

LEAST DEVELOPED COUNTRIES AND THE TRIPS AGREEMENT: ARGUMENTS FOR A SHIFT TO VOLUNTARY COMPLIANCE

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I. BACKGROUND

Following years of intense lobbying, disagreements and a circus of back and forth arguments, intellectual property rights eventually found their way into the legal framework regulating global trade.¹ This followed the conclusion of the Uruguay Round of Multilateral Trade Negotiations, which resulted in the Final Act and annexes that included the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) as Annex C.² Although there were protracted contests in the course of the negotiations over the TRIPS Agreement between developing and developed countries,³ the forum also witnessed disagreements amongst the developed countries themselves.⁴

During the Uruguay negotiations, rifts started to emerge at a very early stage between developed and developing countries on the inclusion of intellectual property in the then General Agreement on Tariffs and Trade framework. Developed countries, keen to expand markets for their enterprises, argued for a comprehensive agreement embodied within the World Trade Organization (WTO) system ('the new system').⁵ On the other hand, developing countries, conscious of their underdeveloped structures and their need for more flexibility in dealing with aspects of their economies that are affected by the generation, appropriation and use of information, opposed such a scheme.⁶ Some countries opposed to the

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1 See generally D. Gervais (ed.), *The TRIPS Agreement: Drafting History and Analysis*, 3rd edn, Sweet and Maxwell (2008).

2 *Ibid.*, p. 28.

3 UNCTAD-ICTSD, *Resource Book on TRIPS and Development*, Cambridge University Press (2005). These disagreements are usually characterised as 'North-South' issues.

4 Gervais, *The TRIPS Agreement*, *supra* note 1, at 25. Disagreements among developed countries are sometimes labelled as 'North-North' issues and during the Uruguay Round some of these issues included the imposition of a private copying levy and the creation of exclusive long-term rental rights on sound recordings.

5 *Ibid.*, p. 14.

6 *Ibid.*, p. 11.

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inclusion of intellectual property rights in the 'new system' argued that inclusion of intellectual property in the WTO system would be superfluous and would amount to unnecessary duplication of mandates as such were already sufficiently covered by the World Intellectual Property Organization (WIPO).⁷

Against this backdrop of divergence in interests, the TRIPS Agreement only managed to come out as a compromise, which aspect is manifested in various ways. It strove to accommodate the concerns of both developed countries (major owners of intellectual property rights) and developing countries (net importers of technology). Further, the Agreement sought to strike a balance between owners of intellectual property rights (IPRs) and the users.

Beyond the generic categorisation of countries within the WTO as 'developed' and 'developing',⁸ the TRIPS Agreement went further to recognise the special circumstances of Least Developed Countries (LDCs). Specifically, it diagnosed these as economic, financial and administrative constraints and the need for these countries to enjoy flexibility in creating a 'sound and viable technological base'.⁹ With this diagnosis, the TRIPS Agreement set up a special transition mechanism built on three main themes: popular acceptance of the agreement; fairness to the least developed countries; and flexibility in implementation as embodied in articles 66 and 67 of the Agreement (this is in addition to the other flexibilities applicable to developing countries generally). These thematic tenets are also discernible from the preamble to the TRIPS Agreement and its provisions on objectives¹⁰ and principles.¹¹

LDCs have until 1 July 2013 to comply with the TRIPS Agreement.¹² As this deadline approaches, this paper endeavours to reconsider the place of LDCs under

7 *Ibid.*, p. 17.

8 The WTO System does not define the terms 'developed' and 'developing' countries and leaves it to the members to classify themselves as they wish subject to objections from other members. See 'Understanding the WTO; the Organisation', available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (accessed 24 March 2012).

9 TRIPS Agreement, article 66(2).

10 *Ibid.*, article 7.

11 *Ibid.*, article 8.

12 'Extension of the Transition Period under Article 66(1) for Least Developed Country Members', Decision of the Council for TRIPS of 29 November 2005, document IP/C/40 of November 30, 2005, available at http://docsonline.wto.org/GEN_highLightParent.asp?qu=%28+%40meta%5FSymbol+IP%FC%2A+and+%40meta%5FTypes+%28decision+and+not+draft%29+and+not+%40meta%5FSerial%5FNum+%2800%2D4311+or+00%2D5079%29+%29+&doc=D%3A%2FDDFDOCUMENTS%2F%2FIP%2FC%2F40%2EDOC%2EHTM&curdoc=3&popTitle=IP%2FC%2F40 (accessed 12 December 2010). This is the general compliance date for LDCs. However, with regard to pharmaceutical products, LDCs are exempted from complying with sections 5 and 7 of Part II of TRIPS before 1 January 2016. See the Decision of the Council for TRIPS 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', IP/C/25 of 27 June 2002, available at http://docsonline.wto.org/GEN_catalogViewAllBottom.asp?ct=DDFEnglish%2CDDFFrench%2CDDFSpanish&c2=@meta_Serial_Num&q2=02-3664&c3=@meta_Symbol&q3=%22IP%FCC%FC25%22&c1=@meta_Language&q1=E. (accessed 12 December 2011).

the TRIPS from both a historical and a progressive perspective. From a historical standpoint, it reviews the trajectory of the emergence of the TRIPS together with its inbuilt mechanisms for safeguarding the interests of LDCs.¹³ Progressively, this paper assesses the efficacy of these provisions to see the extent to which they have aided and continue to aid LDCs in building a 'sound and viable technological base' in a fair and flexible manner.

In conclusion, this paper notes that, from the very outset, the TRIPS Agreement was built on a flawed foundation in relation to the interests of LDCs. The agreement imposed an arbitrary transition period; made participation in the WTO system conditional on its acceptance as a whole (exclusions noted); and imposed concrete obligations on LDCs, but only promised aspirational benefits of dubious authenticity. The negotiating history of the TRIPS indicates a hurriedly cobbled together support structure with no clear guidelines on effective monitoring and enforcement as regards transfer of technology and financial and technical cooperation. Additionally, subsequent development in the implementation and enforcement of the agreement has shown how wide the gap is between the three-pronged thematic approaches and the genuine commitment to, and concern for the plight of, LDCs by other members of the WTO. Based on this conclusion, this paper calls for a reconsideration of the position of LDCs under the TRIPS and strongly urges the WTO system to consider exempting LDCs from obligations to comply with the TRIPS until such a time that they cease being LDCs or voluntarily opt to implement it.

II. WHO ARE THE LDCS?

At the periphery of global relations there sits a group of 48 countries under the inauspicious tag of Least Developed Countries.¹⁴ These countries are characterised as the 'poorest and weakest segment of the international community', whose efforts to improve the quality of life of their people are hampered by extreme poverty, structural weaknesses of their economies and a

13 These include article 66 on extension of transition period and technology transfer and article 67 on technical and financial assistance.

14 Currently, the countries designated as Least Developed Countries are: Angola, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Comoros, Democratic Republic of the Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, São Tomé and Príncipe, Senegal, Sierra Leone, Somalia, Sudan, Togo, Uganda, United Republic of Tanzania, Zambia, Afghanistan, Bangladesh, Bhutan, Cambodia, Kiribati, Lao People's Democratic Republic, Nepal, Samoa, Solomon Islands, Timor-Leste, Tuvalu, Vanuatu, Yemen and Haiti. Details about these countries are available at the United Nations Office of the High Representative for Least Developed Countries website at <http://www.unohrrls.org/en/ldc/related/62/> (accessed 4 March 2012).

lack of capacities related to growth.¹⁵ These countries are identified based on three criteria: low-income;¹⁶ human capital status;¹⁷ and economic vulnerability.¹⁸

The international community started paying attention to the peculiarly unfortunate circumstances of LDCs in the late 1960s, leading to the institution of special measures in their favour in the International Development Strategy for the second United Nations Development Decade for the 1970s.¹⁹ These efforts within the United Nations to ameliorate conditions in the LDCs culminated in the First United Nations Conference on the LDCs in 1981 which adopted a 'Substantial New Programme of Action for the 1980s for the LDCs'.²⁰ The Second United Nations Conference on the Least Developed Countries followed in 1990 and adopted the 'Paris Declaration and the Programme of Action for the LDCs for the 1990s'.²¹ In 2001, the Third United Nations Conference on the Least Developed Countries was held in Brussels and led to the adoption of the Brussels Declaration and the Programme of Action (BPOA) for the Least Developed Countries for the Decade 2001–2010.²²

The Brussels Programme of Action for the LDCs for the Decade 2001–2010²³ contained seven commitments²⁴ and was further broken down into 156 actions to be taken by the LDCs and 178 actions to be taken by their development partners.²⁵ The Programme of Action aimed to provide a coherent framework for coordinating international support measures towards LDCs. The just concluded Fourth United Nations Conference on Least Developed Countries adopted the

15 United Nations Office of the High Representative for Least Developed Countries, 'About Least Developed Countries', available at <http://www.unohrlls.org/en/ldc/25/> (accessed 8 March 2012).

