1-1-2006

The 2005 TRIPS Extension for the Least-Developed Countries: A Failure of the Single Undertaking Approach?

Kevin C. Kennedy
Michigan State University College of Law, kenne111@law.msu.edu

The 2005 TRIPS Extension for the Least-Developed Countries: A Failure of the Single Undertaking Approach?

KEVIN KENNEDY*

The November 2005 WTO decision to extend until July 2013 the obligation of the least-developed countries to assume TRIPS obligations was clearly a decision that bowed to the inevitable: not all LDCs were able to assume all of their TRIPS obligations as scheduled on January 1, 2006. The 2005 TRIPS extension for LDCs is evidence of a fundamental flaw in the so-called "single undertaking" approach of the WTO. In addition, the TRIPS extension for LDCs evidences a failure of developed countries to make good on their promise to provide adequate technical assistance to LDCs so that the latter group of countries would have the human and technical capacity in place to assume their various WTO legal obligations. At the very least, the 2005 TRIPS extension evidences a lack of appreciation of the depth of the problem facing LDCs in assuming their WTO legal obligations and becoming full members of the multilateral trade system.

I. Introduction

As the initial transitional period for the least-developed countries (LDCs) to assume their obligations under the World Trade Organization (WTO) Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) was set to expire on January 1, 2006—eleven years after the TRIPS Agreement first entered into force—the LDCs received an eleventh-hour reprieve on November 29, 2005. Under the extension, the thirty-two least-developed country members of the WTO[1] were given an additional seven and

*Professor of Law and Director, Institute for Trade in the Americas, Michigan State University College of Law. I would like to thank all those who attended the April 2006 conference "The International Intellectual Property Regime Complex," held at Michigan State University College of Law, for their very constructive comments on my paper. I would like to give special thanks to Professor Donald Harris, Temple University School of Law, and Professor Paul Heald, University of Georgia School of Law, for their thoughtful and insightful critiques.

1. Those thirty-two WTO members are Angola, Bangladesh, Benin, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Democratic Republic of the Congo, Djibouti, Gambia, Guinea, Guinea-Bissau, Haiti, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Senegal, Sierra Leone, Solomon Islands, Togo, Uganda, United Republic of Tanzania, and Zam-

one-half years (until July 1, 2013) to provide full protection to the range of intellectual property rights that are the subject of the TRIPS Agreement, namely, trademark, copyright, patent, trade secrets, geographical designations, layout designs of integrated circuits, and industrial designs, coupled with effective domestic legal mechanisms for the enforcement of those rights against infringement.[2] While the November 2005 decision by the WTO Council for Trade-Related Aspects of Intellectual Property Rights (the TRIPS Council) does not relieve LDCs of their TRIPS obligations indefinitely, it does extend the initial transition period for LDCs under the TRIPS Agreement from eleven to eighteen and one-half years, with further extensions possible after July 2013 (the 2005 extension confirms the right of LDCs to seek further extensions after July 2013). Such an eventuality is not out of the realm of possibility for at least some LDCs, considering that the LDCs' October 2005 request to the TRIPS Council sought a fifteen-year extension that the Council ultimately cut in half.[3]

In order to help the LDCs fully implement their TRIPS Agreement obligations, the decision also reaffirms the commitment made under the TRIPS Agreement by the developed-country members of the WTO to provide LDCs with technical and financial assistance. Developed countries also agreed to respond to technical capacity needs that LDCs identify through 2007.[4]

Coming on the eve of the Hong Kong Ministerial Conference, WTO Director-General Pascal Lamy greeted the TRIPS Council decision with enthusiasm:

> This agreement, coming just before the Hong Kong Ministerial Conference, is good news. . . . Members have shown that they are ready to ensure that the world's poorest countries have the flexibility that they need in order to meet their WTO obligations in a way that serves their

---

bia. *See* Understanding the WTO: The Organization, Least-developed countries, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (last visited July 23, 2006). Of the eighteen LDCs that have not yet joined the WTO, eight are in the accession process (Bhutan, Cape Verde, Ethiopia, Laos, Samoa, Sudan, Vanuatu, and Yemen) and two have observer status at the WTO (Saõ Tomé & Principe and Equatorial Guinea), the first step toward WTO accession.

2. *See* Press Release, World Trade Organization, Poorest Countries Given More Time to Apply Intellectual Property Rules (Nov. 29, 2005), *available at* www.wto.org/English/news_e/pres05_e/pr424_e.htm[hereinafter Poorest Countries Given More Time]. In the discussions leading up to the decision, one of the questions raised was whether the extension should be given on a country-by-country basis or to LDCs as a group. The TRIPS Council's decision gives the extension to all the least-developed countries as a group. The 2005 extension expands on an earlier extension given in 2002 for LDCs, covering patents on pharmaceutical products, that gave LDCs until 2016 to provide full patent protection to drugs.

3. *See* Communication from the Delegation of Zambia on behalf of the Least-Developed Country Members, *Request for an Extension of the Transitional Period under Article 66.1 of the TRIPS Agreement*, ¶ 2, IP/C/W/457 (Oct. 21, 2005).

4. The November 2005 TRIPS Council decision provides:

> With a view to facilitating targeted technical and financial cooperation programmes, all the least-developed country Members will provide to the Council for TRIPS, preferably by 1 January 2008, as much information as possible on their individual priority needs for technical and financial cooperation in order to assist them taking steps necessary to implement the TRIPS Agreement. . . . Developed country Members shall provide technical and financial cooperation in favour of least-developed country Members in accordance with Article 67 of the Agreement in order to effectively address the needs identified in accordance with paragraph 2.

Decision of the Council for TRIPS, *Extension of the Transition Period Under Article 66.1 for Least-Developed Country Members*, ¶ 2 (Nov. 29, 2005).

development needs. This demonstrates what can be achieved in Hong Kong where development is a central issue.[5]

At first blush the extension might indeed appear to be a magnanimous gesture on the part of the WTO membership. But rather than being magnanimous, the decision to extend the LDCs' obligation to assume their TRIPS Agreement commitments was instead a decision that simply bowed to the inevitable. The simple fact of the matter is that all LDCs were not ready to assume all of their TRIPS obligations on January 1, 2006, as originally scheduled. Despite Director-General Lamy's upbeat spin on the TRIPS extension, the extension is not cause for celebration but rather evidence that the multilateral trade system may be failing the least-developed countries. The 2005 extension is troubling for at least two reasons.

