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2013/0161 (NLE)

Proposal for a

COUNCIL DECISION

establishing the European Union position within the TRIPS Council of the World Trade Organisation on the request for an extension of the transition period under TRIPS Article 66.1 for least-developed countries

EXPLANATORY MEMORANDUM

1. INTRODUCTION

From the adoption in 1994 of the World Trade Organisation's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Least Developed Countries (LDCs) were exempted from most TRIPS obligations for a period of ten years, beyond the initial one year of general exemption for all WTO Members, via its Article 66.1. This same Article also provides for the possibility of further extensions of this period upon a duly motivated request. In 2005, following a specific request from LDCs, this exemption was duly extended to 1 July 2013.

In view of the approaching deadline, Haiti, on behalf of the LDC group, formally submitted a request on 5 November 2012 for an extension of the transitional period (see WTO Document IP/C/W/583). Rather than asking for a specific extension calculated in years, this time the LDC group has asked for an exemption *"…until they cease to be a least developed country Member."*[1]

A summary of the background to the LDC Group's request is set out below.

2. SUMMARY

The TRIPS Agreement's preamble acknowledges LDCs' particular need for maximum flexibility in implementing laws and regulations domestically, the objective being to enable them to create a sound and viable technological base. It also allowed LDCs ten years from 1995 to apply the bulk of TRIPS obligations. The transition period was extendable in response to a specific request and in 2005 LDCs asked for an extension by 15 years and ultimately obtained an extension by 7.5 years, until 1 July 2013. Meanwhile, the 2001 Doha Declaration on TRIPS and Public Health had already extended the period for LDCs to comply with provisions on patent and data protection for pharmaceuticals to 2016.

In the discussions leading up to the decision in 2005 to extend the deadline for compliance with TRIPS obligations, one of the questions raised was whether the extension should be given on a country by country basis or as a group. The final agreement gave the extension to all LDCs as a group. When the TRIPS Council agreed to the 2005 extension, it also set up a process to help LDCs implement TRIPS within their national intellectual property regimes. The TRIPS Council called on LDCs to identify their priority needs for technical and financial cooperation and asked developed countries to help address those identified needs. It also called for enhanced cooperation with the World Intellectual Property Organisation and other relevant international organisations. The emphasis was on the individual priorities of each LDC and on ensuring these needs are effectively met.

Recognising the utility of intellectual property for development, ministers at the Regional Preparatory Meeting for Africa in Dar es Salaam in March 2013 ahead of the Annual Ministerial Review of the UN Economic and Social Council, for example declared that "Policymakers in Africa should redouble efforts to develop their legal and policy frameworks, including their intellectual property legislation and policy, so as to release the region's untapped potential." Further postponements in implementing TRIPS provisions could therefore hinder growth possibilities for LDCs. An indefinite timeline could also remove some incitation to work towards implementation at all. However, it remains the case that

[1] Proposed text for a TRIPS Council Decision in the LDC Communication reads: "Least developed country Members shall not be required to apply the provisions of the Agreement, other than Articles 3, 4 and 5, until they cease to be a least developed country Member".

some LDCs have progressed further than others in their implementation. Bearing this in mind, a limited extension is acceptable. A limited extension should be accompanied by further targeted technical assistance, of which the EU has been a significant provider. Moreover, a comprehensive analysis of the state of implementation on the ground in each LDC would be useful in order to draw a clearer picture of the situation and thus allow for prioritised and effective assistance.

To avoid the debate in the WTO from digressing from the issue at hand, a new decision to extend the exemption should follow the general structure of the one taken in 2005. Notably, LDCs committed to not reduce the level of intellectual property protection that already existed in their country during the transition period. Furthermore, the current decision to be taken on the general exemption for LDCs to implement TRIPS should be kept separate from the decision of the TRIPS Council of 27 June 2002 on the "Extension of the Transition Period … for LDC Members for Certain Obligations with respect to Pharmaceutical Products".

3. RECOMMENDATION

As a response to the LDC group's request, the Commission recommends the Council of the European Union to establish the following Union position: LDC Members should not be required to apply the provisions of the TRIPS Agreement, other than Articles 3, 4 and 5, for a period no longer than the duration of the extension granted previously in 2005, or until such a date on which they cease to be a least-developed country Member, whichever date is earlier. During this time, proper consideration could be given to the varying states of TRIPS implementation across LDCs, and how technical assistance can be further used to help address these shortcomings, with primary focus on those areas of most immediate utility. During this extension period, LDCs should not decrease their already existing level of IP protection below the standards set by TRIPS.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(4) and Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) On 5 November 2012 Haiti, on behalf of the LDC Group, formally requested an extension to the transition period for the implementation of the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), pursuant to Article 66.1 of that Agreement.

(2) The existing transition period, as agreed in the Decision of the Council for TRIPS of 29 November 2005 (IP/C/40), was due to expire on 1 July, 2013.

(3) Article 66.1 of the TRIPS Agreement provides that the Council for TRIPS *"shall, upon duly motivated request by a least developed country Member, accord extensions of this period"*.

(4) The leveraging and protection of intellectual property is a key factor in promoting socio-economic growth, as for example recognised by ministers at the Regional Preparatory Meeting for Africa in Dar es Salaam in March 2013 ahead of the Annual Ministerial Review of the United Nations Economic and Social Council, which called for a redoubling of effort to develop legal and policy framework for e.g. intellectual property.

(5) Least developed country members (LDCs) have progressed at different paces and depth in their implementation of the WTO TRIPS Agreement.

(6) Valuable steps have already been taken in the field of intellectual property by a number of LDCs, but it remains the case that LDCs have special needs and requirements and continue to face economic, financial and administrative constraints, therefore they have a need for flexibility and further time to implement the provisions of TRIPS.

(7) Accordingly, it is necessary to extend the transition period for implementation of the TRIPS Agreement for least-developed country members of the WTO,

HAS ADOPTED THIS DECISION:

Article 1

1. The position to be taken by the European Union within the TRIPS Council of the World Trade Organization on the request for an extension of the transition period under TRIPS Article 66.1 for least-developed country Members (LDCs) is that LDCs should not be required to apply the provisions of the TRIPS Agreement, other than Articles 3, 4 and 5, for a period no longer than the duration of the extension granted previously in 2005, or until such a date on which they cease to be a least-developed country Member, whichever date is earlier.

2. During this extension period, LDCs should not decrease their already existing level of IP protection below the standards set by TRIPS.

3. During this period, proper consideration should be given to the varying states of TRIPS implementation across LDCs, and how technical assistance and capacity building programmes can be further used to help address these shortcomings, with primary focus on those areas of most immediate utility.

Article 2

This Decision shall enter into force on the day of its adoption.

Done at Brussels,

For the Council
The President