16 This is based on a three-year average estimate of the gross national income (GNI) per capita. According to the latest triennial review by the Committee for Development Policy in 2009, a country would be included in the list of Least Developed Countries if it showed an average of less than \$905 and would only graduate from the list with an average above \$1086. See United Nations Office of the High Representative for Least Developed Countries, 'Criteria for Identification of LDCs', available at <http://www.unohrlls.org/en/ldc/related/59/> (accessed 3 December 2011).

17 This involves a composite Human Assets Index based on indicators of: (1) nutrition – percentage of population undernourished; (2) health – mortality rate for children aged five years or under; (3) education – the gross secondary school enrolment ratio; and (4) adult literacy rate. See *ibid.*

18 This involves a composite Economic Vulnerability Index based on indicators of: (1) population size; (2) remoteness; (3) merchandise export concentration; (4) share of agriculture, forestry and fisheries in gross domestic product; (5) homelessness owing to natural disasters; (6) instability of agricultural production; and (7) instability of exports of goods and services. See *ibid.*

19 United Nations Office of the High Representative for Least Developed Countries, *supra*, note 15.

20 *Ibid.*

21 *Ibid.*

22 Office of the High Representative for Least Developed Countries, 'Brussels Programme of Action', available at <http://www.unohrlls.org/en/ldc/related/60/> (accessed 2 April 2011).

23 *Ibid.*

24 The seven commitments are: (1) fostering a people-centred policy framework; (2) good governance at national and international levels; (3) building human and institutional capacities; (4) building productive capacities to make globalisation work for LDCs; (5) enhancing the role of trade in development; (6) reducing vulnerability and protecting the environment; and (7) mobilising financial resources. *Ibid.*, paragraphs 22–91.

25 UNCTAD, 'The Least Developed Countries Report 2010: Towards a New International Development Architecture for LDCs', UNCTAD/LDC/2010, available at <http://www.unctad.org/templates/WebFlyer.asp?intItemID=5737&lang=1> (accessed 10 June 2011).

Turkey Programme of Action for the Least Developed Countries for the Decade 2011–2020. The action plan hopes to reduce the number of LDCs by half by 2020.²⁶

III. TAKING STOCK

Where do the LDCs stand today after more than four decades of concerted global efforts to pull them out of extreme poverty, economic vulnerability and socio-political instability? In his latest report on the implementation of the Programme of Action for the Least Developed Countries for the Decade 2001–2010,²⁷ the Secretary General in a single sentence dismisses the success of the BPOA thus, ‘One indicator for the limited success of the Brussels Programme is the low number of graduating countries.’²⁸ So far, only three countries have graduated from the LDC status.²⁹ In addition, two more countries have qualified for graduation: Samoa in December 2010³⁰ and Maldives in January 2011.³¹

The situation in LDCs still remains deplorable with only modest achievements. Poverty remains all-pervasive with more than half of the total population in LDCs (53%) still living below the poverty line of \$1.25 a day,³² while 78% live on less than \$2 a day.³³ According to the Food and Agriculture Organization of the United Nations, close to half of the LDCs were experiencing a food crisis and required external assistance or were at risk of crisis brought about by high commodity prices in 2010.³⁴ This precarious food security situation is compounded by weak or nonexistent social protection schemes³⁵ and very high levels of dependency on foreign aid.³⁶

26 Turkey Programme of Action for the Least Developed Countries for the Decade 2011–2020.

27 Report of the Secretary General on the Implementation of the Programme of Action for the Least Developed Countries for the Decade 2001–2010 (A/65/80–E/2010/77), available at <http://unohrrls.org/UserFiles/File/Elle%20Wang%20Uploads/A-65-80%20EN.pdf> (accessed 3 February 2011).

28 *Ibid.*, paragraph 120.

29 Botswana in 1994 and Cape Verde in 2001; see UNCTAD, ‘The Least Developed Countries Report 2010’, *supra* note 25. Maldives is the latest country to graduate from this group. More information available at <http://www.unohrrls.org/en/ldc/25> (accessed 10 April 2011).

30 In September 2010, Samoa’s graduation from the LDCs’ status was deferred to January 2014 owing to its unprecedented losses arising from the Pacific Ocean tsunami. See ‘Extension of the Transition Period Preceding the Graduation of Samoa from Least Developed Country Status’, document A/64/L.55/Rev 1, available at http://www.un.org/en/development/desa/policy/cdp/cdp_res_dec/ares64_295.pdf (accessed 25 January 2012).

31 See General Assembly Resolutions A/RES/59/209, 59/210 and 60/33, all available at <http://www.un.org> (accessed 7 February 2012).

32 Turkey Programme of Action, *supra* note 26, paragraph 24; UNCTAD, ‘The Least Developed Countries Report 2010’, *supra* note 25, 31.

33 *Ibid.*

34 Report of the Secretary General, A/65/80–E/2010/77, *supra* note 27, paragraph 26.

35 *Ibid.*, paragraph 27.

36 According to Report of the Secretary General, A/65/80–E/2010/77, *supra* note 27, the ratio of tax revenues to GDP remains very low for most LDCs. Among 18 countries for which data was available, five reported rates below 10% while nine others showed rates from 10 to 15% between 2002 and 2008. See Report of the Secretary General, A/65/80–E/2010/77, *supra* note 27, paragraph 29.

Various reports also indicate different levels of success, especially in trade. According to the WTO International Trade Statistics 2005, merchandise exports by the LDCs increased by one-third to a new record level of \$62.³⁷ Further positive results were reported by the 2008 and 2009 International Trade Statistics (WTO).³⁸ According to the WTO 2008 report, LDCs were increasingly becoming favourite destinations for international tourists, with a remarkable annual growth above 13% since 2000.³⁹ The WTO 2009 Report also reported an admirable growth in total export of commercial services from LDCs at an average rate of 20% between 2000 and 2008, which was better than the overall global performance.⁴⁰ Despite this, the LDCs' share of global trade still remained below 1%.⁴¹ This success in trade is, however, overshadowed by low progress in the improvement of the productive capacity of LDCs,⁴² failure of economic growth to translate into tangible results like poverty reduction and employment,⁴³ increased vulnerability to external economic shocks⁴⁴ and natural calamities,⁴⁵ lack of inclusive progress⁴⁶ and increased export concentration.⁴⁷

Indeed, this dire state of socio-political and economic circumstances in LDCs calls for a re-evaluation of what promises the TRIPS has held out or continues to hold out to LDCs and whether these justify the potential costs of implementing it.

37 WTO, *International Trade Statistics*, 2005, p. 32, available at http://www.wto.org/english/res_e/statis_e/its2005_e/its2005_e.pdf (accessed 10 December 2011).

38 WTO, *International Trade Statistics*, 2008, available at http://www.wto.org/english/res_e/statis_e/its2008_e/its2008_e.pdf (accessed 10 December 2011); WTO, *International Trade Statistics*, 2009, available at http://www.wto.org/english/res_e/statis_e/its2009_e/its2009_e.pdf (accessed 10 December 2011).

39 WTO 2008, *ibid.*, p. 118.

40 WTO 2009, *supra* note 38, p. 4.

41 *Ibid.*, p. 4.

42 In 2006, close to three-quarters of the LDCs' export revenues came from primary commodities with only one-quarter from manufactures. See WTO, *International Trade Statistics*, 2007, accessible at http://www.wto.org/english/res_e/statis_e/its2007_e/its2007_e.pdf (accessed 11 December 2011); further, the ratio between manufacturing and GDP remains low. Between 2001 and 2010, only seven LDCs had a share more than 15%, particularly in 'light manufacturing' and 'low technology products' like apparel, textiles, leather and tobacco products. See Report of the Secretary General, A/65/80–E/2010/77, *supra* note 27, paragraph 54. According to UNCTAD, 'The Least Developed Countries Report 2010', *supra* note 25, paragraph 50, during the economic boom between 2002 and 2007, the manufacturing sector in LDCs accounted only for 10% of the GDP, which was similar to the level at the start of the boom. In fact, during this period a total of 27 LDCs experienced deindustrialisation.