First, the decision exposes a troubling defect in the WTO constitution, namely, the single undertaking approach. Under the single undertaking approach—an innovative feature of the WTO that is enshrined in the Agreement Establishing the World Trade Organization[6]—countries joining the WTO must assume all of the obligations created under the various WTO Agreements.[7] It is a take-it-or-leave-it, one-size-fits-all approach, with all WTO legal obligations eventually binding all WTO members, regardless of the member's economic status. It represents a volte-face from the Tokyo Round Code à la carte plurilateral approach that existed from 1980 until the establishment of the WTO on January 1, 1995, where contracting parties to the General Agreement on Tariffs and Trade were free to join all, some, or none of the side agreements (Codes) that were negotiated during the Tokyo Round of multilateral trade negotiations. But if they did not assume any of the Tokyo Round Code obligations, then they received none of the legal benefits of the Codes. In other words, the General Agreement on Tariffs and Trade had reverted to conditional most-favored-nation status.

The basic rationale for rejecting the Tokyo Round à la carte approach in favor of the Uruguay Round single undertaking approach was that the à la carte approach was considered a serious threat to multilateralism as it was undermining the unconditional, most-favored-nation obligation. Despite the blow that the single undertaking approach strikes for multilateralism, is the approach a fundamentally flawed, bankrupt concept when it comes to the LDCs? Is it reasonable to expect that all countries, regardless of economic status, will be able to assume all WTO obligations, if only given sufficient time?

Article XI:2 of the Agreement Establishing the WTO provides that LDCs "will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities."[8] But article XI:2 does not generally relieve LDCs of their WTO obligations.

5. *Id.*

6. *See* Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. II:2, 1867 U.N.T.S. 3 (1995), *available at* http://www.wto.org/english/docs_e/legal_e/04-wto.pdf [hereinafter Marrakesh Agreement]. The single undertaking approach is embodied in the following words of Article II:2: "The agreements and associated legal instruments in Annexes 1, 2 and 3 . . . are integral parts of this Agreement, binding on all Members."

7. There are two exceptions to the single undertaking approach involving two holdover agreements created in 1979, the Agreement on Government Procurement and the Agreement on Trade in Civil Aircraft. These two plurilateral agreements are optional for WTO members.

8. Marrakesh Agreement, *supra* note 6, art. XI:2.

Indeed, what article XI:2 seems to contemplate is that the WTO members are to lower their expectations when it comes to the commitments and concessions that LDCs will be expected to make in the WTO accession process and in future trade negotiations as WTO members. Article XI:2 is not an escape clause generally relieving LDCs of their WTO obligations. On the contrary, such a construction of article XI:2 would fly in the face of the express provision in article 66.1 of the TRIPS Agreement that gave LDCs the initial eleven-year transitional period to assume all TRIPS obligations.[9]

Besides exposing cracks in the single undertaking approach, the 2005 TRIPS extension for LDCs may also reflect a failure on the part of developed countries to make good on their promise to provide adequate technical assistance to LDCs so that the latter group of countries would have the human and technical capacity in place to assume their TRIPS obligations. At the very least, it evidences a lack of appreciation of the depth of the problem facing LDCs in assuming their TRIPS obligations and becoming full members of the multilateral trade system.

Beyond exposing flaws in the WTO system's single undertaking approach, the 2005 extension may be a setback for LDCs in connection with their economic development and their ability to attract foreign direct investment (FDI). Granted, FDI should not be viewed as a silver bullet or a panacea. Clearly FDI alone cannot solve all of the problems that beset LDCs. But strong intellectual property protection is unquestionably one of the key determinants of FDI, and FDI in turn is an indispensable link in the development chain. It is unassailable that if LDCs are to diversify their economies by becoming less dependent on agriculture and extractive industries, then they must become attractive hosts for foreign capital. The 2005 TRIPS extension thus may further delay LDC development.

II. LDCs at the WTO

By way of backdrop, the WTO divides its membership into three broad economic groups: developed countries, developing countries, and least-developed countries. The difference between a developed and a developing country traditionally generally has been a matter of uncontested self-selection.[10] Regarding designation as a least-developed country, article XI:2 of the Marrakesh Agreement Establishing the World Trade Organization accepts the

9. Article 66.1 of the TRIPS Agreement provides:

> In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65. The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.

Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, art. 66.1, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement].

10. A challenge to such self-selection arose in the WTO accession negotiations with China, which insisted on accession as a developing country in the services and agricultural sectors. In the end, China acceded to the WTO as a hybrid, with treatment in some contexts the same as a developed-country Member, in other instances on terms the same as a developing-country Member, and still in other cases on terms worse than either a developed- or developing-country Member. *See* World Trade Organization, Decision of 10 November 2001, Accession of the People's Republic of China, WT/L/432 (Nov. 23, 2001).

Table 1.
The Fifty Least-Developed Countries

Afghanistan	Congo, Dem. Rep.	Madagascar	Solomon Islands
Angola	Djibouti	Malawi	Somalia
Bangladesh	Equatorial Guinea	Maldives	Sudan
Benin	Eritrea	Mali	Tanzania
Bhutan	Ethiopia	Mauritania	Timor Leste
Burkina Faso	Gambia	Mozambique	Togo
Burma	Guinea	Nepal	Tuvalu
Burundi	Guinea-Bissau	Niger	Uganda
Cambodia	Haiti	Rwanda	Vanuatu
Cape Verde	Kiribati	Samoa	Yemen
Cen. African Rep.	Laos	Saõ Tomé & Principe	Zambia
Chad	Lesotho	Senegal	
Comoros	Liberia	Sierra Leone	

United Nations' designation of a country as least developed for purposes of the WTO agreements.[11] Low per capita income, weak human resources, and high economic vulnerability characterize the LDCs. In 2004, the fifty LDCs accounted for more than 11 percent of the world's population (742 million people), but only 0.6 percent of the world's GDP. Table 1 lists the fifty countries recognized by the United Nations as being least developed as of 2005—up from forty-eight when the WTO was created in 1994.[12]

Thirty-five of the world's fifty LDCs are located in sub-Saharan Africa (SSA),[13] presenting an important regional case study of how the 2005 TRIPS extension might negatively impact the region.[14]

III. The Role of Agriculture in Sub-Saharan Africa's Economy

To appreciate the formidable hurdles that confront LDCs on the road to economic development and diversification, it is important to understand the dominant role that agriculture currently plays in the economies of most LDCs. Farming dominates the economies

11. *See* Marrakesh Agreement, *supra* note 6, art. XI:2.

