

LDC Needs Assessment under TRIPS: The ICTSD experience (2007–2011)

Executive Summary

The experience of ICTSD with intellectual property (IP) needs assessments has resulted in positive engagement by Least Developed Countries (LDCs) with the multilateral trading system. With the direct or indirect assistance of ICTSD, five LDCs - Sierra Leone, Uganda, Rwanda, Bangladesh and Tanzania- have up until now submitted their IP needs assessments to the TRIPS Council of the World Trade Organization (WTO).¹

The design and implementation a technical assistance project in this area carries a number of interesting lessons that could be useful for the Aid for Trade Review.

1. Issues Addressed

The WTO Agreement Trade-related Aspects of Intellectual Property Rights (TRIPS) established, for the first time, binding minimum intellectual property standards for all WTO members.

Least Developed Country Members (LDCs) were not required to apply the provisions of the TRIPS Agreement - other than the most favored nation and national treatment disciplines - for a period of ten years from its entry into force, in view of their special needs and requirements, financial and administrative constraints, and need for flexibility to create a viable technological base. In addition, TRIPS Article 66.1 also provided that extensions to this period should be accorded upon duly motivated requests.

In 2005, the WTO TRIPS Council decided to prolong the transition period granted to LDCs to comply with the TRIPS Agreement to 1st July 2013, taking into account that LDCs were not required to fully protect pharmaceutical products until 2016 as a result of an extension granted to them in 2002 (the decision is contained in WTO document IP/C/40).

The 2005 decision also called on LDCs to provide the TRIPS Council with their specific technical and financial assistance needs, in order to implement the TRIPS Agreement, preferably by 1 January 2008. However, by January 2007, no LDC had submitted to the TRIPS Council its specific technical and financial assistance needs.

Against this background, the International Centre for Trade and Sustainable Development (ICTSD), in cooperation with Saana Consulting and with the support of the UK Department for International Development (DFID), launched, in 2007, a project to undertake, upon request, needs



¹ Sierra Leone, Uganda and Rwanda received direct assistance from ICTSD. Bangladesh and Tanzania benefited indirectly through their use of the methodology that was developed in the context of this work.

assessment diagnostic studies in LDCs aimed at identifying their needs for financial and technical cooperation in the context of the implementation of the WTO TRIPS Agreement.²

2. Objectives

The overall objective of the needs assessment project is to assist LDCs in identifying their technical and financial cooperation needs in light of the request by the TRIPS Council in its decision of 29 November 2005 and their obligation to implement the TRIPS Agreement by 1 July 2013.

The specific objective of the national needs assessments is to review the current status of the IPRs regime in LDCs and to provide assistance for the next stage of required reforms, together with a tailored program of capacity building and awareness raising for key stakeholders from government, the private sector and civil society.

3. Design and Implementation

The IP needs assessments project for LDCs was designed to be based on a consultative and participatory process at all stages with strong involvement of relevant stakeholders, in particular representatives of LDCs in Geneva and national stakeholders in LDCs where the needs assessments were undertaken.

To carry out the needs assessments in LDCs, the project first endeavored to elaborate a methodology which could be replicated in different countries.

This methodology consisted of a ‘Diagnostic Toolkit’, tailor-made to the needs of LDCs, which contained a checklist of questions aimed at identifying their IP technical assistance and financial cooperation needs in five different areas: 1) the national development context; 2) the IP policy framework; 3) the IPR administration regime; 4) the IP enforcement and regulation regime and 5) issues pertaining to the promotion of innovation, creativity and technology transfer.³

To seek inputs from LDCs on the draft diagnostic toolkit, ICTSD, in cooperation with Saana Consulting, organized a dialogue on ‘Improving IP Technical Cooperation for LDCs to Facilitate the Implementation of the TRIPS Agreement’ in Geneva, on 3rd May 2007, for Geneva-based LDC missions to the WTO.⁴ During the meeting, the draft diagnostic toolkit was presented and inputs were received from LDCs representatives. Then, the project was also introduced at the LDC Group coordination meeting at the WTO where positive feedback on the project and the toolkit were received.