43 Despite high levels of growth in GDP between 2002 and 2007, the number of people living in extreme poverty in LDCs continued to increase by over 3 million people per year. See UNCTAD, 'The Least Developed Countries Report 2010', *supra* note 25, p. 3.

44 This has been caused by their continued integration into the world economy without any improvement in their economic resilience. See UNCTAD, 'The Least Developed Countries Report 2010', *supra* note 25, p. 15.

45 See Report of the Secretary General, A/65/80–E/2010/77, *supra* note 27, paragraph 80.

46 See UNCTAD, 'The Least Developed Countries Report 2010', *supra* note 25, p. 1.

47 This has been caused by overreliance on a few export products—primary commodities. See UNCTAD, 'The Least Developed Countries Report 2010', *supra* note 25, p. 16.

IV. LDCS AND THE TRIPS AGREEMENT

The WTO has a membership of 153.⁴⁸ Out of this number 31 are LDCs⁴⁹ while a further group of 12 LDCs are said to be negotiating accession.⁵⁰ Unfortunately, at the time of enactment of the TRIPS, LDCs were not properly represented and as such the agreement is not an authentic representation of their needs and priorities actively articulated. Only one LDC took an active part in the negotiation of the TRIPS – Tanzania.⁵¹ The case of LDCs was principally argued by the developing countries and, as such, their accession to the TRIPS only came as a tacit endorsement of the instrument together with its numerous shortcomings, some of which are highlighted in this section.

A. Defects in the foundation of the TRIPS

1. Time

As a reflection of the compromise between acceptance of the TRIPS by the weak and vulnerable LDCs and the desire by the more economically, socially and politically advanced countries to attain universal protection for intellectual property rights, the TRIPS instituted a special transition arrangement for LDCs. It allowed LDCs a longer period for compliance: 10 years longer than that for developed countries⁵² and in general terms, six years longer than that for developing countries.⁵³ This time schedule sets out a hierarchy of speed for compliance that can, in general terms, be expressed in the ratio 1:5:11 (developed: developing: LDCs).

One thing is conspicuously odd about this hierarchical arrangement of developed, developing and least developed countries. Its logic and rationale are neither apparent in the text of the Agreement nor are they implicit in the negotiating history of the text. They appear arbitrary and are not in harmony with indicators like disparities in levels of development, economic capabilities and wealth accumulation among the various countries. The categorisation of countries based on the required speed of compliance does not capture even the palest picture of the relationship between the various countries. It is not true that requiring LDCs to comply with the Agreement 10 years later than developed countries puts them at par. Indeed, some commentators have argued that, even for developing countries

48 See 'Understanding the WTO: The Organisation, Members and Observers', available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (accessed 12 March 2012).

49 See 'Understanding the WTO: The Organisation, Least Developed Countries', available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (accessed 12 March 2012).

50 See 'Understanding the WTO: The Organisation, Least Developed Countries', available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (accessed 12 March 2012).

51 UNCTAD-ICTSD, *supra* note 3, at 715.

52 TRIPS Agreement, articles 65(1) and 66(1).

53 TRIPS Agreement, articles 65(2) and 66(1). See exceptions to this general statement in articles 65(3) and 65(4) of the TRIPS Agreement, which allow additional time for countries in the process of transforming from a centrally planned economy into a free market and developing countries in cases where the agreement required them to extend protection to products not initially protectable in such jurisdictions.

(the bigger group), compliance with the TRIPS is 50–100 years premature based on GDP per capita.⁵⁴ In an attempt to enhance fairness, the TRIPS allowed room for extension of time for LDCs. However, this safeguard has various flaws, which are discussed below.

2. *The WTO system as a wholesale regime*

The Uruguay Round of Multilateral Trade Negotiations culminated in the conclusion of a framework of legal instruments. These were the Final Act, the Agreement Establishing the WTO together with annexes of agreements on goods (Annex 1A), services (Annex 1B), intellectual property (Annex 1C), dispute settlement (Annex 2) and the trade policy review mechanism (Annex 3), and a raft of plurilateral agreements (Annex 4). The WTO Agreement together with annexes 1A, 1B, 1C, 2 and 3 constitutes a wholesale and inseparable regime. Paragraph 4 of the Final Act decrees that the WTO Agreement must be accepted as a whole. This is further supported by article II(2) of the Agreement Establishing the WTO, which states 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.

This position was further reinforced by the Appellate Body’s Report on *Brazil-Desiccated Coconut*, where it noted that ‘[t]he authors of the new WTO regime intended to put an end to the fragmentation that had characterised the previous system.’⁵⁵

As such, apart from Annex 4, the WTO system is a cumulative regime that does not allow cherry-picking. Save for the provisions on special and differential treatment and some exceptions, the system must be accepted on its own terms – you either accept it in its entirety or reject it as such. This aspect of the WTO regime puts LDCs in a dilemma with regard to the TRIPS. It imposes compliance with the TRIPS as one of the prices to be paid for participation in the WTO system. It does not allow LDCs the freedom to assess the suitability of subscribing to the TRIPS separate from their desire to participate in the global trading system. Indeed, this is the same dilemma that developing countries had to contend with while considering the promise of more market access and the potential gains in other sectors like agriculture and textiles.⁵⁶

54 UNCTAD, ‘Intellectual Property in the World Trade Organization: Turning it into Developing Countries’ Real Property’, UNCTAD/DITC/TNCD/2006/8, p. 3, available at <http://www.unctad.org/Templates/Page.asp?intItemID=3830&lang=1> (accessed 1 December 2010).

55 Appellate Body Report on *Brazil-Desiccated Coconut*, p. 17, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds22_e.htm (accessed 10 December 2010).

56 D. J. Gervais, ‘TRIPS and Development’, in D. J. Gervais (ed.), *Intellectual Property, Trade and Development: Strategies to Optimise Development in a TRIPS-Plus Era*, Oxford University Press (2007), p. 7. See also UNCTAD, ‘Intellectual Property in the World Trade Organization’, *supra* note 54, p. 7. See also UNCTAD-ICTSD, *supra* note 3, p. 709.

3. *Concrete costs with dubious benefits*⁵⁷

The TRIPS styles itself as a balance between users and owners of IPRs; between its costs and benefits; and between the interests of rich and poor countries. For the fervent supporters of the TRIPS it embodies the optimal level for protection of IPRs: it reflects neither a 'non-robust protection regime' nor a 'robust' one.⁵⁸

The first side of this TRIPS balance represents the costs it imposes on governments in general (direct cost of implementation), those that arise out of the peculiar circumstances of a country (such as the level of development) and those that arise from the mere distribution of rights between owners of IPRs and users (for example, stronger protection with limited safeguards for public interests).

The TRIPS revolutionised the protection of intellectual property at the international stage. It strives for a 'transnational law of intellectual property by requiring incorporation of globally negotiated standards into each member country's domestic system'.⁵⁹ It passes for the 'broadest and most comprehensive multilateral agreement in the field of intellectual property'.⁶⁰ It revives other international instruments in this area,⁶¹ like the Berne and Paris Conventions, and breathes life into them with finer rules on 'enforcement, acquisition and most favoured nation'⁶² and an 'effective and binding dispute settlement mechanism'.⁶³ Beyond the resuscitation of the old regime, the TRIPS also establishes obligations for genres of intellectual property that did not initially enjoy protection in any multilateral forum, like undisclosed information.

The TRIPS appears to impose two types of costs on its signatories: direct costs and indirect costs. The direct costs include the administrative costs together with the cost of reviewing and drafting laws to implement the agreement. The indirect costs, which may vary widely among countries, include welfare costs like increases in prices, loss of jobs, and inhibition of competition and further innovation.

The TRIPS requires countries to introduce amendments to their legislations to bring them into compliance. Further, it requires countries to establish departments and other administrative units to administer and enforce the laws. This requirement introduces competition among the various activities that countries have to finance through the national budget. This state of affairs is more acute in the case of LDCs where they are required to use their scarce resources to

57 M. Chon, 'Substantive Equality in International Intellectual Property Norm Setting and Interpretation', in D. J. Gervais (ed.), *Intellectual Property, Trade and Development: Strategies to Optimise Development in a TRIPS-Plus Era*, Oxford University Press (2007), p. 491.

