

National Experiences in Negotiating and implementing Trade Agreements

PAPER BY:

Mboi E. Misati (B.Sc., M.I.P.)

Senior Patent Examiner

Kenya Industrial Property Institute – Nairobi

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PREAMBLE – Paper Objectives

- This paper aims to share the experiences of Kenya in negotiating and implementing trade agreements that cover Intellectual Property Rights (IPRs), in the context of:
 - Symposium theme: **Public Health, Intellectual Property, and TRIPS at 20: Innovation and Access to Medicines; Learning From the Past, Illuminating the Future;** and
 - Panel 3 Sub-theme: **Trade Agreements: How to Measure Their Impact on Innovation and Access to Medicines**
- It may not be exhaustive, but aims at presenting the issues in an open and sincere manner with a view to sharing status and experiences and triggering discussion on the objective matters.

FOCUS/OUTLINE OF PAPER: SLIDES

- Introduction:
 - Kenya vis-a-vis WHO, WIPO, WTO
 - Kenya and TRIPS Agreement
- National Trade Negotiations:
 - Strategy
 - Experiences (Institutional/Personal)
 - Challenges:
- Implementation of Trade Agreements
 - Smooth
 - Moderate
 - Rough
 - Other challenges
- Measuring Impact on Innovation and Access to Medicines:
 - Implementation
 - Statistical data

Kenya vis-à-vis WHO, WIPO and WTO

- Kenya is a (founding) Member of all the three organisations.
- Kenya is party to several treaties /arrangements administered by WHO, WIPO or WTO.
- Kenya is an active participant in processes of all the three organisations.

Kenya vis-à-vis the TRIPS Agreement

- **Kenya is TRIPS Compliant:**

- Kenya as a developing country Member of the WTO was obligated to conform to the TRIPS Agreement by 1st January 2000.
- Kenya amended or reviewed its national legislations on IPRs and was reviewed by the Council for TRIPS beginning 2001 and was cleared from the review agenda in June 2003.
- Further IP legislative reviews, amendments or enactments; and policy and strategy development, are envisaged in order to better serve the IP stakeholders across the board.

Trade Negotiations Structure: Mandate

- The **Constitution of Kenya** provides for public participation in all matters affecting them. Therefore, any public institution developing national policies, legislation and strategies must cause them to be subjected to public participation before adoption/enactment. This is the case for those relating to trade and health sectors.
- In addition, The National Trade Negotiations Committee (NTNC), first established in 1995 upon Kenya's accession to WTO Agreement, is the administrative body involved in policy, legislation and strategy coherence between trade and other sectors like health and industry.
- NTGC has several functions, among them:
 - Handles **negotiations** and overseeing **implementation** relating to multilateral issues like WTO and bilateral arrangements including those under the Economic Partnership Agreement (EPA) and Tripartite (EAC/COMESA/SADC).

Trade Negotiations Structure: Optimising Consultations

- In order to execute its mandate more efficiently and effectively, NTNC has established at least 8 Sub-committees to address specific agreements of WTO.
- One such Sub-committee is the **Sub-committee on TRIPS (SC-TRIPS)** whose main responsibility is to oversee the implementation of the TRIPS Agreement.
- The SC-TRIPS has established task forces to address specific agendas under the Council for

Trade Negotiations Structure: Membership

- NTNC is chaired by the Ministry for the time being responsible for international trade (read Ministry of Foreign Affairs and International Trade) that also provides the Secretariat.
- It has membership from various stakeholders in the public sector including the parliament, private sector including the informal sector, civil society including Non-Governmental Organization, and academia.
- This membership pattern is also the case for sub-committees although ideally, the lead institution in the specific agreement of the sub-committee chairs the sub-committee.

SO 1: Establish National Status

- Preferably through studies
- Should cover at least:
 - both real and potential incoherencies;
 - Negative impact on development
 - Possible approaches to promoting coherence
 - Best approach(es) to promoting coherence

SO2: Create awareness

- Cover:
 - intellectual property as a whole
 - The findings of the incoherencies studies
- Strategically target policy/law makers including both the executive and legislature at national and regional levels.
- Target also general public – use media
- Attract/Earn political goodwill
- Apply advocacy if necessary
- Address:
 - Superiority/inferiority complex
 - Swallowing syndrome
 - What is in it for syndrome

SO3: Develop Negotiations Capacities

- Identify and train national and regional teams on negotiations skills
- Strategically target both technical and policy/law makers including both the executive and legislature at national and regional levels.
- Involve as wide stakeholders as possible - inclusivity
- Encourage trained teams to participate in negotiations:
 - Address “pain-killer” and “individual benefit” syndromes.