12. The list is reviewed every three years by the United Nations Economic and Social Council (ECOSOC). The criteria underlying the current list of LDCs are: (1) a low-income criterion, as measured by per capita gross national income (GNI); (2) weak human resources, as measured by a composite index called the Augmented Physical Quality of Life Index that is based on indicators of life expectancy at birth, per capita calorie intake, combined primary and secondary school enrollment, and adult literacy; and (3) a low level of economic diversification, as measured by a composite index called the Economic Diversification Index, which is based on the share of manufacturing in GNI, the share of the labor force in industry, annual per capita commercial energy consumption, and UNCTAD's merchandise export concentration index. *See* U.N. Conference on Trade and Development, The Least Developed Countries Report 2004: Linking International Trade with Poverty Reduction at xiv, U.N. Doc. UNCTAD/LDC/2004, U.N. Sales No. E.04.11.D.27 (2004) [hereinafter UNCTAD LDC Report 2004]. At the time of ECOSOC's 2003 review of the LDC list, the low-income threshold for inclusion on the list was per capita GNI of $750, and the threshold for graduation was per capita GNI of $900. *See id.*

13. All but nine of the SSA LDCs are WTO members.

14. Only thirteen of the forty-eight countries that make up sub-Saharan Africa are not classified as LDCs.

Table 2.
The Role of Agriculture in SSA Economies

SSA LDCs	Percentage of Labor Force Employed in Agriculture	Percentage of GDP Attributable to Agriculture
Angola	71	8
Benin	52	35
Burkina Faso	92	38
Burundi	90	49
Cape Verde	22	11
Central African Republic	71	55
Chad	73	37
Comoros	73	35
Congo, Democratic Rep.	62	56
Djibouti	78	4
Equatorial Guinea	69	8
Eritrea	77	21
Ethiopia	82	52
Gambia	78	40
Guinea	83	24
Guinea-Bissau	82	58
Lesotho	39	18
Liberia	67	(data unavailable)
Madagascar	73	27
Malawi	82	39
Mali	80	38
Mauritania	52	21
Mozambique	81	23
Niger	87	40
Rwanda	90	42
Senegal	73	18
Sierra Leone	61	52
Saõ Tomé & Principe	63	20
Somalia	70	(data unavailable)
Sudan	59	39
Togo	59	40
Uganda	79	31
Tanzania, United Rep.	80	45
Zambia	68	22
All LDCs	69	33
All Developing Countries	54	12

Source: UNCTAD LDC REPORT 2004[15]

of virtually every LDC, and sub-Saharan Africa is no exception. As shown in Table 2, the role that farming plays in the work force and the overall economies of the LDCs in sub-Saharan Africa is significant.

With the exceptions of Cape Verde and Lesotho, agriculture employs at a minimum more than 50 percent of the total labor force in all SSA LDCs. In the case of seven SSA

15. *See* UNCTAD LDC REPORT 2004, *supra* note 12, at 323. With regard to the percentage of GDP attributable to agriculture for Mali, *see* THE ECONOMIST, WORLD IN FIGURES 44 (2003).

LDCs (the Democratic Republic of the Congo, Equatorial Guinea, Liberia, Sierra Leone, Saõ Tomé & Principe, Somalia, and Zambia), agriculture employs more than 60 percent of the labor force. In the case of eleven SSA LDCs (Angola, the Central African Republic, Chad, Comoros, Djibouti, Eritrea, Gambia, Mali, Senegal, Uganda, and the United Republic of Tanzania), more than 70 percent of the work force is employed in agriculture. In eight other SSA LDCs (Burundi, Ethiopia, Guinea, Guinea-Bissau, Malawi, Mozambique, Niger, Rwanda), the figure is more than 80 percent. Finally, in Burkina Faso, more than 92 percent of the labor force works in agriculture. The economic dependency of these nations on agriculture is equally striking: Twenty-seven of them are ranked among the top forty-eight countries in terms of economic dependency on agriculture as a percentage of GDP.[16]

While the structure of most developing countries' exports has shifted to manufacturing (about 70 percent), in the case of Africa that figure is closer to 30 percent, a mere 10-percentage-point increase over the two decades from 1980 to 2000.[17] As Table 2 dramatically illustrates, farming dominates the economies of sub-Saharan Africa, with the balance going primarily to extractive industries. Lack of economic and export diversification is obviously a problem for the region. A solution might be to attract FDI to the region. This is not a call to abandon agriculture, but rather a suggestion to find ways to complement it.

Unfortunately, one prominent legacy of Africa's colonial past is the predominance of small countries: thirty-one countries have a population of ten million or less, and most of these less than five million. Given the importance of market size in attracting FDI, this is a potentially significant constraint on capital inflows to the region. Greater economic integration in the region could address this demographic fact. But only 10 percent of African trade is with other African nations, leaving a fragmented market that cannot achieve economies of scale, thus making the region a less attractive destination for foreign investment.[18] Underscoring the lack of economic integration within the region, the United Nations Conference on Trade and Development (UNCTAD) has observed that "the full potential of intra-African trade has yet to be fully exploited through greater coordination of efforts aimed at harmonizing customs procedures and reducing tariffs and non-tariff barriers, and at improving transport and communications links through greater investment in developing regional infrastructure."[19] To promote regional trade facilitation and build infrastructure, it has been suggested that the key to sub-Saharan Africa becoming a significant player in the global economy is for SSA countries to form one or more regional trading blocs.[20]

Within the region there currently are nine major free trade areas and customs unions: the Economic Community of West African States (ECOWAS); the West African Economic and Monetary Union (WAEMU); the Common Market for Eastern and Southern Africa (COMESA); the Southern African Development Community (SADC); the Southern African

16. *See* THE ECONOMIST, WORLD IN FIGURES 44 (2003).

17. *See id.* at 2-3.

18. *See* Eric J. Boos, *Between Scylla and Charybdis: The Changing Nature of U.S. and EU Development Policy and Its Effects on the Least Developed Countries of Sub-Saharan Africa*, 11 TUL. J. INT'L & COMP. L. 181, 211 (2003).

19. *See* U.N. CONFERENCE ON TRADE AND DEVELOPMENT, ECONOMIC DEVELOPMENT IN AFRICA: TRADE PERFORMANCE AND COMMODITY DEPENDENCE 54, U.N. Doc. UNCTAD/GDS/AFRICA/2003/1, U.N. Sales No. E.03.II.D.34 (2003).

20. *See* Boos, *supra* note 18, at 216.

