Post-Doha African Challenges in the Sanitary and Phytosanitary and Trade Related Intellectual Property Rights Agreement

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Abstract

The World Trade Organization agreements on sanitary and phytosanitary (SPS) and Trade Related Intellectual Property Rights (TRIPS) present various challenges and opportunities for sub-Saharan African countries to expand international trade in their products. The main challenges for the SPS Agreement include capacity for participation in standards setting and implementation, protectionist use of the Agreement by developed countries, and high compliance costs for developing countries. The challenges arising from the TRIPS Agreement include counteracting the side effects arising from compulsory licenses and patent rights, use of geographical indications, and developing measures to cover traditional knowledge. Opportunities arising from SPS Agreement include investments in infrastructure and technical skills to improve competitiveness in trade of products from sub-Saharan Africa, while opportunities for the TRIPS Agreement include the need for impact assessment of the effects of TRIPS on industries as well as clarification of patenting needs for the region. These challenges need to be taken into account and opportunities exploited if sub-Saharan Africa countries are to benefit from trade liberalization and post-Doha negotiations.

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1. Introduction

Africa's participation in the Uruguay Round processes that introduced major changes in international trade were marginal. In particular, sub-Saharan Africa lacked the capacity to engage substantially on the wide range of issues on the Uruguay Agenda. African countries were overwhelmed by the complexity of the negotiations and lacked the negotiating experience and expertise in economic policy analysis and in international law (Economic Commission for Africa (ECA), 1999). Because of the complexity of the entire system, African countries made commitments beyond their administrative and institutional capacity to implement.

As a result of the above factors, Africa has not experienced improved market access, particularly on agricultural commodities. At the conclusion of the Uruguay Round in 1994, the United Nations Development Program (UNDP) had calculated that world income would grow by US$200-500 billion within six years. However, these gains would go mostly to the industrialized countries and that sub-Saharan Africa would lose US$1.2 billion a year during the period. Besides problems of market access, the weak industrial and technological bases in Sub Saharan African countries have also been major obstacles to taking advantage of the opportunities availed by liberalization of trade (ECA, 1999).

Africa's capacity to participate in the subsequent rounds of trade negotiations (Seattle and Doha rounds) greatly improved largely because of policy analysis efforts made by African governments and regional and international bodies. Consequently, many African countries and the continent at large presented position papers on a number of issues such as the Agreement on Agriculture (AoA), Sanitary and Phytosanitary (SPS) and Trade Related Intellectual Property Rights (TRIPS). Some of the issues raised by African countries, such as trade and debt and trade and

technology transfer formed part of the Doha Declaration. The focus in this paper is on the challenges for sub-Saharan Africa arising from Doha Declarations on SPS and TRIPS Agreements.

2. Sanitary and Phytosanitary (SPS) Agreement

The SPS agreement sets out the rights and obligations of members of World Trade Organization (WTO) in relation to the health of plant and plant products and animal and animal products that may restrict international trade. The basic aim of the SPS Agreement is to maintain the sovereign right of any government to provide the level of health protection it deems appropriate while ensuring at the same time that these sovereign rights are not misused for protectionist purposes and do not result in unnecessary barriers to trade. The Agreement includes several provisions such as notification and making known factors considered in establishment of new standards to prevent abuse of rights of using SPS measures. It also provides a loophole that allows countries to introduce measures that result in a higher level of protection than would be yielded by those based on international standards for as long there is scientific justification for departure (Oyejide et al. 2001).

2.1 African Concerns and Doha Declarations on SPS

The African experience with the SPS Agreement is that the Agreement is not effectively implemented because of a number of problems. Some of the problems faced are:

(i) Lack of adequate information about health, sanitary and phytosanitary regulations/standards applicable to their products in target markets.

(ii) Arbitrary and sometimes discriminatory application of SPS measures.

(iii) Use of measures to disguise trade restrictions.

(iv) Little efforts by developed countries to deal with negative trade effects of legitimate regulation, particularly at the multilateral level.

The main issues focused on by African countries and the Doha Ministerial Declaration on the SPS Agreement are summarized in Table 1. The African position focused on the need for transparency on the part of developed countries on notification and setting of standards; flexibility in introduction of SPS measures; review of Article 12.7 that deals with operation and implementation of SPS; facilitation of members at different levels to participate in development of international standards; and provision of technical and financial assistance to African and other developing countries to respond adequately to introduction of new measures that may have significant effects on their trade.