The application of the diagnostic toolkit, at the national level, entailed a number of steps including: the designation of a national focal point (usually the Ministry of Trade), the organization of a national stakeholder consultation to collect information from stakeholders to facilitate the identification of needs and present the diagnostic toolkit, interviews with a number of key stakeholders to supplement information provided at the national stakeholder dialogue and finally a validation process leading to the adoption of the needs assessment report and its submission to the TRIPS Council. National stakeholder consultations have been held in Sierra Leone, Uganda, Rwanda and Cambodia.⁵

Feedback received from LDCs, at different levels, pointed to the importance of not construing the needs assessment process as a narrow exercise focusing only on legal and administrative changes required for future TRIPS implementation. Rather, they underlined that it should also look into the means towards “creating a sound and viable technological base” taking advantage of the transition period granted to LDCs under TRIPS.⁶

In this context, the section of the diagnostic toolkit on promotion of innovation, creativity and technology transfer acquired particular importance in the context of the needs assessment process in many of the LDCs. Rwanda, for instance, chose to make it the first

2 More information is available online at: <http://www.iprsonline.org/ictsd/LDCneeds.htm>

3 The Diagnostic Toolkit is available online at: www.iprsonline.org/ictsd/docs/LDCToolkit-final.pdf

4 Information on this consultation is available online at: http://www.iprsonline.org/ictsd/Dialogues/2007-05-03/2007-05-03_desc.htm

5 Information is available online on the national stakeholder consultations in Sierra Leone, 16-17 July 2007 (see <http://ictsd.org/i/events/dialogues/38589/>), Uganda, 18 - 27 July 2007 (see <http://ictsd.org/i/events/dialogues/38584/>), Rwanda 29th September and 9th March 2009 (see <http://ictsd.org/i/events/dialogues/66755/>) and Cambodia 3rd February (see <http://ictsd.org/i/events/dialogues/69453/>).

6 The Preamble to the TRIPS Agreement recognizes “the special needs of the 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”.

section to figure in its needs assessment submission (document IP/C/W/548).

Thus, since its inception, the diagnostic toolkit has remained a ‘living document’ in the sense that it has been applied with different emphasis given to different elements of it, according to the specificities and needs of each country.

In two cases, the needs assessments exercise was undertaken with assistance from ICTSD in conjunction with the elaboration of a national IP strategy, in the case of Rwanda, or a Development Dimension of IP Report (DDIP), in the case of Uganda, with assistance from the United Nations Conference on Trade and Development (UNCTAD). This synergy proved to be quite complementary as the needs identified were determined in function of the objectives and priorities established in the national IP strategy and the DDIP report. This also ensured coherence between needs, technical assistance provided by donors and broader policy of objectives relating to IP protection.

4. Problems Encountered

Limited capabilities. In most of the LDCs involved, there was limited institutional and analytical capabilities in areas relating to IP and even more so at the intersection of IP and public policy challenges such as public health, agriculture, technology transfer, education etc. This was reflected in the level of human resources allocated to deal with these issues at the national level as well in the weak awareness about IP issues in general, particularly their broader implications for development. Consequently, part of the national consultation was devoted to introducing the main issues and challenges facing LDCs in the context of future TRIPS implementation.

The lack of sufficient articulation between IP laws, development objectives and technical assistance needs. In several instances, the countries had already adopted IP laws which did not fully take into advantage the different options and flexibilities available to LDCs under TRIPS. In some instances, the needs assessment reports recommended changes to the existing IP laws so as to ensure such consistency.