58 R. M. Sherwood, 'The TRIPS Agreement: Implications for Developing', 37 *IDEA: The Journal of Law and Technology* (1997): 461, at 494.

59 R. L. Okediji, 'The Limits of Development Strategies at the Intersection of Intellectual Property and Human Rights', in D. J. Gervais (ed.), *Intellectual Property, Trade and Development: Strategies to Optimise Development in a TRIPS-Plus Era*, Oxford University Press (2007), p. 356.

60 Gervais, *The TRIPS Agreement*, *supra* note 1, p. 13.

61 *Ibid.*, p. 218.

62 *Ibid.*, p. 12.

63 *Ibid.*, p. 13.

fund protection of IPRs at the expense of more immediate needs like healthcare, education and development of other social amenities.⁶⁴ In this regard, the World Bank has noted that:

Given other pressing needs in education, health and policy reform it is questionable whether the LDCs would be willing to absorb these costs, or indeed whether they would achieve much social payoff from investing in them. Moreover, note that poor countries are extremely scarce in trained administrators and judges, suggesting that one of the largest costs would be to divert scarce professional and technical resources out of potentially more productive activities. Indeed, in many poor countries, devoting more resources to the protection of tangible property rights, such as land, could benefit poor people more directly than the protection of intellectual property.⁶⁵

Although opinions vary, the World Bank and the United Nations Conference on Trade and Development (UNCTAD) have estimated that the cost of implementing the TRIPS could be as high as \$10 million per country.⁶⁶ Other estimates indicate that each country requires \$2 million to defray recurrent expenditure.⁶⁷ In its report to the Council for the TRIPS on priority needs, Bangladesh states that it needs at least \$71 million to implement the TRIPS Agreement.⁶⁸

So far as the grant of IPRs leads to a form of monopoly, it has a direct effect on the extent of competition in the market.⁶⁹ It raises entry barriers in terms of restricting permissible conduct and the cost of starting up. This then affects the prices of goods and services⁷⁰ and the extent to which other enterprises other than the right-holder may use the subject matter of an IPR to engage in further innovation.⁷¹ This reduced activity may then ultimately lead to job losses.

64 M. Blakeney and G. Mengistie, 'Intellectual Property Policy Formulation in LDCs in Sub-Saharan Africa', 19(1) *African Journal of International and Comparative Law* (2011): 66, at 68.

65 Quoted in I. Mgbeoji, 'TRIPS and TRIPS-PLUS Impacts in Africa', in D. J. Gervais (ed.), *Intellectual Property, Trade and Development: Strategies to Optimise Development in a TRIPS-Plus Era*, Oxford University Press (2007), p. 294.

66 M. Bystrom and P. Einarsson, 'TRIPS: Consequences for Developing Countries, Implications for Swedish Development Cooperation' (Consultancy Report to the Swedish International Development Cooperation Agency, Final Report, August 2001), p. 23, available at <http://www.grain.org/docs/sida-trips-2001-en.PDF> (accessed 10 February 2011).

67 World Bank, 'Intellectual Property and Development: Lessons from Recent Economic Research' (2005), available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/TRADE/0,,contentMDK:20360014~menuPK:167375~pagePK:148956~piPK:216618~theSitePK:239071,00.html> (accessed 1 January 2011).

68 Council for Trade-Related Aspects of Intellectual Property Rights – Priority Needs for Technical and Financial Cooperation – Communication from Bangladesh, document IP/C/W/546, available at http://docsonline.wto.org/GEN_highLightParent.asp?qu=IP%2FC%2FW%2F546&doc=D%3A%2FDDFDOCUMENTS%2FT%2FIP%2FC%2FW546%2EDOC%2EHTM&curdoc=15&popTitle=IP%2FC%2FW%2F546 (accessed 13 December 2010).

69 Hon. J. R. Homere, in D. J. Gervais (ed.), *Intellectual Property, Trade and Development: Strategies to Optimise Development in a TRIPS-Plus Era*, Oxford University Press (2007), p. 342.

70 Gervais, 'TRIPS and Development', *supra* note 56, p. 33.

71 *Ibid.*

Job losses occur in established industries that thrived through copycat techniques and piracy.⁷²

The second side of the TRIPS balance constitutes the benefits. Some of these benefits include facilitation of innovation and inward flow of foreign direct investment, more trade⁷³ and technology transfer.⁷⁴ These benefits are, however, usually identified in a context of generalisation and may not necessarily be realised. They presume the existence of certain preconditions that may, however, not be present in all countries. Indeed, in this regard, one commentator has observed that '[t]he benefits of intellectual property, especially for the poorest countries, are overstated and the costs minimized'.⁷⁵ Similarly, while conducting a study commissioned by the Swedish International Development Cooperation Agency (SIDA) on the expected implications of the TRIPS for developing countries, Marie Bystrom and Peter Einarsson note that:

While dynamic effects also in developing country economies have been predicted in the long term, these are much less certain than the immediate costs, and even at best there will be a considerable time lag before they compensate.⁷⁶

It has been argued that IPRs merely constitute one of the elements necessary for foreign direct investment (FDI), innovation and technology transfer.⁷⁷ Other factors include 'market size, macroeconomic policies (and) availability of personnel', which can be summed up as a conducive environment for investment.⁷⁸ Thus, not even the creation of 'world-class' intellectual property offices in LDCs would lead to any results by itself.⁷⁹ Much more effort needs to be directed at education, physical infrastructure, research and various other sectors like governance structures.

Even more confusing is the research on the extent to which IPRs encourage transfer of technology and FDI. For transfer of technology, some report that they are only of medium importance and only play a significant role in particular industries that involve technologies that are more susceptible to imitation and reverse engineering.⁸⁰ With regard to FDI, history shows some paradoxes. It is recorded that 'perceived inadequacies of intellectual property protection did not hinder FDI inflows in global terms', while FDI increased substantially in Brazil (1970–1985) and Thailand (1980s) despite comparatively low levels of

72 *Ibid.*

73 Mgbeoji, *supra* note 65, p. 265.

74 *Ibid.*

75 Chon, *supra* note 57.

76 SIDA, *supra* note 66, pp. 48–9.

77 C. M. Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options*, Zed Books (2000), p. 24.

78 *Ibid.*

79 Mgbeoji, *supra* note 65, p. 292.

80 Correa, *supra* note 77, pp. 30–1.

protection.⁸¹ Ironically, many developing countries that had high standards of protection during this time did not receive significant inflows of FDI.⁸²

Arguably, LDCs face a more onerous task in implementing the TRIPS because most of them have to start from nothing.⁸³ The inequity of this state of affairs is worsened by the fact that, since foreign companies are the predominant owners of intellectual property, they stand to be the first beneficiaries of any reforms introduced in this regard by LDCs without any real and immediate compensation to the populations in LDCs.⁸⁴ With regard to the balance between costs and benefits for LDCs, some commentators have dismissed the TRIPS by saying that ‘any benefits will likely be concentrated in NICs [Newly Industrialised Countries], while LDCs and other countries at the opposite end of the development scale will risk net costs even over the longer term’.⁸⁵

Supporters of the TRIPS Agreement urge LDCs down a very uncertain route of seeking development through stronger intellectual property protection. Whatever its merits, this advice sounds suspicious considering that most presently industrialised countries walked the exact opposite route of weaker protection in their early stages of industrialisation. History has it that most industrialised countries went through a learning and imitation phase before they found their feet in innovation, and that none had intellectual property regimes comparable to the TRIPS when their per capita GDP was comparable to that of a developing country, let alone LDCs.⁸⁶ However, today because the TRIPS is being used as a tool to expand the market for IPR owners, most of whom are located in industrialised countries, the world is willing to use LDCs and developing countries as guinea pigs for this ‘innovative’ and ‘revolutionary’ approach to development!

B. Inbuilt safeguards

Having argued above that the TRIPS was structured on an imbalanced and inequitable architectural model, the question that follows is whether its inbuilt support mechanisms provide a sufficient remedy to the foundational defects. This section discusses three of these safeguards as contained in articles 66 and 67 of the TRIPS.