Customs Union (SACU); the East African Community (EAC); the Inter-Governmental Authority on Development (IGAD); the Indian Ocean Commission (IOC); and the Communauté Economique et Monétaire de l'Afrique Centrale (CEMAC).[21] The fifty-two-member African Union, the successor to the Organization of African Unity, was launched in July 2002, together with the African Economic Community, with lofty ambitions of becoming an African version of the European Union, with EU-like institutions (a parliament, a commission, a court of justice, and a central bank) and with a common currency.[22] But the record of existing SSA free trade areas and customs unions on integrating the economies of their member states is at best mixed.[23] Based on the region's choppy experience with free trade areas and customs unions, the merits of creating a pan-SSA trading bloc—whether in the form of a free trade area or a customs union—are debatable. Nevertheless, in view of the importance of market size to potential foreign investors, creating fully functioning, regional free trade areas and customs unions could be instrumental in attracting FDI. Still, when the goal is economic diversification in order to reduce over-dependency on one or two export commodities, attracting FDI is not the same thing as attracting the right kind of FDI.

Among the many thorny issues facing the SSA region, one is how to break out of its over-dependency on agriculture. Attracting foreign direct investment is one obvious answer. Table 3 shows the amount of FDI made in SSA LDCs for the five-year period 2000 to 2004. The record is not encouraging. In absolute dollar amounts, FDI in LDCs during this period increased 280 percent—from $3.8 billion in 2000 to $10.7 billion in 2004. However, LDCs' share of FDI as a percentage of FDI to developing countries in 2004 was 4.6 percent. As a percentage of total FDI, LDCs' share in 2004 was a mere 1.6 percent. The year 2003 was slightly better, with LDCs receiving 6.2 percent of all FDI destined for developing countries. But that amount was still only 1.6 percent of FDI for the world.

As Table 3 partially illustrates (the two largest recipients of FDI in the region, Nigeria and South Africa, are not included), and as noted by UNCTAD:

> Just eight countries from among these two groupings account for almost half of the total increase in FDI flows to Africa during the period 1999–2003 over the previous six years. While this improvement is to be welcomed, the suggestion that it anticipates a new type of growth dynamic for the region seems implausible.[24]

In other words, FDI is spread unevenly among the countries in the region. Moreover, it is not just FDI in the abstract that is important. Rather, it is the right mix of FDI to the right places that is needed to ensure diversification within an economy and a gradual movement away from economic dependence on one or two export commodities. As Table 3 indicates, there is an FDI bias toward mining and oil, with the largest foreign investments in SSA LDCs going to the extractive industries of Angola, Equatorial Guinea, and Sudan.[25]

21. *See* U.S. Int'l Trade Comm'n, *U.S. Trade and Investment with Sub-Saharan Africa, Fourth Annual Report*, Inv. No. 332-415, at 3-1 (Pub. 3650 Dec. 2003).

22. *See id.*

23. For an analysis of the nine SSA regional trade arrangements, *see id.* at 3-3 to 3-21.

24. UN CONFERENCE ON TRADE AND DEVELOPMENT, ECONOMIC DEVELOPMENT IN AFRICA: RETHINKING THE ROLE OF FOREIGN DIRECT INVESTMENT 26 U.N. Doc. UNCTAD/GDS.AFRICA/2005/1, U.N. Sales No. E.05.II.D.12 (2005).

25. *Id.* at 34.

Table 3.
FDI to SSA LDCs (in millions of dollars)

Country (Year of WTO Accession)	Annual Avg. 1985-1995	2000	2001	2002	2003	2004
Angola (1996)	208	879	2,146	1,672	3,505	2,048
Benin (1996)	39	60	44	14	45	60
Burkina Faso (1995)	5	23	1	2	2	1
Burundi (1995)	2	12	0	0	0	3
Cape Verde*	6	32	9	12	14	20
Central African Rep. (1995)	1	1	5	6	3	-13
Chad (1996)	15	115	460	924	713	478
Comoros	3	21	1	0	1	2
Congo, Dem. Rep. (1997)	3	23	82	117	158	900
Djibouti (1995)	2	3	3	4	11	33
Equatorial Guinea*	17	108	945	323	1,431	1,664
Eritrea	—	28	12	20	22	30
Ethiopia*	5	135	349	255	465	545
Gambia (1996)	9	44	35	43	25	60
Guinea (1995)	13	10	2	30	79	100
Guinea-Bissau (1995)	2	1	0	4	4	5
Lesotho (1995)	14	31	28	27	42	52
Liberia	—	21	8	3	1	20
Madagascar (1995)	11	83	93	8	13	48
Malawi (1995)	6	26	19	6	10	16
Mali (1995)	11	82	122	244	132	180
Mauritania (1995)	7	40	92	118	214	300
Mozambique (1995)	17	139	255	348	337	132
Niger (1996)	19	8	23	2	11	20
Rwanda (1996)	11	8	4	7	5	11
Saõ Tomé & Principe*	—	4	3	3	7	54
Senegal (1995)	18	63	32	78	52	70
Sierra Leone (1995)	-8	39	10	2	3	5
Somalia		0	0	0	0	9
Sudan*	11	—	574	713	1,349	1,511
Togo (1995)	12	41	64	53	34	60
Uganda (1995)	30	181	151	203	211	237
Tanzania (1995)	30	282	467	430	527	470
Zambia (1995)	105	122	72	82	172	334
SSA LDCs	613	2,665	6,111	5,753	9,598	9,465
All LDCs		3,758	6,828	6,327	10,351	10,702
All Developing Countries		253,179	217,845	155,528	166,337	233,227
World		1,396,539	825,925	716,128	632,599	648,146

Sources: UNCTAD, *World Investment Report 2005*; UNCTAD Major FDI Indicators, *available at* http://stats.unctad.org/FDI/TableViewer/tableView.aspx; and WTO, Understanding the WTO, Members and Observers, *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.
*In the process of WTO accession or a WTO observer

IV. Possible Fallout of the 2005 TRIPS Extension: FDI Flows to LDCs

There are at least two potential casualties of the 2005 TRIPS extension. The first casualty is FDI inflows to LDCs. A simple fact of life is that the demand for foreign capital greatly exceeds its supply, creating a seller's market for FDI. Although the TRIPS Agreement does not directly address the question of FDI, its provisions on national treatment, most favored nation treatment, minimum standards of intellectual property protection, and domestic IP enforcement procedures bear directly on the legal environment in which FDI operates. If a foreign investor cannot make an investment in a host country with the assurance that its intellectual property rights will be adequately protected from infringement, that investor may very well decide not to make the investment. With the protections of the TRIPS Agreement in place for patents, trademarks, and trade secrets, coupled with effective domestic legal mechanisms for the enforcement of those rights against infringement within the host country, FDI may be encouraged, especially FDI by firms with valuable intellectual property to protect. The TRIPS Agreement thus plays a pivotal role in promoting investment and, in turn, development.[26]