SO4: Launch Coherence Negotiations

- Identify/Establish the right forum for:
 - National negotiations
 - Regional negotiations
- Ensure only trained teams participate in negotiations:
 - Address “pain-killer” and “individual benefit” syndromes.
- Ensure policy coordination mechanisms
- Ensure national negotiators have common national positions for regional negotiations.

SO5: Apply Monitoring, Evaluation and Reporting Mechanism

- Establish MERM for both:
 - National negotiations
 - Regional negotiations
- Ensure the MERN is followed to the letter and spirit.

SO6: Harvest one at a Time

- Especially for the palatable approach:
- E.g.:
 - National then EAC then COMESA then TRIPARTITE then AU
 - National then ECOWAS then AU
 - National then ARIPO
- The more the stakeholders, the more difficulty to agree.

SO7: Safeguard every Harvest

- Maximum use of national policy coordination teams
- Vigilance over upcoming negotiations at all levels, especially FTAs or investment treaties.

Implementation

- Depends on Policy coherence:
 - Smooth: Where public sectoral policies do not conflict
 - Moderate: Where public sectoral policies do slightly conflict.
 - Rough: Where public sectoral policies do conflict.
- The higher the policy incoherence, the rougher the domestication process.

Why Policy Inconsistence?

(<http://www.oecd.org/pcd/50461952.pdf> , p.4)

- Governments pursue a wide range of policy objectives, trying to balance interests and priorities of domestic constituencies with longer term foreign and development policy objectives.
- These may, in the short term, appear to be competing or even contradictory objectives.
- But in an increasingly interconnected world, neglecting development may undermine the achievement of domestic objectives

Where do Policy Coherence Issues Arise?

- Within national governments, policy coherence issues arise:
 - between different types of public policies,
 - between different levels of government,
 - between different stakeholders and
 - at an international (regional) level.
(<https://www.tcd.ie/iiis/policycoherence/concept/what-is.php>)

Examples of Domestication Process

- Smooth:
 - Transitional arrangements to conform to TRIPS
- Moderate:
 - Parallel Importation clause “amendments”; and
 - Acceptance of the TRIPS Protocol (2007-2015).
- Rough:
 - Implementation of the Anti-counterfeit Act 2008
 - Notification of Tobacco Regulations under TBT Agreement

Lesson 1: Need for Policy Coherence

- *To ensure that government policies are mutually supportive of the countries' development goals:*
 - avoid negative consequences and spillovers which would adversely affect the development prospects of poor countries (<https://www.tcd.ie/iiis/policycoherence/concept/what-is.php>)
 - Avoid policies, laws and regulations that might undermine development in developing countries ((<http://www.oecd.org/pcd/50461952.pdf> , p.5)
- To make international cooperation for international development more effective (http://en.wikipedia.org/wiki/Policy_Coherence_for_Development).

Lesson 1Bis : Achieving Policy Coherence

- Example: Through **Policy Coherence for Development (PCD)**: an approach and policy tool for integrating the economic, social, environmental and governance dimensions of sustainable development at all stages of domestic and international policy making. It is the aim of Policy Coherence for Development to make foreign relations to be as ecologically, economically and socially coherent as possible and thereby to make international cooperation for international development more effective (http://en.wikipedia.org/wiki/Policy_Coherence_for_Development).
- Having National negotiations structure is a practical mechanism to facilitate policy coherence.

Lesson 2 : Trade Negotiations not a Bed of Roses

- Develop or enhance negotiation capacities (institutional/human and financial resources).
- Be aware and withstand “Underground Hurricanes”
 - Mis-reporting to capitals
 - Undermining at capitals
- .

Lesson 3: Measuring the Impact

- No data widely available
- Studies required to avail data.

Author's Contacts as at Time of Presentation

Mboi E. Misati,
Senior Patent Examiner and
Kenya Industrial Property Institute,
Popo (Former Kapiti) Road – Off Mombasa Rd
South C
P.O. Box 51648-00200,
NAIROBI - KENYA.
Tel: +254-20-6002210/11 (office),
Tel: +254-710-891-918 (Cellular),
Fax: +254-20-6006312
E-mail: Misati.Mboi@yahoo.com /
Misati_Mboi@yahoo.com or
misati@justice.com or memisati@kipi.go.ke

End of Presentation

- Imbuya Mono
- Asante Sana
- Thanks
- Muchas Gracias
- Merci Beaucoup
- Arigato Gosaimasi