1. Extension of transition period

While article 66(1) of the TRIPS required LDCs to comply with its terms by 1 January 2006, it empowered the Council for the TRIPS to accord an extension upon a duly motivated request by an LDC. To date, this provision has been

⁸¹ *Ibid.*, p. 27.

⁸² *Ibid.*

⁸³ SIDA, *supra* note 66, p. 23.

⁸⁴ UNCTAD, ‘The TRIPS Agreement and Developing Countries’ UNCTAD/ITE/1 (1996), paragraph 25, available at http://www.unctad.org/en/docs/ite1_en.pdf (accessed 10 November 2010).

⁸⁵ SIDA, *supra* note 66, p. 23.

⁸⁶ Gervais, ‘TRIPS and Development’, *supra* note 56, p. 16.

utilised twice.⁸⁷ The first time was the decision of the Council for the TRIPS to implement paragraph 7 of the Doha Declaration on the TRIPS Agreement and Public Health.⁸⁸ This decision allows LDCs to disregard the agreement's provisions on patents and undisclosed information for pharmaceutical products until 2016. The second time was in 2005, when the Council for the TRIPS made a decision to extend the transition period for LDCs until July 2013.⁸⁹

The provision in article 66(1) on extension of time has one main shortcoming that is inherent in its terms. Its enforcement is both arbitrary and unpredictable: arbitrary because, like the original decision on an 11 year transition period for LDCs, the choice of duration for extension does not appear to be guided by any verifiable logic or principle. This can, for instance, be seen in the recent call by Bangladesh for a general extension of 15 years.⁹⁰ Why 15 years? Why not 1 year? Why not 30 years? The enforcement of the provision is unpredictable because it is not possible or easy for LDCs to definitely project the likelihood of a future extension so as to act in a particular way. They have to keep their fingers crossed, hoping that their plight will forever inspire favourable treatment within the WTO system.

Apart from the inherent shortcoming, the utility of this provision on extension of time was significantly diminished by the circumstances of the 2005 decision by the Council for the TRIPS to extend the general compliance period until July 2013. Through a document dated 21 October, 2005,⁹¹ LDCs requested for a 15 year extension of the general compliance date, arguing that, considering the economic, financial and administrative constraints they face and their failure to build a critical mass of technological base, they were still not ready to comply with the TRIPS. This proposal met strong opposition from the developed countries led by the USA and Japan, both of which argued for a particularised approach in which each LDC's case would have to be assessed individually on its merits.⁹²

From the discussions on the request by LDCs for an extension of time, the Council agreed to award half the duration requested—seven years and six months—accompanied by a number of conditions that directly limit the way in

87 These do not include the decision by the General Council of 8 July, 2002 which exempts LDCs from the obligation to grant Exclusive Marketing Rights for pharmaceutical products until January 2016.

88 Document IP/C/25, *supra* note 12.

89 *Ibid.*

90 'Bangladesh Calls for Time Extension for LDCs to Manufacture Patented Drugs', available at <http://apparel.blogge.rs/tag/asia/> (accessed 23 March 2011).

91 See 'Request for an Extension of the Transition Period under Article 66.1 of the TRIPS Agreement', IP/C/W/457 of 21 October 2005, available at http://docsonline.wto.org/GEN_highLightParent.asp?qu=IP%2FC%2FW%2F457&doc=D%3A%2FDDFDDOCUMENTS%2FT%2FIP%2FC%2FW457%2EDOC%2EHTM&curdoc=16&popTitle=IP%2FC%2FW%2F457 (accessed 23 February 2011).

92 'Minutes of Meetings of the Council of TRIPS held in the Centre William Rappard on 25–26 and 28 October, 29 November and 6 December 2005', document IP/C/M/49, paragraphs 266, 267 and 268, available at http://docsonline.wto.org/GEN_highLightParent.asp?qu=%28+%40meta%5FSymbol+IP%FCC%FCM%FC%2A%29+&doc=D%3A%2FDDFDDOCUMENTS%2FT%2FIP%2FC%2FM49%2EDOC%2EHTM&curdoc=53&popTitle=IP%2FC%2FM%2F49 (accessed 10 December 2011).

which LDCs may use the transition period to pursue various national policies. Although the allowance for an extension under article 66.1 was open-ended, the debate and the decision indicate gravitation towards some limitation. The decision imposed certain obligations and conditions on LDCs, one of which was that LDCs are not supposed to make changes to their laws in a way that conflicts with the TRIPS.⁹³

The decision to only grant half of the duration requested by the LDCs appears to warn them what to expect come July 2013. This was quite unfortunate considering that no LDC took part in a meaningful manner in the TRIPS negotiations. This was the first time that they had argued their case with a close to full appreciation of the impact of including IPRs within the global trading system. At the TRIPS negotiations, LDCs as part of the wider group of developing countries had no eloquent experts in intellectual property to satisfactorily argue their case.⁹⁴ Ignoring all these factors, the WTO simply failed to listen to the LDCs' story with a truly sympathetic ear.

2. *Transfer of technology*

Article 66 (2) of the TRIPS requires developed countries to incentivise their enterprises to transfer technology to LDCs. This was aimed at persuading LDCs and other developing countries that their innovative enterprises would not be stifled by the creation of proprietary rights over knowledge in their jurisdictions.⁹⁵ In 2001, the Ministerial Conference reiterated the mandatory nature of article 66(2) and called upon the TRIPS Council to put in place an implementation and monitoring mechanism.⁹⁶ This decision was implemented by the TRIPS Council through a decision that required developed countries to submit periodic reports on their activities under article 66(2).⁹⁷

However, this provision and its enforcement has been criticised as ineffective in promoting transfer of technology to LDCs for a variety of reasons.⁹⁸ It has been noted that '(the) TRIPS is relatively clear on country obligations regarding IP protection, but remarkably vague on what would comprise satisfactory compliance

93 Document IP/C/40, *supra* note 12.

94 Gervais, 'TRIPS and Development', *supra* note 56, p. 10.

95 Correa, *supra* note 77, p. 18.

96 Paragraph 11.2 of the 'Ministerial Decision on Implementation-Related Issues and Concerns of 14th November 2001', WT/MIN(01)/17 of 20 November, 2001 available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_implementation_e.htm (accessed 12 February 2011).

97 See Implementation of Article 66.2 of the TRIPS Agreement: Decision of the Council for TRIPS of 19 February, 2003, document IP/C/28 available at http://docsonline.wto.org/GEN_highLightParent.asp?qu=IP%2FC%2F28&doc=D%3A%2FDDDOCUMENTS%2FT%2FIP%2FC%2F28%2EDOC%2EHTM&curdoc=6&popTitle=IP%2FC%2F28 (accessed 5 February 2011).

98 Suerie Moon, 'Does TRIPS Art. 66.2 Encourage Technology Transfer to LDCs?', Policy Brief Number 2, December 2008 (Suerie Moon, 2008) available at <http://www.iprsonline.org/New%202009/Policy%20Briefs/policy-brief-2.pdf> (accessed 26 December 2011).

with article 66.2'.⁹⁹ Further, it has been noted that:

[The] TRIPS has strengthened the global protection offered to suppliers of technology, but there is no international framework to ensure that the transfer of technology takes place within a competitive framework which minimises the restrictive technology licensing practices with which the Code was concerned.¹⁰⁰

The following parts discuss some of the specific problems with the TRIPS' provisions on transfer of technology.

i. Transferring technology to the wilderness?

The requirement for developed countries to incentivise their enterprises to transfer technology to LDCs makes a mockery of the role played by IPR protection in such transactions. No country would motivate its business enterprises to transfer protected technology into the wilderness; there must be some form of protection in the importing country to receive, protect and nurture the technology.¹⁰¹ It is unrealistic to expect developed countries to effectively motivate transfer of restricted technologies by their business enterprises into the public domain in the LDCs. Developed countries and LDCs view the role of IPR protection differently based on their self-interest. Developed countries see an IPR regime as a prerequisite for effective transfer of technology, while LDCs are arguing that they need the transfer to take place first before they can offer protection, otherwise, there is nothing to protect warranting a change of their laws.¹⁰² These opposing views introduce a chicken and egg situation and beg the question of which, between technology transfer and institution of an IPR regime, should come first in an ideal setup.