Table 1: Comparison of Africa concerns and Doha Declarations on SPS

SPS Issue	**African Concerns**	**Doha Declaration**
Notification and standards setting (Article 7 and Annex B)	Developed countries to provide notification obligations taking into account interests of developing countries	Phased introduction for less than six months and member consultation where problems occur
SPS implementation (Article 13)	Compensation if wrongly invoked	Not addressed
Time frame for reasonable interval for introduction of measures (Article 10)	Reasonable time for implementation and invocation	Less than six months taking into account peculiar circumstances and actions required
Implementation of Article 12.7 on administration of operation and implementation	Adequate implementation required	Review operation and implementation at least once every four years
Comprehensiveness of Article 12 on administration	Assess extent special interests of African countries are taken into account	WTO Director General to facilitate members with technical and financial support but priority to LDCs
Review of SPS Agreement and implementation	Technical assistance and programs for African countries	Members to provide technical and financial assistance to LDCs for adequate response to new measures that affect trade

2.2 Challenges from Doha Declaration

In general, the Doha Declaration took into consideration the issues of concern to sub-Saharan African countries. The main challenges facing these countries are mainly on capacity problems to participate in standards setting and implementation, protectionist use of the measures by developed countries, and high costs of compliance.

Capacity problems include limited expertise to participate in international standards setting, testing and risk analysis, and training and dissemination of information regarding required standards to firms and farmers. The problem is made worse by limited resources to undertake these activities (Nyangito et al., 2002; and Jooste et al. 2002). Most African countries have different capacities (organization, infrastructure and technical) in standards setting and implementation related to SPS (standards setting, risk analysis, testing, surveillance, training and dissemination). More advanced countries like South Africa have adequate capacity while others like Kenya have a modest capacity; the least developed countries have a low capacity. In general, the effectiveness of implementation of SPS requirements is constrained by available funds and technical skills. The challenge therefore is to create adequate human, capital, and physical capacity for SPS related work. The Doha Declaration for technical and financial support on these areas offers an opportunity to sub-Sahara African countries to enhance implementation of the SPS Agreement.

Restriction of market access for products from Africa to developed countries on basis of SPS measures is a common feature. Examples include fisheries bans from East Africa countries and Mozambique in 1997 to European Union (EU) countries due to Cholera outbreaks and from East African countries between 1999 and 2000 because of the inability of the countries to enforce Hazards Analysis and Critical Controls Points (HACCP) management systems as required for the EU

market. Some of these requirements are legitimate with respect to food safety but most African countries find it difficult to meet the standards because of technical and resource capacity constraints. Others restrictions over the past years include exports from sub-Saharan Africa of meats to the United States of America (USA), dairy products to EU, and products of animal origin to Japan on health grounds. These restrictions are considered discriminatory by the affected countries because the restrictions are not specific but depend on inspections that are undertaken at the time. Another case is the EU's zero analytic minimum residual levels (MRLs) for pesticides on horticulture from developing countries. Products with MRLs above the zero analytic will not be allowed into EU markets once the requirement comes into force.

The losses to African countries due to restrictions to market on SPS basis can be enormous. For example, Otsuki et al (2001) have estimated the loss in revenue for African countries from implementation of low aflatoxin levels required by EU under a new stringent standard than the international standard set by Codex Alimetarius Commission at about US$400 million for cereals, dried and preserved fruits, and nuts. The same study indicates that trade flow of these products from Africa could increase by nearly US$700 million if an extension of current international Codex standard is used rather than the EU one.

The challenge for sub-Saharan Africa is to develop the capacity to undertake HACCP as required and to improve the ability to negotiate with developed countries on some of the new measures. The countries also need to participate effectively in the international meetings for standards setting. The developed countries on the other hand need to provide technical assistance necessary to enable sub-Saharan African countries respond adequately to the new SPS measures as proposed in the Doha Ministerial Declaration.