An overarching question, however, is this: Even if LDCs do fully implement their TRIPS obligations, what assurances do they have that FDI will be forthcoming? Given the tremendous cost, both financial and human, of building and maintaining a domestic intellectual property legal regime, are the benefits of doing so worth the cost in the case of LDCs? Clearly, there are no guarantees in this regard. Because the demand for FDI exceeds the supply, incentives could be created to attract FDI. Investment incentives typically do not play a fundamental role in the investment decision, compared to other factors such as infrastructure, market size, production costs, and the skill level of the local workforce. Nevertheless, all other things being equal, investment incentives do appear to influence foreign investors in their investment decision.[27] Investment incentives come in several forms: (1) financial incentives (funds paid directly to the investor in the form of grants and

26. It may be important to disaggregate the various kinds of intellectual property rights when making a claim that FDI is contingent upon strong IP protection. The only IP protection that a foreign investor may in fact need when investing in a developing country is protection of trade secrets. As argued by Professor Paul Heald:

> [I]f a developing country does not adequately protect secret processes, devices, and know-how, or provides no means to protect investments in training local employees by enforcing restrictive covenants, then some kinds of foreign direct investment may be deterred. If locating in a developing country means that valuable information or technology will be appropriated or disclosed due to poor enforcement of trade secrecy or contract law, then investment decisions may be affected. The same logic, however, does not apply to decisions to move manufacturing or research facilities to developing countries that fail to protect adequately patents, trademarks, and copyrights.

Paul J. Heald, *Misreading a Canonical Work: An Analysis of Mansfield's 1994 Study*, 10 J. INTELL. PROP. L. 309, 314 (2003). Based on corporate executive responses to an FDI-IP survey, Professor Heald concludes that:

> disclosure fears—driven by inadequate trade secret or contract law—affect decisions to invest in manufacturing facilities or to transfer technology to the developing world. There is little support, on the other hand, for the proposition that levels of patent, copyright, and trademark are relevant in foreign direct investment decisions.

Id. at 316 (footnote omitted).

27. *See* Organization for Economic Cooperation and Development, Open Markets Matter: The Benefits of Trade and Investment Liberalisation 5 (April 1998).

subsidized loans); (2) fiscal incentives (tax holidays or exemptions from import duties on capital goods); and (3) indirect incentives, such as subsidized services or market privileges (e.g., the provision of infrastructure at less-than-market prices, preferential treatment in obtaining government procurement contracts, or a monopoly position in the market).[28]

Arguments have been advanced that investment incentives distort FDI inflows, just as the use of export and import substitution subsidies distort global patterns for trade in goods.[29] But the evidence for such distortions is not clear[30] and remains the subject of conjecture.[31] If developing countries in general are at a disadvantage vis-à-vis developed countries in any investment incentive competition where an incentives package is determinative in the investment location decision, then LDCs are completely hobbled in this regard. Investment incentives can distort investment patterns in favor of developed countries simply because they have deeper pockets.[32] LDCs cannot hope to compete.

A counter-argument has been made that if governments compete for FDI through investment incentives, this helps ensure that FDI goes to those places where it is most highly valued.[33] In defense of incentives it has also been suggested that they draw foreign investment where they help correct market failures (e.g., weak infrastructure, such as roads and telecommunication networks). When used for this reason, incentives can be considered a country risk premium, providing a partial counterweight to the lack of adequate infrastructure.[34] Investment incentives have been defended on the ground that they serve as a direc-

---

28. *See* REPORT BY THE WTO SECRETARIAT: TRADE AND FOREIGN DIRECT INVESTMENT 21 (Oct. 16, 1996), *attached to* WTO/Press Release 57 (Oct. 9, 1996), *available at* http://www.wto.org/english/news_e/pres96_e/pr057_e.htm [hereinafter TRADE AND FOREIGN DIRECT INVESTMENT]. For a list of the main types of investment incentives, *see* UNCTAD, WORLD INVESTMENT REPORT 1998: TRENDS AND DETERMINANTS 180 (1998) [hereinafter WORLD INVESTMENT REPORT 1998]. For an inventory of common incentives, *see* WTO Working Group on the Relationship between Trade and Investment, *Note by the Secretariat: The Impact of Investment Incentives and Performance Requirements on International Trade*, WT/WGTI/W/56, at 6 (Sept. 30, 1998) [hereinafter *Note by the Secretariat*].

29. *See* Patrick Low & Arvind Subramanian, *TRIMs in the Uruguay Round: An Unfinished Business?*, *in* THE URUGUAY ROUND AND THE DEVELOPING ECONOMIES 413, 414 (Will Martin & L. Alan Winters eds. 1995) (wherein the authors argue that as with subsidies in trade in goods, investment incentives tend to distort the allocation of FDI).

30. *See* Bernard Hoekman & Kamal Saggi, *Multilateral Disciplines for Investment-Related Policies?*, World Bank Policy Research Working Paper 2138 (June 1999) (concluding that the case for initiating negotiations on investment policies is weak).

31. *See* WTO Working Group on the Relationship between Trade and Investment, Communication from ASEAN, WT/WGTI/W/41, ¶ 4 (July 3, 1998) [hereinafter Communication from ASEAN].

32. This assumes, of course, that developing countries and developed countries are in fact in competition for the same FDI. It seems more likely that developing countries compete *inter se* for FDI. UNCTAD adds that:

> [e]xperience suggests that incentives do not rank high among the determinants of FDI, although their impact on FDI locational choices is sometimes apparent at the margin. . . . In many instances, therefore, incentives can be a waste of resources—something most countries can ill-afford—and, when they are successful, can be distortional.

UNCTAD, WORLD INVESTMENT REPORT 1996: INVESTMENT, TRADE AND INTERNATIONAL POLICY ARRANGEMENTS 181 (1996) [hereinafter WORLD INVESTMENT REPORT 1996].

33. "Subsidy freedom" has been advocated in cases where incentives are effective in attracting FDI. *See* Eric W. Bond & Larry Samuelson, *Tax Holidays as Signals*, 76 AMER. ECON. REV. 820-26 (1986).

