

1. INTRODUCTION

1.1 Background

LDCs face special challenges in building a sound and viable technological base and modernizing their national IPR and innovation infrastructure. Designing the right policy framework and ensuring adequate capacity within a range of institutions in LDCs are long-term, difficult tasks. But they are essential for implementing the objectives, principles, rights and obligations of the TRIPS Agreement in a manner which supports social and economic development goals in LDCs – rather than a narrow approach focused only on compliance with its provisions.ⁱ

Of the 49 LDCs, 32 are members of the WTO and a further 9 are in the process of accession. Most LDCs have long had some form of IPR protection regime. Many are party to regional and multilateral international IP conventions covering industrial property and copyright. But the recent process of policy, legal and institutional reforms begun in response to TRIPS in many developing countries has highlighted the challenges to be faced in designing, implementing, enforcing and regulating development-oriented and pro-competitive, IPR regimes, tailored to their special needs and circumstances. Many LDCs also face serious constraints in participating effectively in international IPR standard setting at regional and multilateral levels, principally in WIPO and the WTO.

A central challenge for LDCs – which should be understood within an era of unprecedented globalisation and technological change – lies in stimulating local innovation, creativity, access to knowledge and technology transfer. As the preamble to the TRIPS Agreement envisages, LDCs require time and flexibilities to build a sound and viable technological base and use the IPR system to contribute to cultural, social and economic development. This is one of the central purposes and objectives of the S&DT provisions, such as technical assistance, incentives for technology transfer, and the extended transition period, for LDCs in the TRIPS Agreement.

All of these issues underline the importance – perhaps more than ever before – of high quality, development-oriented, and locally-led technical assistance and capacity building programmes, tailored to meeting the varied and long-term needs of LDCs. They also have significant implications for the ways in which IPRTA and capacity building are planned, co-ordinated, designed, delivered, managed and evaluated by the range of international institutions, bilateral donors, NGOs and other providers who are active in this sector. Whilst a large number of providers of IPRTA can be identified, principal among these in terms of scale and coverage are WIPO, the European Patent Office, the European Commission, USAID and Japan.ⁱⁱ

Most donors and providers of IPRTA to LDCs recognize the importance of building local ownership, reducing duplication of work and inefficient use of resources that can result from poorly planned programmes and insufficient co-

ordination of activities. As shown by the recent discussions in the IPRTA Forumⁱⁱⁱ and at WIPO with its Development Agenda, major IPRTA providers are showing renewed interest in examining ways to improve the effectiveness of their efforts and increase collaboration in designing IPRTA and capacity building programs for LDCs. The reality of limited resources in the face of increasing demands is leading to growing acceptance of the need for greater information sharing and dialogue between and among LDCs and providers of IPRTA. Among a broad range of issues that have been at the centre of these discussions are those that relate to:

- improved needs assessment using common tools and participatory approaches which support local ownership and place LDCs in the lead;
- longer-term programme planning & implementation horizons which take account of the likely timescales for capacity building efforts in LDCs to take effect;
- a greater development-orientation in IPRTA projects and activities, covering the use of policy flexibilities for LDCs and emphasising the role of IP systems for promoting innovation, creativity and technology transfer for private sector development;
- the involvement of a broader range of national stakeholders from government, the private sector and civil society; and
- the continuous evaluation of the impacts and outcomes of IPRTA and capacity building in LDCs with a view to learning lessons about what has and has not worked.^{iv}

IPRTA activities are normally designed in consultation with the beneficiary country after an initial “needs assessment” and reflect the needs expressed by the beneficiaries. Where there are multiple donor organizations providing IPRTA, each donor generally performs their own independent needs assessment. To the extent that input is sought and obtained from others, this may be by way of informal consultation, “on the ground”, in the beneficiary country itself, and will often depend on the personal working relationships that exist between individuals. Sharing of plans and reviews of results among donors is not common. This is largely attributable to concerns about sensitivity of institution-specific information that could be disclosed.