Some LDCs have recognised this circuitous maze in the TRIPS discourse and have sought to start by putting in place an IPR regime as the initial step in encouraging technology transfer. They seem to subscribe to the argument that there exists a significant positive correlation between stronger protection for intellectual property and technology transfer.¹⁰³ For instance, the Industrial Property Act of Liberia of 2003 succinctly captures this attempt to impress investors in its preamble by stating that:

WHEREAS, technology will not be transferred to a Third World country such as our [sic] without a set of laws on the ground to protect industrial properties consistent with international standard[sic].

NOW, THEREFORE, it is enacted by the Senate and the House of Representatives of Liberia [the Industrial Property Act].

⁹⁹ *Ibid.*, p. 7.

¹⁰⁰ Report of the Commission on Intellectual Property Rights, 'Integrating Intellectual Property Rights and Development Policy' (2002), p. 25, available at http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf (accessed 30 December 2010).

¹⁰¹ Correa, *supra* note 77, p. 31.

¹⁰² Document IP/C/W/457, *supra* note 91.

¹⁰³ Homere, *supra* note 69, p. 338.

ii. Lack of definition of developed and developing countries

Although article 66(2) imposes an obligation on ‘developed countries’ in favour of developing countries, neither the text of the TRIPS¹⁰⁴ nor the general WTO system has a definition of which countries fall into either category, thereby raising the question of effective enforcement.

iii. No uniform reporting format

Despite the call by the ministerial conference of 2001 and the decision of the TRIPS Council to institute a reporting system for developed countries under article 66(2), there is no standard or uniform format for filing the reports. Thus, most of these reports are too broad, general and irregular, with some developed countries filing no reports at all.¹⁰⁵ At the TRIPS Council’s meetings, developed countries have consistently resisted any attempts to adopt a well-structured reporting format to facilitate evaluation of the reported information. The present *laissez-faire* approach permits any kind of information, some of which does not have anything to do with technology transfer. Developed countries urge a very fluid conception of their obligation to institute incentive mechanisms, which would even include subconscious or unintentional transfer of technology through mundane activities of global trade in goods and services. For instance, in its 2007 report under article 66(2), Australia reported that it discharged its obligations by providing approximately \$300 million for governance assistance programmes in LDCs without indicating if this had any transfer of technology component.¹⁰⁶

It has been argued that article 66(2) and its manner of implementation do not appear to have introduced anything new, as pre-TRIPS activities are simply restyled as programmes under article 66(2) that may also include aspects of technical cooperation.¹⁰⁷ In its 2010 Report on Least Developed Countries, UNCTAD notes that:

[The] TRIPS Article 66.2 has been implemented in such a way that rather than offering financial incentives for technology transfer, existing activities have simply been reclassified which could—at a stretch of the imagination—be said to fall within the ambit of that Article.¹⁰⁸

104 Moon, *supra* note 98, p. 2.

105 *Ibid.*

106 ‘Council for TRIPS—Report on the Implementation of Article 66.2 of the TRIPS Agreement—Australia’, 3 December 2007, document IP/C/W/497/Add.7.p1, available at http://docsonline.wto.org/GEN_highLightParent.asp?qu=IP%2FC%2FW%2F497%2FAdd%2E7&doc=D%3A%2FDDFDDOCUMENTS%2FT%2FIP%2FC%2FW497A7%2EDOC%2EHTM&curdoc=6&popTitle=IP%2FC%2FW%2F497%2FAdd%2E7 (accessed 28 March 2011).

107 CIPR, *supra* note 100, p. 26.

108 UNCTAD, ‘The Least Developed Countries Report 2010’, *supra* note 25, p. xii.

Because of the lack of a standard format for reporting under article 66(2) of the TRIPS, some LDCs have raised concerns that the information elicited is too difficult to understand.¹⁰⁹ In any case, some developed countries have never filed any reports at all.¹¹⁰

iv. Some incentives are not specific to LDCs

Although article 66(2) specifically deals with LDCs, some of the activities reported by some developed countries are not specifically targeted at them. In analysing the developed country reports under article 66(2) from 1999 to 2007, Suerie Moon notes that only 31% of the programmes and policies reviewed specifically targeted LDCs.¹¹¹

v. Targeted at governments and not private enterprises

Article 66(2) is structured in a very interesting way. As its primary premise, it recognises that technology is mainly owned by private entities.¹¹² This immediately becomes an obstacle that must be overcome in encouraging transfer of technology. This the TRIPS does by taking it for granted that governments have an overwhelmingly broad police power over the utilisation by these private entities of their technologies. Thus, the real target of article 66(2) appears to be to put indirect pressure on private entities to transfer technology to LDCs. This endeavour is greatly limited by the nature of international treaties so far as they impose obligations only on the signatory governments.

By imposing an indirect obligation on private entities through the governments, the TRIPS appears to acknowledge its own shortcomings. Article 66(2) simply imposes an obligation on governments to put in place an incentive structure. The reporting requirements imposed by the TRIPS Council then merely seek a system for disclosure of this information. Whether the incentive structures put in place by countries lead to actual transfer or indeed encourage and promote transfer of technology becomes another issue with which the TRIPS seems conveniently unconcerned. Thus, reports filed under article 66(2) cannot be relied upon as an evaluative tool—anything goes and indeed there are developed countries

109 See 'Minutes of Council for TRIPS Meeting held in the Centre William Rappard on 21–22 September 2000', document IP/C/M/28, available at http://docsonline.wto.org/GEN_highLightParent.asp?qu=%28+%40meta%5FSymbol+IP%FCC%FCM%FC%2A%29+%&doc=D%3A%2FDDDFDOCUMENTS%2FT%2FIP%2FC%2FM28%2EDOC%2EHTM&curdoc=19&popTitle=IP%2FC%2FM%2F28 (accessed 30 January 2011). See also the concerns raised by Brazil that the reports filed under article 66(2) were lengthy and differed in style, thereby making assessment very difficult: 'Minutes of Council for TRIPS Meeting held in the Centre William Rappard on 23 and 24 October 2007' (21 December 2010), document IP/C/M/55, paragraph 174, available at http://docsonline.wto.org/GEN_highLightParent.asp?qu=%28+%40meta%5FSymbol+IP%FCC%FCM%FC%2A%29+%&doc=D%3A%2FDDDFDOCUMENTS%2FT%2FIP%2FC%2FM49%2EDOC%2EHTM&curdoc=53&popTitle=IP%2FC%2FM%2F49 (accessed 10 December 2011).

110 Moon, *supra* note 98, p. 5.

111 *Ibid.*

112 CIPR, *supra* note 100.

like New Zealand that ‘have reported not providing “any direct incentives to organisations to promote technology transfer to LDCs”’,¹¹³

The inadequacies of reports under article 66(2) as an evaluative is compounded by the lack of a definition of what constitutes technology transfer¹¹⁴ and the lack of clear guidance on the exact type of information that developed countries are required to disclose. Indeed, discussions about these inadequacies have dominated most meetings of the Council for the TRIPS for quite a long time, with developed countries arguing that their obligation only extends to the institution of an incentive mechanism and disclosing this, while the decision to actually transfer remains the prerogative of the private entities. LDCs, on the other hand, argue for an assessment of compliance under article 66(2) conducted with a lens strong enough to capture not only developed countries’ obligation to institute incentive regimes and make reports to the Council about them, but also the extent of efficiency and efficacy of these mechanisms.¹¹⁵

The way developed countries view their obligation under article 66(2) is probably best captured in the contributions of Australia to the Council for the TRIPS’ discussion during its meeting held between 26 and 29 June, 2000. In its contribution, Australia quoted from a paper that had been presented to the Council by Korea.

Domestic policies designed to improve the technology-related investment environment are important to attract FDI and enhance a country’s ability to absorb new technologies. However, such policies must fall short of imposing technology transfer requirements on foreign investors. The main problem with mandatory requirements is that they are not conducive to transfers of the best technologies or technologies that are needed. Indeed, foreign investors subject to these requirements will often prefer to transfer low-level technologies that may not be necessarily what the host economy needs... Korea’s experience has proven that a free-hand approach is better than imposing technology transfer requirements... Such free-hand approach... must be supplemented by the host economy’s effort... to improve its investment environment.

113 C. M. Correa, ‘Intellectual Property in LDCs: Strategies for Enhancing Technology Transfer and Dissemination’, Background paper for the Least Developed Countries Report, UNCTAD (2007), p. 25, available at http://www.unctad.org/sections/lcdc_dir/docs/lcdc2007_Correa_en.pdf (accessed 12 April 2011).