34. *See* Communication from ASEAN, *supra* note 31, ¶ 8; WTO Working Group on the Relationship between Trade and Investment, Communication from Singapore, WT/WGTI/W/99, at 2-3 (Mar. 13, 2001)

tional tool or carrot to regulate the type and nature of FDI a country receives. Finally, investment incentives have been defended on the ground that they attract the kind of investment that leads to long-term competitiveness because along with capital comes technology transfer, managerial know-how, and ready-made access to overseas markets.[35]

Although all host countries might mutually benefit if they voluntarily foreswore the use of investment incentives, individual cheaters would gain from continuing to offer incentives regardless of what other countries did. Because of this prisoner's dilemma, host countries harm themselves by pursuing their narrow self-interest and providing incentives. When all countries offer incentives, the incentives may simply cancel each other out, and investments will essentially be made in the same way as if no country was offering incentives in the first place.[36]

An amended WTO Agreement on Trade-Related Investment Measures (TRIMs) that imposes disciplines and limitations on the use of investment incentives would permit WTO members to break out of the prisoner's dilemma, which could be especially important for LDCs that cannot expect to outspend developed countries in any investment incentive competition.[37] The question is whether such an amendment would achieve the desired result. Of course, only one country can be the recipient of a specific investment. The hope must be that in the long run everything evens out, yet no lawyer or economist can make such a promise and deliver on it.[38]

Despite the arguments against using investment incentives, "[a]rguments on the pros and cons of investment incentives have never been conclusive and are unlikely ever to be so."[39]

[hereinafter Communication from Singapore]; WTO Working Group on the Relationship between Trade and Investment, Communication from Korea, WT/WGTI/W/62, ¶¶ 3-4 (Oct. 28, 1998) [hereinafter Communication from Korea]. *But see* Note by the Secretariat, *supra* note 28, ¶ 18 ("If investors request a 'risk premium' to compensate for the risk associated with macroeconomic instability, runaway inflation and exchange rate fluctuations, the most sensible policy response would be to address these underlying problems . . . rather than to compensate investors for the poor investment climate."); and WTO Working Group on the Relationship between Trade and Investment, Communication from Mexico, WT/WGTI/W/64, ¶ 14 (Nov. 19, 1998) ("To attract FDI it is preferable to remedy, and not to compensate for, structural or economic imperfections [through fiscal incentives].").

35. *See* Communication from ASEAN, *supra* note 31, ¶ 12. *But see* Communication from Korea, *supra* note 34, ¶ 8 (tax incentives have generally failed to achieve their desired effects).

36. The WTO Secretariat has explained in the following words:

> [H]ost country pursuit of the perceived first best solution—attracting investment from other countries—destroys the possibility of achieving a second best solution in which no country offers incentives, and countries therefore end up in a third best solution with incentives being paid out, but with few, if any, effects on investment allocation.

Trade and Foreign Direct Investment, *supra* note 28, at 21 n.83.

37. Modest attempts to corral investment incentives have been taken in the OECD Decision on Incentives and Disincentives, in the Caribbean Common Market agreement on the harmonization of fiscal incentives, and in the EU as part of its competition rules. *See* World Investment Report 1996, *supra* note 32, at 181; Organization for Economic Cooperation and Development, Decision on International Investment Incentives and Disincentives, Second Revised Decision of the Council, DAFFE/IME(2000)02 (May 1984). The impact of these regional and plurilateral efforts has been limited. *See* World Investment Report 1996, *supra* note 32, at 181.

38. *See* James R. Markusen, *Multilateral Rules on Foreign Direct Investment: The Developing Countries' Stake* 53 (World Bank Study Paper, Oct. 1998), *available at* http:// www.worldbank.org/wbiep/trade/papers_2000/jmarkusen.pdf.

39. Communication from Singapore, *supra* note 34, ¶ 13. *See also* Hoekman & Saggi, *supra* note 30, at 2 (authors conclude that regardless of whether investment incentives work or not, "there is no clear case for international cooperation that restricts the ability of governments to pursue national policies").

Many developing countries still dangle new ones to attract FDI.[40] For them, investment incentives remain an important policy instrument in the pursuit of development strategies.[41] Moreover, because developing countries are net importers of FDI, they have little incentive to negotiate an agreement on investment incentives unless the negotiations are expanded to include other issues of interest to them.[42] LDCs, on the other hand, because they cannot effectively compete in the investment incentives competition, could well gain from an amendment to the TRIMs Agreement that bans positive as well as negative TRIMs.

Considering the strong differences of opinion over the value of investment incentives,[43] perhaps the appropriate response is to strengthen the capacity of governments to effectively administer incentive programs rather than prohibit their use.[44] In addition, considering the near impossibility of controlling local tax regimes through a multilateral agreement, any international prohibitions on investment incentives could be circumvented. In sum, given the diversity of opinion on the pros and cons of investment incentives, disciplining the use of investment incentives anytime soon seems unlikely.

So given their limited financial resources, how can LDCs begin to compete in an international investment climate?[45] Forming fully functioning regional trade arrangements where resources could be pooled is one possibility, but this suggestion could be little more than telling LDCs to pull themselves up by their bootstraps. Alternatively, article 66.2 of the TRIPS Agreement clearly states that developed countries are to create incentives for technology transfer to LDCs. Developed-country preferential trade programs for developing countries that provide duty-free treatment for exports to donor countries, including the Generalized System of Preferences, the Caribbean Basin Economic and Recovery Act, the African Growth and Opportunity Act, and the Cotonou Agreement, could also influence vertical FDI by encouraging investors to locate labor-intensive assembly operations in beneficiary developing countries where labor costs are low. Free trade agreements between the

40. *See, e.g.*, *Philippines Passes Law Giving Breaks to Attract Investment by Multinationals*, 16 Int'l Trade Rep. (BNA) 2043 (Dec. 16, 1999) (multinational firms setting regional headquarters in the Philippines not subject to income tax or value-added tax); Glen Perkinson, *Indonesia Preparing Tax Breaks to Attract More Foreign Investors*, 16 Int'l Trade Rep. (BNA) 1400 (Aug. 25, 1999).

41. *See* WTO Working Group on the Relationship between Trade and Investment, Report (1998) of the Working Group on the Relationship between Trade and Investment to the General Council, WT/WGTI/2, ¶ 77 (Dec. 8, 1998).

42. *See* Hoekman & Saggi, *supra* note 30, at 2.

43. For example, the OECD's draft Multilateral Agreement on Investment specified that government subsidies or advantages offered for training or employing certain workers or for constructing and expanding facilities would not have been barred. *See* OECD, THE MAI NEGOTIATING TEXT (AS OF 24 APRIL 1998) 22 n.29 (1998), *available at* www.oecd.org/dataoecd/46/40/1895712.pdf. For a brief account of the highlights of the main provisions of the MAI and the MAI negotiating process, *see* WORLD INVESTMENT REPORT 1998, *supra* note 28, at 65-69; UNCTAD, LESSONS FROM THE MAI 28 (1999).