Compliance costs associated with implementation of the SPS Agreement may be prohibitive to sub-Saharan countries. This is because the need to comply with new measures requires investments in new facilities and expertise, which increases the costs of production. For example, compliance with the HACCP EU requirements for fisheries by the East African countries in 1999-2000 forced governments to invest in new competent authorities together with equipment and technical capacity to inspect fish and implement quality control measures. These are costly investments, which most countries cannot afford. Uganda for instance, had to solicit funds from the United Nations Industrial Development Organization (UNIDO) to invest in the competent authority and associated facilities (Rudaheranwa et al, 2002). At the firm level, enforcement of the standards required firms to invest in new facilities (fishing and processing) and in education. The processors in Kenya were forced by this requirement to start up a private fisheries organization to assist fishermen and processors meet the required standards (Nyangito et al 2002). Other costs that are incurred under compliance are decline in production. Low use of pesticide in horticulture production as required by EU standards will for example result in low yields.

On-going studies on standards compliance costs in Kenya (Nyangito et al, 2002) indicate that to grow flowers using high investments that are capable of conforming to the EU MRLs standards costs 10 times more than when traditional conventional methods are used. It has also been estimated that to upgrade a honey processing plant in Uganda to conform to ISO standards will require US$ 300 million (Rudaheranwa et al, 2002). Likewise, to produce quality coffee that conforms to standards increases the costs of firms by 200 percent.

The challenge with respect to compliance to the SPS Agreements is for sub-Saharan countries to set aside resources to meet the requirement of SPS Agreement both at the national and firm levels. However, the Agreement also creates opportunities since investments in infrastructure

and technical skills improve the competitiveness of products in both the domestic and export markets.

3. Trade Related Intellectual Property Rights (TRIPS)

The TRIPS Agreement stipulated minimum standards for protection of intellectual property rights. The Agreement covers a wide range of objects of creations of the human mind and intellect, which include patents, copyrights, and industrial designs. It also covers trade and service marks, and brand names that are used to distinguish products. Several provisions of the Agreement impose obligations upon members to provide minimum protection to intellectual property rights. Members are free to determine the appropriate method of implementation of the provisions of the Agreement within their own legal systems and practice and they must accord the National and Most Favored Nation treatment to the nationals of other states.

3.1 African Concerns and Doha Declaration on TRIPS

Most African countries recognize adequate protection of intellectual property rights as fundamental for economic growth and therefore the need for recognition of adequate protection of the property rights that should produce tangible benefits to every member. However, the entire modern evolution of intellectual property rights protection has been framed on principles and systems that are biased against developing countries (ECA, 1999). The principles have for example left aside a large sector of human creativity, namely 'traditional knowledge' in the use of and application of genetic, biological and natural resource, and the management and conservation of such resources and the environment in ways that have economic, commercial and cultural value. Further, patenting of living organisms and materials of medicinal value is also

an issue of concern, especially the extent to which such patenting would grant rights to multinational drug and chemical companies at the expense of local communities. The African concerns during the Doha Round and the declarations made by the Council of Ministers are shown in Table 2.

Most developing countries consider the TRIPS Agreement to be a protection measure on technologies developed by developed countries. For instance, full implementation of TRIPS will strengthen intellectual property rights that will lead to payment of high level of royalties which most developing countries may not afford (South Center, 1997). The likely impact is to make technology acquisition more difficult for developing countries and this may have serious implications for trade and investment in developing countries. Furthermore, the TRIPS Agreement brought together all previous conventions on intellectual property rights under one umbrella without much negotiation and participation of developing countries. For this reason, most developing countries argue

Table 2: Comparison of African concerns and Doha Declaration on TRIPS

TRIPS Issue	African Concerns	Doha Declaration
TRIPS Council work	Stagger for effective participation by African countries	Council to examine scope and modalities and give recommendation
Transitional period for implementation	Extend to allow sufficient time to address difficulties with Agreement	Extended to 10 years
Article 62.2 on technology transfer	Regular review to ensure operationalization of commitments by developed countries	Monitor implementation and developed countries to provide full reports on incentives
Article 27.3(b) on protection of plant varieties	Clarification and substantive review	Review
Article 23.4 on geographical indications	Extend to include agricultural products, food stuffs and handicrafts	Be addressed by TRIPS Council
Traditional Knowledge and new developments	Develop measures to safeguard and include	Include in Council work
Essential drugs	Automatic licensing by countries	Allowed under Public Health Declaration

that the TRIPS Agreement should be harmonized with provisions of the Convention on Biological Diversity (CBD) and the International Undertaking on Plant Genetic Resources. Developed countries have further achieved the level of property protection bound by WTO while developing countries will require several years of reforms and physical, institutional and human capacity efforts to reach the level of protection assumed in the agreements.