114 Some countries define technology transfer in very broad terms to incorporate any flow of goods and services that embody any element of intellectual property: see the criticism of Canada’s approach to technology transfer to include the most mundane activity of trade in goods and services; document IP/C/M/55, *supra* note 109, paragraph 175.

115 For instance, see the contribution of LDCs and Developing Countries during the Council for TRIPS meeting of 17 June, 2008: ‘Minutes of Council for TRIPS Meeting held in the Centre William Rappard on 17 June, 2008’ (16 September 2008), document IP/C/M/57, available at http://docsonline.wto.org/GEN_highLightParent.asp?qu=%28+%40meta%5FSymbol+IP%FCC%FCM%FC%2A%29+%&doc=D%3A%2FDDFDDOCUMENTS%2FT%2FIP%2FC%2FM57%2EDOC%2EHTM&curdoc=25&popTitle=IP%2FC%2FM%2F57 (accessed 10 December 2010).

Along lines similar to the view put forward by Australia, the European Commission during a different session also noted that 'it was important to keep in mind that technology transfer was often one component of a much more complex project or strategy by private companies rather than a stand-alone activity'.¹¹⁶ Developing this line of thought further, Switzerland, while contributing to the Council for the TRIPS meeting of 23 and 24 October, 2007 candidly noted that:

[T]he obligation of developed countries under Article 66.2 was to provide incentives to their enterprises and institutions for the purpose of promoting and encouraging technology transfer to least-developed country Members. It was not their obligation nor were they in a position to provide for technology transfer themselves or to ensure that technology is actually transferred. Furthermore, private companies and institutions could only be expected to invest in and transfer their technology to a specific country, if a number of framework conditions in the beneficiary country did actually exist. These conditions fell largely outside the sphere of influence of Switzerland or any other WTO Member under the provisions of Article 66.2.¹¹⁷

Thus, according to developed countries, article 66.2 only requires them to provide carrots to private entities without any use of the stick whatsoever. A more stringent interpretation of article 66(2) appears to sound suicidal to developed countries by requiring them to coerce their private institutions to transfer technology to LDCs in return for marginal benefits. This is a politically weighty issue and it seems that arguments on this would go on incessantly without any meaningful progress.

C. Technical and financial cooperation

Article 67 of the TRIPS urges developed countries to offer technical and financial assistance to developing countries and least developed countries upon request and on mutually agreed terms and conditions. This assistance is supposed to cover the preparation of laws and regulations and the establishment or reinforcement of domestic offices, including capacity building. UNCTAD dismisses the efficacy of article 67 by stating that:

Overall, existing special international support measures do not work in a way that is developmentally effective, either because of their inappropriate design or the manner in which they are implemented. The nature of these measures reflects the weak bargaining power

116 'Minutes of Council for TRIPS Meeting held in the Centre William Rappard on 2 March, 2010' (1 June, 2010), document IP/C/M/62, available at http://docsonline.wto.org/GEN_highLightParent.asp?qu=%28+%40meta%5FSymbol+IP%FCC%FCM%FC%2A%29+%&doc=D%3A%2FDDFD%2FDOCUMENTS%2FT%2FIP%2FC%2FM62%2EDOC%2EHTM&curdoc=8&popTitle=IP%2FC%2FM%2F62 (accessed 10 December 2010).

117 Document IP/C/M/55, *supra* note 109, paragraph 182.

of LDCs, so that they are forced to accept what they are offered. The commercial interests of rich countries and wide differences in interpretation between LDCs and their development partners also continue to stymie their effective implementation.¹¹⁸

Article 67 does not appear to have introduced any new dimension to global relations. It simply sanctifies a new market for technical and financial assistance and accords developed countries an avenue for driving their own agenda by raising standards for the protection of IPRs through norm-setting initiatives. Furthermore, this provision simply condenses all dimensions of intellectual property protection into one: trade relations.¹¹⁹ Mutuality in such a narrow conception of IPRs would simply lead to the wholesale transplantation of legal norms from a developed donor country to an LDC recipient without a proper analysis of suitability. Indeed, the arrangement under article 67 of the TRIPS has not achieved much in implementing the agreement in a balanced way. Technical and financial assistance offered by developed countries comes with many conditions and in general only work to serve the self-interests of developed countries. In this regard, one commentator has rightly noted that:

Although WTO Agreements have provisions for technical assistance that member countries, upon accession, could theoretically utilise to create or improve domestic technical capacity to implement the agreements entered into, the reality is that such provisions are neither legally binding nor enforceable. Indeed, non-industrialised states have not received technical assistance and support from richer and more experienced member states.¹²⁰

The deficiencies of article 67 and the insincerity of developed states may also be seen in the manner in which these countries resisted attempts to institute an evaluative mechanism in the Council for the TRIPS for their reports on technical assistance.¹²¹ They instead argued that assessment should be done in a bilateral manner between the countries involved only and not by any other independent body. These arguments by developed countries betray efforts to assist LDCs as enshrined in the BPOA, which called for a 'genuine partnership' between LDCs and their partners.¹²²

V. IMPLEMENTATION OF THE TRIPS BY LDCS

The historical discourse on IPRs at the international level provides powerful lessons for LDCs in their endeavours to establish an IPR regime. Indeed there

118 Conclusion in discussing a number of international support measures for LDCs, including technology transfer under TRIPS article 66.2, whose success has only been symbolic; UNCTAD, 'The Least Developed Countries Report 2010', *supra* note 25, p. 116.

119 Chon, *supra* note 57.

120 Mgbeoji, *supra* note 65, p. 293.

121 See paragraph 7 of documents IP/C/W/21 and IP/C/W/6.

122 Office of the High Representative for Least Developed Countries, *supra* note 22, paragraph 21.

are countries like Uganda that appear to be learning fast from the trajectory of other fast-advancing developing countries, like China and India, in boosting technological competitiveness. In February 2009, the government of Uganda brokered a joint venture initiative between an Indian pharmaceutical company (CIPLA) and a local Ugandan pharmaceutical company (Quality Chemicals) for the establishment of a local production plant at Luzira in Uganda. The government of Uganda was intimately involved in this project and provided it with various benefits and privileges, such as ‘free land to build the plant’, ‘free set-up of the entire infrastructure’ (the factory, roads and electricity, and remuneration for CIPLA’s pharmaceutical experts engaged in capacity-building for local staff).¹²³ Further, the government agreed to purchase antiretrovirals worth \$30 million annually for the next seven years from the joint venture, aside from allowing it a 10 year tax holiday.¹²⁴

Although this is obviously a lucrative venture for CIPLA, which has developed significant productive capacity, especially for generic drugs, if properly managed, it provides the Ugandan pharmaceutical industry with an opportunity to learn from an established player. The joint venture appears to give CIPLA some breathing space considering that India, like all other developing countries, is now required to comply fully with the TRIPS. Thus, LDCs that still lack strong IPR protection regimes provide a strong attraction to generic product enterprises that have productive capacity with little or no innovative prowess. The path taken by Uganda through the CIPLA–Quality Chemicals joint venture is reminiscent of those taken by East Asian countries, India and China among other technologically advanced countries (during their formative stages) that strategically used lower protection levels to encourage unhindered access and modification to technologies to suit their local circumstances.¹²⁵

In a global context, LDCs appear not to be making any serious effort to implement the TRIPS.¹²⁶ They appear to regard their plight with contempt and view their obligations to implement the TRIPS with disdain. They remain totally oblivious to the short time left before the deadline for the implementation of the TRIPS. In 2005 the TRIPS Council, while extending the compliance period for LDCs to 2013, called upon them to identify their individual priority needs to facilitate more focused technical and financial assistance by January 2008.¹²⁷ However, to date, more than three years past that deadline, only six countries

123 UNCTAD, ‘Development Dimensions of Intellectual Property in Uganda: Transfer of Technology, Access to Medicines and Textbooks’, A report by the UNCTAD-ICTSD Project on Intellectual Property Rights and Sustainable Development, UNCTAD/PCB/2009/13, p. 7, available at http://www.unctad.org/en/docs/diaepcb200913_en.pdf (accessed 24 January 2011).