44. It has been suggested that the SCM Agreement, which distinguishes between prohibited and permitted subsidies, be used as a model for classifying and regulating investment incentives. *See* WTO Working Group on the Relationship between Trade and Investment, Report (1999) of the Working Group on the Relationship between Trade and Investment to the General Council, WT/WGTI/3, ¶¶ 43-45 (Oct. 22, 1999).

45. In the words of the WTO Secretariat, "[a]s competition for FDI intensifies, potential host governments find it increasingly difficult to offer less favourable conditions for foreign investment than those offered by competing nations." TRADE AND FOREIGN DIRECT INVESTMENT, *supra* note 28, at 21.

developed countries and LDCs that include investment chapters with incentives could also spur FDI.[46]

On the other hand, it may be unrealistic to expect that with the adoption of the TRIPS Agreement FDI flows to LDCs will begin to significantly increase. A "build it and they will come" mentality could cost LDCs dearly in terms of both the financial and human costs associated with building an intellectual property legal regime and bureaucracy if there is no payoff in the form of FDI. Even if LDCs do have strong IP protection in place, there is evidence to suggest that other factors are equally, if not more, important than intellectual property right (IPR) protection for facilitating technology transfer. For example, multinational enterprises still invest in large, developing countries such as Brazil, China, and India, despite the fact that IPR protection and enforcement is rather weak, presumably because of the size of the local market.[47] Technology transfer and the quality of the technology transferred also depend upon the level of technological capability in the country. Countries tend to acquire technology more readily if domestic firms are engaged in research.[48] This suggests that technology transfer and diffusion will take longest in the poorest economies that lack a sizeable local market and a well-educated local workforce.[49]

V. Possible Fallout of the 2005 TRIPS Extension: The Rule of Law

Besides potentially discouraging FDI flows to LDCs, a second casualty of the TRIPS postponement for LDCs may be the rule of law.[50] One of the important incidental benefits of WTO membership for many developing countries, including the LDCs, is the introduction of transparency in domestic administrative and judicial proceedings dealing with

46. When it enacted the African Growth and Opportunity Act, Congress declared that free trade agreements should be negotiated, where feasible, with interested countries in sub-Saharan Africa in order to serve as the catalyst for increasing trade between the United States and sub-Saharan Africa and increasing private sector investment in sub-Saharan Africa. *See* 19 U.S.C. § 3723 (2004). In November 2002, the U.S. Trade Representative's Office notified Congress of the decision to negotiate a free trade agreement with the Southern African Customs Union, whose membership is comprised of Botswana, Lesotho, Namibia, South Africa, and Swaziland. Those negotiations continue as of May 2006.

47. *See* Sanjaya Lall & Manuel Albaladejo, *Indicators of the Relative Importance of IPRs in Developing Countries*, UNCTAD-ICTSD Project on IPRs and Sustainable Development, Issue Paper No. 3, *available at* http://www.ictsd.org/pubs/ictsd_series/iprs/cs_lall.pdf.

48. *See* Bernard Hoekman, Keith E. Maskus, & Kamal Saggi, *Transfer of Technology to Developing Countries: Unilateral and Multilateral Policy Options*, World Bank Research Working Paper No. 3332 (June 2004); Keith E. Maskus, *Encouraging International Technology Transfer*, UNCTAD/ICTSD Capacity Building Project on Intellectual Property Rights and Sustainable Development (Dec. 2003).

49. *See* Maskus, *supra* note 48.

50. The Organization for Economic Cooperation and Development has noted the importance of the rule of law in attracting FDI:

> International rules have much to contribute to the stability of the multilateral system by helping avoid distortions to production and trade and in promoting more stable investment flows, higher quality investments and a better distribution of their benefits. Adherence to rules may be especially valuable to countries whose share of international investment falls short of their needs, as well as to small and medium-sized enterprises that might otherwise hesitate to invest outside familiar territory. Rules offer transparency and predictability for investors, and a vehicle for international co-operation and dispute resolution.

OECD, *Open Markets Matter: The Benefits of Trade and Investment Liberalisation* 7 (Policy Brief Oct. 1999).

trade laws and their administration. Domestic rules and regulations governing trade have to be published in advance and made available upon request.[51] Beyond the beneficial rule-of-law effects derived from WTO membership in general, the TRIPS Agreement, more so than any other WTO agreement that obligates WTO members to enact domestic legislation, contains several rule-of-law provisions that bring a measure of stability, predictability, and transparency to a country's domestic legal environment. For example, besides the obligation to provide domestic protection for core IPRs, the TRIPS Agreement contains twenty-five articles that require WTO members to have in place effective administrative and judicial machinery for securing IPRs, for challenging alleged IPR infringements, and for preventing the importation of goods that infringe IPRs.[52]

Whether or not these rule-of-law provisions have a spill-over effect for other areas of domestic law, such as commercial law or criminal law, is unclear. Nevertheless, even if adopting TRIPS obligations does not lead to a bleed-through of transparency and due process within a country's entire legal system, it certainly could not impede the growth of the rule of law.

VI. Honoring Commitments Made as Part of the Single Undertaking Approach

As an incentive to developing countries and LDCs to adopt the TRIPS Agreement and embrace the single undertaking approach, the TRIPS Agreement dangles the carrot of technology transfer. Developed countries made a vague promise of technology transfer in article 7 of the TRIPS Agreement, which states in part that the "the protection and enforcement of intellectual property rights should contribute to . . . dissemination of technology . . . ."[53] This hortatory goal is made mandatory in TRIPS article 66.2 which provides that "[d]eveloped country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base."[54] The TRIPS Agreement thus obligates the developed-country members of the WTO—Australia, Canada, the European Union, Iceland, Japan, New Zealand, Norway, Switzerland, and the United States—to facilitate the transfer of technology to LDCs and to provide them with technical assistance in the preparation of domestic intellectual property laws and personnel training. Technology transfer has been a frequent demand of both developing and least-developed countries in the TRIPS Council.

51. The basic transparency and rule-of-law provision of the General Agreement on Tariffs and Trade, Article X, provides in part as follows:

> 1. Laws, regulations, judicial decisions and administrative rulings of general application, [pertaining to trade] shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. . . . 3. (a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

52. *See* TRIPS Agreement, *supra* note 9, arts. 41-63.

53. *Id.* art. 7.

54. *Id.* art. 66.2.