Institutional fragmentation. In most countries, while Ministries of Trade have overall responsibility for TRIPS,

responsibilities regarding IP policy and administration were fragmented between a wide range of government ministries and agencies which had little coordination between them. This was reflected in a lack of an overall policy on IP matters in relation to development challenges and an *ad hoc* approach to technical requests and needs. This fragmentation proved to be challenging in carrying out the needs assessments. Consequently, one of the recurrent recommendations in the needs assessments reports was the establishment of national bodies for IP coordination where relevant government ministries, agencies and stakeholders would be represented to formulate IP policies in a cohesive and coordinated manner. The Rwanda Development and Intellectual Property Forum is an example.⁷

Challenges in follow-up and donor mobilization. The experiences of Sierra Leone and Uganda confirmed that the needs assessments reports were not an end in themselves but a means to present a more cohesive and articulated vision of IP technical assistance needs and to catalyze donor support. After the completion of the needs assessment report, Sierra Leone and Uganda, with the support of DFID, held bilateral consultations with donors at the margins of the meetings of the WTO TRIPS Council meetings in 2008 to seek donor support. The experience showed that the needs assessment reports were not sufficient to attract themselves further donor support but needed to be supplemented with a project document that transformed the needs identified into ‘bankable projects’. Consequently, both Sierra Leone and Uganda made follow-up submissions with this purpose (respectively documents IP/C/W/523 and IP/C/W/510). In the case of Rwanda, an additional submission was made by the country to the TRIPS Council which contained a Development and IP capacity building project, with a view to translating the needs assessment into a concrete technical assistance project (document IP/C/W/548/Add.1)

Integration into the EIF and AfT. Given that the project was initially designed in a short time frame to enable LDCs to respond to the TRIPS Council invitation by 1st January 2008, it was not formally integrated in Enhanced Integrated Framework (EIF) and Aid for Trade (AfT) frameworks particularly in the cases of Sierra Leone and Uganda. In the case of Rwanda, more efforts have been made to integrate the IP needs assessments into these frameworks given their importance for donor support and mobilization of donor resources.

⁷ See paragraph 19 of document IP/C/W/548.

Recognizing the importance of integration into the EIF and AfT, the WTO Secretariat compiled information on the respective roles of the AfT Initiative and the EIF with respect to the LDC needs assessment process based on a request from the LDCs at the TRIPS Council meeting of June 2009 (this information is contained in document IP/C/W/544). With regard to the AfT initiative, the document points that IPR needs assessments can play a potentially useful role by helping intellectual property emerge as an identified priority area in the mainstreaming process and in dialogue with development partners. As for the EIF, funding under the EIF umbrella can only be done as long as the LDC has identified IPR-related needs as a priority in its Diagnostic Trade Integration Study (DTIS)/Action Matrix. Thus LDCs should, in the future, consider including IPR-related priority needs assessment projects as a priority in their respective DTIS, so funding from EIF would be possible.

5. Factors for Success

A participatory and open process. All national stakeholders, including civil society and the private sector, actively participated in the needs assessments process. The engagement of officials from government departments and agencies involved with IP-related policymaking, administration and enforcement was essential in generating a successful outcome. In addition, the participation of other stakeholders including businesses, academia, consumers and civil society was a great asset towards to generating a transparent and open assessment process.

A replicable yet adaptable methodology. All LDCs which have submitted their priority needs for technical and financial cooperation to the TRIPS Council have used the Diagnostic Toolkit developed in the context of the project undertaken by ICTSD, in cooperation with Saana Consulting and with the support of DFID. As explained below, some LDCs have done this with direct ICTSD assistance while others have used the methodology on their own which further fulfills the objectives of the project aiming at ensuring national leadership and ownership.

National ownership of process and outcomes. Ensuring national ownership was constantly present at all stages of the needs assessments undertakings. Through the national stakeholder consultation, stakeholders

identified national priorities and technical assistance needs. A further manifestation of national ownership was the submission of the needs assessments reports by the governments to the WTO TRIPS Council.

6. Results Achieved

Submission of needs assessments reports to WTO TRIPS Council. The most immediate objective of the project was assisting LDCs to comply with the invitation of the TRIPS council to submit their needs for IP technical assistance and financial cooperation by 1st January 2008.

