union (TEU) – A Commentary*, (Springer, 2013, Comments under Article 51), p. 1419-1432; J.-B. Racine et F. Siiriainen, *Droit du commerce international*, (3e éd., Paris, Dalloz, 2018), p. 32.
[64] The Medicines Law & Policy’s TRIPS Flexibilities Database (http://tripsflexibilities.medicineslawandpolicy.org/) shows that Burkina Faso used the transition period in 2005. However, there is no detail on how the country used it, nor the result of this action.
[65] A study indicates that in the mid-2000s, eight OAPI Members (Benin, Burkina Faso, Chad, Comoros, Guinea–Bissau, Niger, Senegal and Togo) utilized the LDC transition provision in order to waive patent protection for antiretrovirals (ARVs). See, Yousuf A Vawda and Bonginkosi Shozi, “Utilising Public Health Flexibilities in the Era of COVID-19: An Analysis of Intellectual Property Regulation in the OAPI and MENA Regions”, Research Paper, No. 141, (South Centre, November 2021), p. 10-11. If it is clear that the utilisation of this flexibility was largely in response to the HIV/AIDS pandemic, there is no additional explanation on how those countries utilized the stated transition period.

IV. CONCLUSION AND RECOMMENDATIONS

The transition periods provided by the TRIPS Agreement can be implemented in OAPI countries. This includes the general extension as well as the extension provided in implementing paragraph 7 of the Doha Declaration. For developing country members, transition periods no longer constitute a flexibility. Thus, only the twelve LDCs Member of OAPI are concerned by the said flexibility. However, the issue of the extension of the benefit of the use of transition periods to neighboring OAPI developing country members can be raised.[66] That said, some recommendations may be suggested in order to ensure that the legal environment is suited for an efficient use of transition periods. These recommendations are:

1. OAPI should amend article 46 of the Bangui Agreement (2015) in order to provide for the possibility of the extension of the transition period beyond 1 January 2033.
2. The general extension of the LDC transition period, which covers all TRIPS obligations except the non-discrimination principles until 1 July 2034, shall be expressly introduced.
3. For the purpose of the recommendation 2 above, OAPI may reintroduce the article according to which nationals may claim application for their benefit of the provisions of international agreements, **in all cases where such provisions are more favorable than those of this Bangui Agreement** and its Annexes in protecting the interests at stake in intellectual property law.
4. LDC Member States of OAPI should take advantage of the transition periods flexibility to develop a strong local pharmaceutical industry.

[66] What would happen if during the transition period, for example, a LDC starts producing generic version of a patented drug and exports it in OAPI developing members? Moreover, if the commercialization of such a product is based on a judicial decision, does article 20 of the Bangui Agreement related to the scope of judicial decision may apply? Such issues can be discussed in subsequent research.

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