The Doha Ministerial Declaration focused on three main areas. First, implementation and interpretation of the TRIPS Agreement in a manner supportive of public health. Second, the Council on TRIPS was mandated to complete work on Implementation of Article 23.4 to negotiate for establishment of a multilateral system of notification and registration of geographical indications for wines and spirits and extension of the principle to other products. Third, review of Article 27.3 and implementation of the TRIPS Agreement to include relationships between the TRIPS Agreement and the Convention on CBD and other relevant new developments raised by members.

3.2 Challenges from Doha Declarations on TRIPS

The Public Health Declaration recognizes the potential side effects of the TRIPS Agreement and gives room to African countries to counteract the side effects. Measures include the right to grant compulsory licenses, which override patents and the freedom to determine the grounds upon which such licenses are granted. This means that the Doha Declaration provided a road map to use flexibilities of the TRIPS Agreement to protect public health. This however might not benefit countries with insufficient capacity or no capacity to manufacture pharmaceuticals because the Agreement requires production under compulsory license to be authorized predominantly for the supply of the domestic market (Panagariya, 2002). The Declaration has instructed the Council for TRIPS

to find an expeditious solution to this problem and report to the general Council before the end of 2002.

The review of Article 23.4 on geographical indications (GI) is a challenge to developing countries. African countries want TRIPS to confirm principles, objectives and measures which developing countries can use to exercise sovereign rights over their biological resources. However, Rangnekar (2002) observes that divisions exist on the issue of extending GIs to other goods given the strong level of protection allowed for wines and spirits. The most important question that arises is whether the applicability and effectiveness of widening the scope of application of high-level geographical indications will deliver economic returns. It is believed in Africa that extension of the principle to products such as agricultural products, foodstuffs and handicrafts will pay. However, detailed analysis of the pros and cons may be required to show the actual benefits.

The review of Article 27.3 on TRIPS Agreement is an opportunity for Africa because a considerable amount of uncertainty remains on the economic impact of the TRIPS Agreement in developing countries. The effects of TRIPS on industry and technology vary according to the countries' level of development and the need for, and benefits of, stronger patent protection, incomes and technological sophistication (Lall, 2002). Assessing the impact of TRIPS in developing countries therefore requires a clear distinction on the levels of development. There is no clear case that most developing countries below the stage of newly industrializing economy will gain in net terms from TRIPS; the least developed countries are most likely to lose (*op cit*). This therefore calls for a differential approach to intellectual property rights regime. It is in light of this that the 10-year extension granted to LDCs to comply with the TRIPS Agreement offers an opportunity to be exploited by most sub-Saharan African countries.

Evidence on the impact of TRIPS in Africa is scanty but Adeyemo (2002) indicates that Nigerian firms largely acknowledge that intellectual property rights require them to pay more but for as long as the firms are allowed to procure the technology, they are willing to pay the cost because of the higher costs of research and development, the long time it takes to generate [something is not clear] and the high risks involved. This might as well be the case for most sub-Saharan African countries. The challenge with respect to technology acquisition is therefore to strengthen the intellectual property rights environment, and particularly legislation to facilitate trade.

The mandated Review of Article 27.3(b) also provides an opportunity to clarify patenting needs of genetic resources for food and agriculture. A large number of African communities depend on locally saved seed and local livestock breeds for their food security and sustainable agricultural production systems. Flexibility is required to implement *sui generis* options so that they can protect the farmers' rights. The TRIPS Agreement also needs to be made compatible with the International Treaty on Plant Genetic Resources for Food and Agriculture, and with provisions of the Convention on Biological Diversity based on informed consent and benefit sharing.

4. Conclusion

The Doha Declaration on SPS and TRIPS offers diverse challenges and opportunities for sub-Saharan African countries. These challenges and opportunities need to be exploited if sub-Saharan countries are to benefit from trade liberalization as a result of Post-Doha negotiations. Improved technical and capital capacities and financial support is key to better exploitation of the opportunities offered.

Research on how best African countries can benefit from opportunities offered by the Doha Ministerial Declarations on SPS and TRIPS is also required. This is because available information on how this can be done is limited. Information from research can assist African countries take advantage of available opportunities and also help them prepare adequately for negotiations during the Doha Round.

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