This goal was achieved by Sierra Leone and Uganda by the deadline set by the TRIPS Council. In effect, Uganda and Sierra Leone submitted their communications to the WTO TRIPS Council, titled 'Priority Needs for Technical and Financial Cooperation' in October 2007 (respectively, documents IP/C/W/499, 3 October 2007 and IP/C/W/500, 9 October 2007). These submissions provide an overview of the needs of both countries in terms of policy, legislation and administrative reform taking into account the development context of each country. The submissions were welcomed by WTO Members.

Rwanda submitted its needs assessment report to the TRIPS Council in June 2010 (document IP/C/W/548). Bangladesh and Tanzania also submitted their needs assessments reports in 2010 using the methodology developed by ICTSD and Sanaa Consulting (respectively document IP/C/W/546 and document IP/C/W/552).⁸

In recognition of the usefulness of the diagnostic toolkit, ICTSD received requests from several LDCs to assist them with their IP needs assessment exercise.

Facilitation of follow-up technical assistance. The methodology and findings of the project and the country reports have been useful in facilitating other technical assistance activities. For instance, UNCTAD undertook in 2008 a DDIP report for Uganda which built on the methodology and findings of the needs assessments report prepared for Uganda in 2007.⁹

Follow-up implementation and resource mobilization. A longer term objective was that the needs assessments reports would be a catalyst for further resource mobilization. This achieved more mixed results for a

8 The submissions mentioned above by Sierra Leone, Uganda, Rwanda, Bangladesh and Tanzania are available at the WTO's website at: http://www.wto.org/english/tratop_e/trips_e/ldc_e.htm

9 The UNCTAD DDIP on Uganda is available online at: <http://www.unctad.org/Templates/StartPage.asp?intItemID=3423&lang=1>

number of reasons already mentioned: lack of more formal integration in the EIF and AfT frameworks, necessity of transforming the needs assessments into 'bankable' projects and, in some cases, lack of sufficient interest from donors and availability of donor funding.

7. Lessons Learned

Major lessons learned include:

- a) The importance of a participatory and consultative process in undertaking trade related technical assistance projects.
- b) The importance of national ownership in the design and implementation of trade related technical assistance projects.
- c) The need for designing methodologies which are replicable but also flexible in accommodating different national and socio-economic circumstances.
- d) The necessity of a 'built in' implementation road map for the needs assessments reports.
- e) The necessity of a better integration and identification of IPRs related capacity building needs into EIF and AfT for ensuring donor support and resource mobilization.

- f) The need for a strong commitment from donors and development partners to respond adequately to the needs identified by LDCs.

8. Conclusion

The IP needs assessments project was overall successful in achieving its immediate results of assisting countries in presenting submissions to the TRIPS Council in the context of integration to the new trading regime and of IP reform from a broad sustainable development perspective. However, it is important to recall that the needs assessment process is not an end in itself but a means towards identifying specific needs and addressing them. Thus, the additional objective of catalyzing resource mobilization to fulfill these needs requires a more sustained and systematic effort on a longer term from a variety of actors and development partners.

From this perspective, this project illustrates also the fact that though intellectual property is an integral area of trade regulation, as a result of the TRIPS agreement, it has been relatively neglected in the main frameworks of trade related technical assistance and capacity building such as EIF and AfT. This lacuna should be addressed by both donors and LDCs in future AfT reviews, particularly as the transition period for LDCs to implement the TRIPS is quickly coming to an end in 2013 (and 2016 for pharmaceutical patents).¹⁰

¹⁰ Possibilities of extending the transition period beyond 2013 have been suggested by the UK most notably. See paragraph 3.88, p.68, the *UK Trade and Investment for Growth Report* (2011) available online at: <http://www.official-documents.gov.uk/document/cm80/8015/8015.asp>

About ICTSD

Founded in 1996, the International Centre for Trade and Sustainable Development (ICTSD) is an independent non-profit and nongovernmental organization based in Geneva. By empowering stakeholders in trade policy through information, networking, dialogue, well-targeted research and capacity-building, ICTSD aims to influence the international trade system so that it advances the goal of sustainable development.

For further information, please visit www.ictsd.org.

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