Advocates of strong IPR protection argue that such protection provides an incentive for technology transfer, such as through IP licensing.[55] But therein lies the dilemma of the 2005 TRIPS extension: LDCs have been given another seven and one-half years to assume their TRIPS obligations, but without strong IP protection in place they are at a competitive disadvantage in their ability to attract FDI. In addition to mandating the transfer of technology, the TRIPS Agreement obligates developed-country members to provide technical assistance to LDCs that will enable them to assume their TRIPS obligations in full:

> In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial co-operation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.[56]

This article 67 TRIPS commitment on technical assistance was reiterated in the 2005 TRIPS Council decision, extending the transition period for LDCs. Just how well are developed countries doing in this regard?

In February 2003 the TRIPS Council decided to monitor actions taken or planned by developed countries under article 66.2 of the TRIPS Agreement.[57] Under the decision, developed-country members are required to submit annual reports of their activities (full reports every third year and updates in the intervening years), which are to be reviewed by the Council at the end of each year. As developed countries submit their reports on the technical assistance they have provided to LDCs, how is the value of that assistance to be appraised? Measuring the effectiveness of developed-country technical assistance to LDCs is both a qualitative and quantitative assessment. It isn't just a question of throwing money at a problem, but rather carefully targeting it.

In its 2005 report to the TRIPS Council on implementation of TRIPS article 66.2, the United States reported on general intellectual rights programs it has launched. Its activities included a visiting scholars program and enforcement academy within the U.S. Patent and Trademark Office that is designed to foster a better understanding of international intellectual property obligations and norms, to educate participants on the U.S. intellectual property system, and to exchange information on intellectual property issues. Officials from eighteen countries participated in 2005, but only one LDC was represented (Yemen).[58] As

---

55. In the 2001 Doha Ministerial Declaration, the trade ministers of the WTO members agreed that a working group would be set up to examine "the relationship between trade and transfer of technology and of any possible recommendations on steps that might be taken within the mandate of the WTO to increase flows of technology to developing countries." WTO Ministerial Conference, Fourth Session, Ministerial Declaration adopted on 14 November 2001, ¶ 37, WT/MIN(01)/DEC/1 (Nov. 20, 2001). There are several studies on this subject. *See, e.g.*, G. Yang & K.E. Maskus, *Intellectual Property Rights and Licensing: An Econometric Investigation*, 137 WELTWIRTSCHAFTLICHES ARCHIV 58 (2001); L.E. Branstetter, R. Fisman & C.F. Foley, *Do Stronger Intellectual Property Rights Increase International Technology Transfer? Empirical Evidence from U.S. Firm Level Panel Data*, National Bureau of Economic Research Working Paper No. 11516 (July 2005), *available at* http://www.nber.org/papers/w11516.

56. TRIPS Agreement, *supra* note 9, art. 67.

57. Council for Trade-Related Aspects of Intellectual Property Rights, Decision of the Council for TRIPS of 19 February 2003, *Implementation of Article 66.2 of the TRIPS Agreement*, IP/C/28 (Feb. 20, 2003).

58. *See* Council for Trade-Related Aspects of Intellectual Property Rights, Report on the Implementation of Article 66.2 of the TRIPS Agreement, IP/C/W/452/Add.5 (Dec. 12, 2005).

reported by the European Union, a large number of technical training programs were held in 2005, but very few programs targeted sub-Saharan Africa (the one notable exception is training activities conducted by Portugal for its former colonies in the SSA region).[59]

Conceding that developed countries have been providing some technical assistance to developing countries pursuant to their TRIPS obligations, as noted in the LDCs' request for the 2005 TRIPS extension, LDCs are nevertheless critical of the level of assistance they have received from developed countries: "While there has been some movement in implementing this commitment with some developed countries notifying to the Council for TRIPS the technology transfers that they have been involved in, the commitment has not yet been adequately fulfilled.[60] Regardless of whether the developed countries are in fact living up to their TRIPS commitment to provide technical assistance and to transfer technology to LDCs, it is clear that LDCs do not feel that the level of developed-country TRIPS assistance has been adequate. If the effectiveness of technical assistance can be measured by its results, then TRIPS technical assistance to date has not been effective, as evidenced by the seven and one-half year extension LDCs received in 2005 to adopt the TRIPS Agreement.

VII. Conclusion

If they are to break out of their economic dependency on agriculture and primary commodities, then LDCs must pursue a policy of cultivating a hospitable environment for foreign direct investment. One of the many steps toward achieving this goal is to adopt effective domestic legislation on IPR protection and enforcement consistent with the TRIPS Agreement. But it would be overly simplistic, as well as inaccurate, to suggest that the sole determinant of FDI is adequate intellectual property protection within a host country. Without the fundamentals firmly in place—political stability, desirable geographic location, adequate infrastructure, human capacity, functioning legal institutions, enforceable contract rights, open trade policies, *and* intellectual property protection—a country will not be an attractive host site for FDI.

At the same time, developed countries must fully honor their TRIPS commitment to provide effective technical assistance that will enable LDCs to assume their TRIPS commitments sooner rather than later and thus become full-fledged WTO members. In the process, LDCs will enhance their attractiveness as a destination for FDI and the technology transfer that comes with it in a world with a limited supply of capital.

Article XI:2 of the Agreement Establishing the WTO is not an escape hatch designed to relieve LDCs permanently of their WTO legal obligations. But if that article is indeed a general exception for LDCs from the single undertaking approach, then perhaps a decision should be taken by the WTO Ministerial Conference permanently to exempt LDCs from assuming any obligations under the TRIPS Agreement and instead to make adoption of the Agreement optional for them. Intellectual property protection for them is at present a one-sided proposition, given that they have little intellectual property of their own to protect. Given the uncertainty that FDI will be forthcoming even if they do assume all of their

59. *See* European Communities, Technical Cooperation Activities: Information from Members, IP/C/W/426/Add.5 (Mar. 4, 2005).

60. Communication from the Delegation of Zambia, *supra* note 3, ¶ 6.

TRIPS obligations, weighed against the clear human and institutional cost to them of creating and maintaining a domestic intellectual property system, amending the TRIPS Agreement by making it optional for the LDCs might be seriously considered, though only as a last resort.

Is the multilateral trade system failing the LDCs? The answer has to be yes, at least in part. The exogenous and endogenous problems facing LDCs are daunting, and not all the blame for these problems can be laid at the feet of the WTO. Rather than play the blame game—never a constructive exercise—efforts to fully integrate the LDCs into the WTO system must instead be redoubled. Simply throwing up our hands and doing nothing is not an option.