124 *Ibid.*

125 CIPR, *supra* note 100, p. 20.

126 M. Periera, ‘Is Time running Out for LDCs to take Advantage of the TRIPS Transition Periods?’, 2(9) *IQsensato ‘In Focus’* (5 November 2008), available at <http://www.iqsensato.org/wp-content/uploads/In%20Focus%20-%20Vol%202%20No%209%20Nov%202008.pdf> (accessed 12 April 2011).

127 Document IP/C/40, *supra* note 12, paragraph 2.

have filed reports detailing their priority needs.¹²⁸ In any case, even countries that have reported their priority needs have not received any special or satisfactory assistance as envisaged by the decision.¹²⁹ Thus, it would be unrealistic to expect LDCs to have complied with the TRIPS by 2013 or 2016 for pharmaceutical products.

VI. CONCLUSION

Superficially, the provisions of TRIPS on transition exude a great deal of efficacy if not nobility as safeguards for LDCs' compliance. Perhaps this is so, considering the acrimonious and antagonist atmosphere of most multilateral negotiations. However, these provisions cannot stand scrutiny and do not adequately provide a balance for the costs imposed on LDCs by the instrument. Because of their level of development, LDCs need more protection and may not benefit from implementing the TRIPS. Their economies lack manufacturing capacity and most of them rely on extractive industries that are less than marginally concerned with IPRs. These countries face myriad problems that must be addressed in a holistic manner. It is not enough to create a magnificent IPR regime when physical infrastructure and other social amenities remain in a state of dereliction. True and sustainable development may only be expected to come from within the LDCs themselves as they make efforts to reform both their public and private sectors.

Although LDCs may desire to protect IPRs, the standards stipulated by the TRIPS do not represent the optimal levels. As such, there is need for articulation of a distinction between IPR protection as a general goal and IPR protection under the TRIPS as a specific goal. This is a truism that has long been recognised by commentators, some of whom aptly observe as follows:

Strictly speaking, however, even if economic benefits from strengthened IPR protection could be conclusively demonstrated, they would not be benefits of the TRIPS implementation, but of IPR implementation. Also before the TRIPS, developing countries were free to implement the TRIPS levels of IPR protection, or indeed higher levels, if they saw fit. None of the potential benefits of IPRs depend on the existence of the TRIPS. What would need to be demonstrated are benefits of having mandatory minimum standards of IPR protection, which is the only new contribution of the TRIPS.

128 TRIPS: Least Developed Countries, 'Least Developed Countries' Priority Needs in Intellectual Property', available at http://www.wto.org/english/tratop_e/trips_e/ldc_e.htm (accessed 2 April 2012).

129 During the Council for TRIPS meetings held in the Centre William Rappard, Uganda lamented that, despite promptly identifying its priority needs, technical assistance from the WTO was not forthcoming. See 'Minutes of Meetings of the Council of TRIPS held in the Centre William Rappard on 8–9 June, 2009', document IP/C/M/49, paragraph 72, available at http://docsonline.wto.org/GEN_highLightParent.asp?qu=%28+%40meta%5FSymbol+IP%FC%FCM%FC%2A%29+%&doc=D%3A%2FDDFD%2FDOCUMENTS%2FT%2FIP%2FC%2FM%2F49%2EDOC%2EHTM&curdoc=9&popTitle=IP%2FC%2FM%2F49 (accessed 10 December 2010).

In the course of this study, we have been unable to identify any substantial benefits to developing countries of being bound by the TRIPS minimum standards, rather than retaining their freedom to define levels of protection nationally.¹³⁰

IPR protection is not solely concerned with promotion of trade (one of the primary goals of the WTO system). At the basic level it reflects the manner in which a society desires to manage the generation and dissemination of its knowledge for the benefit of the whole society. As such, differences are to be expected between the goals of protecting IPRs under the TRIPS (trade-related aspects) and the goals that IPR regimes ideally ought to achieve in a broader public interest context (societal aspirations). The WTO lacks this broader public interest context and does not constitute the appropriate forum for comprehensive discussions on IPRs so far as the interests of the socially, economically and politically vulnerable countries are concerned.

VII. MOVING FORWARD

Having argued for a distinction between protection of IPRs (general goal) and implementation of the TRIPS (specific goal), this paper calls for a separation of the WTO system in respect of LDCs and intellectual property. There is a need to review the WTO system with a view to amending it to allow LDCs not to comply with the TRIPS either until they cease to be LDCs or until they decide on their own volition to implement it. The effect of this proposal would be to fragment the WTO system and allow LDCs to remain part of the overall system while not being obliged to apply the TRIPS.

Although this may sound like an extremely ambitious proposal, it does not lack precedence.¹³¹ It proceeds on the premise that developed countries are genuinely committed to helping pull LDCs out of poverty and other structural vulnerabilities. Alternatively, that even if they are not so committed to this cause, they would hesitate to push LDCs over the precipice by imposing upon them obligations from which they stand to gain nothing. These concerns were indeed captured in the report of the Commission on Intellectual Property Rights, where the commissioners note that:

We consider that developed countries should pay more attention to reconciling their own perceived commercial self-interest, with their own interest in the reduction of poverty in developing countries.¹³²

This reconciliation process must further be reinforced with an acknowledgement of the global commitments to assist LDCs improve their lot. An amendment that clearly allows LDCs a choice of whether to subscribe to the TRIPS would take away the present psychological push suffered by the LDCs to join the TRIPS

130 SIDA, *supra* note 66, p. 23.

131 For instance, SIDA, *ibid.*, calls for repeal of the TRIPS Agreement altogether.

132 CIPR, *supra* note 100, p. 8.

bandwagon. This push is mainly caused by uncertainty at the WTO and the desire on the part of individual LDCs not to be seen as the odd one out for failing to implement the TRIPS (ruinous race to the top). As time advances, an LDC may face great temptations to rush and carry out mechanical implementation of the TRIPS so as not to be perceived as recalcitrant. Such actions would not be desirable.

Making the TRIPS optional would diminish the need for LDCs to consider extraneous factors in establishing IPR regimes. Instead, it would allow them enough policy room to study their circumstances, identify their needs and establish sound and practical innovation charters or policies not simply aimed at complying with the TRIPS obligations as an end in themselves but laying down an equitable model for the generation of knowledge, its dissemination and utilisation to the satisfaction of users, right-holders and the society.

The proposal in this paper faces four main challenges. First, it is based on the assumption that all (or at least a significant proportion of) WTO members remain sensitive to the needs of LDCs, which might not be the case. Yet, if this is not the case then all discussions on promoting the welfare of LDCs by the international community are deceptive and are in vain.

Second, the proposal may be seen as reversing the gains of the WTO system by reintroducing fragmentation. Giving LDCs a choice might undermine popular acceptance of TRIPS in the long run. The rule on mandatory compliance guards against isolation of LDCs by binding them to certain generally acceptable standards. Referring to the standards set in the TRIPS for protection of IPRs as 'generally acceptable' ones distorts the negotiating history of the WTO system. It creates a fictional world with equals involved in negotiations on the basis of sovereignty.¹³³

Third, the proposal in this paper assumes that LDCs have the potential to evaluate their technological environments and develop appropriate innovation policies that meet their circumstances. It assumes that these countries are committed to the promotion of IPRs. Admittedly, this potential is lacking in most LDCs, while others have economies that are only marginally concerned with technology. However, this potential and economic orientation may be gradually built through bilateral engagement with strategic partners (South–South and South–North collaborations), a position no different from the prescription under article 67 of the TRIPS, which simply sanctions a market already existing to varied degrees for technical and financial assistance.

Finally, the proposal in this paper will deny LDCs the benefit under the 2003 waiver and 2005 proposed amendment to article 31(f) for countries with

133 For similar assertions see L. Lessig, *Free Culture: The Nature and Future of Creativity*, Penguin Books (2005), p. 64:

If a country is to be respected as a sovereign, however, then its laws are its laws regardless of their source. The international law under which these nations (poor countries) live gives them some opportunities to escape the burdens of intellectual property law ... more developing countries should take advantage of that opportunity, but when they don't, then their laws should be respected.

inadequate manufacturing capabilities. The waiver and the proposed amendment allow compulsory licensing for the purpose of importing the protected subject matter in partnership with another country with a corresponding compulsory licence to manufacture and export the same subject matter. However, for close to a decade now, this provision has not had any real utility; only one LDC (Rwanda) has invoked it so far.