

Annex 1

LDCs and Intellectual Property obligations in Comprehensive Economic Partnership (RCEP) negotiations – critique

In terms of impact, RCEP will cover nearly 50% of the world's population - including the most vulnerable, marginalised and impoverished - such as people living in Least Developed Countries (LDCs).

The negotiating text of the IP chapter was leaked online on 19 April 2016 and is now available <http://keionline.org/node/2472>. The leaked text reveals that the draft IP chapter proposes the premature adoption of intellectual property obligations by LDCs.

Article 5.7¹ of the draft RCEP IP chapter undermines the transition period LDCs are entitled to under the TRIPS Agreement, as the exemption is limited only to patentable subject matter and electronic registration regime and does not apply to all intellectual property. Article 12.1 contains some elements supporting the LDCs' transition periods, though a footnote suggests that LDCs may still be required to implement some provisions in the draft RCEP IP Chapter.

Article 66.1 of the TRIPS Agreement guarantees² LDC Members of the WTO a renewable exemption from TRIPS obligations (except for Articles 3, 4 and 5 of the TRIPS Agreement) in view of their special needs and requirements (for e.g public health), economic, financial and administrative constraints and their need for flexibility to create a viable technological base. The TRIPS Agreement in its preamble also recognizes the need for LDCs to enjoy “maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base”.

In view of the above, we stress that countries negotiating RCEP should recognize and uphold the current transition periods and waivers granted to LDCs as well as any further extensions of the same by the WTO, and to adapt below proposed amendments to RCEP text:

Article 5.7 should be amended to read: “The Parties agree that the least-developed country parties will not be obligated to implement intellectual property protections as provided for by TRIPS Council Decision (IP/C/64) dated 11th June 2013 until 1st July 2021 or any further extension thereof, whichever occurs later nor to implement intellectual property protections on pharmaceutical products as provided in TRIPS Council Decision (IP/C/73) dated 6th November 2015 and WTO General Council Decision WT/L/971 dated 2nd December 2015 until 1st January 2033 or any further extension thereof, whichever occurs later.”

Article 12.1 of the draft text should be amended accordingly and provisions that undermine LDCs' flexibilities or that obligate or locks-in LDCs' implementation of intellectual property should be deleted.

In accordance with Article 66.1 of the TRIPS Agreement, LDCs enjoy a number of exemptions and waivers to the implementation of TRIPS Agreement which are listed below for reference:

1. *Pursuant to extension of transition period granted to LDCs in accordance with Article 66.1 of the TRIPS Agreement, LDCs are exempted from applying all TRIPS standards until 1 July*

¹ [ASN/IN/NZ/CN propose: The Parties agree that the least-developed country Parties will not be obliged, with respect to pharmaceutical products, to implement or apply Paragraphs 1(a) of Article 4 (Patentable Subject Matter) and Paragraph 4 of Article 4 (Electronic Registration Regime) or to enforce rights provided for under these Paragraphs until 1 July 2021, without prejudice to the right of least-developed country Parties to seek other extensions of the transition periods as provided for in Article 66.1 of the TRIPS Agreement.]

²Pursuant to Article 66.1, such duly motivated requests “shall” be accorded.

2021.³ This period must be extended by the TRIPS Council on LDCs submitting a duly motivated request.⁴ Thus far this transition period has been extended twice.

2. Further, LDCs have been granted a specific pharmaceutical transition period wherein LDCs do not have to apply or enforce TRIPS provisions concerning patents⁵ as well as test data protection⁶ in relation to pharmaceutical products until 1 January 2033.⁷ This period must also be extended pursuant to a duly motivated request.
3. In addition, the WTO General Council has granted LDCs waivers until 1 January 2033 from obligations to make available a mechanism for filing patent applications for pharmaceutical products (mailbox) or to grant exclusive marketing rights to such applications.⁸

In view of the above, we stress that countries and their negotiators should recognize and uphold the current transition periods and waivers vis-a-vis intellectual property granted to LDCs as well as any further extensions of the same by the WTO. In fact, the text should encourage LDCs to fully utilize these transition periods. In addition, countries negotiating RCEP should not impose TRIPS-plus obligations on LDCs.

³TRIPS Council Decision (IP/C/64) dated 11th June 2013. This exemption has been extended twice so far upon LDCs submission of requests.

⁴Article 66.1 of the TRIPS Agreement

⁵Section 5 of the TRIPS Agreement

⁶Section 7 of the TRIPS Agreement

⁷TRIPS Council Decision (IP/C/73) dated 6th November 2015

⁸WTO General Council Decision WT/L/971