Generally the assessment of IPRTA needs for creating or modernizing IP regimes is carried out by technical experts, frequently a patent or trademark specialist from developed country IP offices. Often in the case of LDCs, the beneficiary country does not have sufficient specialized knowledge and relevant expertise among its officials to enable it to participate effectively in this needs definition process. This problem is often exacerbated by a lack of communication between the various departments and agencies of the beneficiary government that have, or should have, an interest in the development of the IP regime. Moreover, there is a shortage of tools and guidance available to donors and beneficiaries of

IPRTA about how to conduct a needs assessment exercise and what issues should be included.

These factors often combine and may result in the setting up or modernization of policies, laws and institutions for establishment, administration and enforcement of IPRs in LDCs which in fact are based largely on developed country models rather than on actual, clearly defined needs of stakeholders in beneficiary countries.

1.2 Purpose of the diagnostic toolkit

Assessing IPRTA needs for implementing the TRIPS Agreement

This document is principally an attempt to develop a participatory checklist for assessing needs for IPR technical and financial assistance in LDCs so as to facilitate implementation of the objectives, principles, rights and obligations of the TRIPS Agreement, whilst taking due account of the flexibilities, safeguards and S&DT provisions which LDCs enjoy because of their status. The diagnostic toolkit is aimed at national stakeholders in LDCs, particularly those government agencies charged with leading the development of the national IPR infrastructure and building a sound and viable technological base, as well as IPRTA providers such as WIPO, WTO, EPO, bilateral donor agencies from developed countries, and NGO providers.

The document builds on an earlier IPRTA Common Diagnostic Toolkit developed by the authors in December 2004.^v In this version, a concerted attempt has been made to better tailor the toolkit to suit the special circumstances and requirements of LDCs and for the task of assessing IPRTA needs in the context of the challenge of implementation of the TRIPS Agreement in a manner which fully supports the achievement of social and economic development goals and is consistent with the objectives, principles and rights of LDCs under the Agreement rather than just with their obligations.

The transition period for implementation of the TRIPS Agreement by LDCs under Article 66.1 was to end on 1 January 2006. Due to a Decision of the TRIPS Council of 29 November 2005, this transition period was extended to 1 July 2013. LDCs have the right to request further extensions to this transition period, and a number of commentators have flagged the importance of this issue for LDCs.^{vi}

In practice, the transition period agreed by the TRIPS Council in November 2005 applies to all TRIPS obligations with the exception of Articles 3, 4 and 5, which incorporate the principles of national treatment and Most Favoured Nation and regulates the relationship between the TRIPS Agreement and other multilateral agreements on acquisition or maintenance of IP rights. It is also important to note that this extension of the transition period does not affect a previous extension given to LDCs not to apply obligations under sections 5 and 7 of Part II of the TRIPS Agreement (patents and protection of undisclosed information)

until the year 2016, which was granted by the Doha Declaration on the TRIPS Agreement and Public Health of 2001.^{vii}

According to the WTO TRIPS Council Decision of 29 November 2005 and for purposes of facilitating targeted technical assistance and financial cooperation, LDCs are invited to provide the TRIPS Council, preferably before 1 January 2008, all possible information on their individual needs in order to obtain the necessary assistance in implementing the TRIPS Agreement.

Assessing IPRTA needs for implementing other international IP Agreements

In addition to the treaties and agreements incorporated by reference in TRIPS, there are numerous other international and regional treaties and agreements that relate to intellectual property and need to be taken into account when undertaking an assessment of LDC needs for technical and financial assistance. Including the foregoing, there are a total of 23 that are administered by WIPO^{viii} (three of them jointly with other international organizations), plus the WIPO Convention.

The first group of treaties defines internationally agreed basic standards of IP protection applicable in each Member country. The second group of treaties, known as the global protection system treaties, ensures that a single international filing or registration will have effect in any relevant signatory states. The services provided under these treaties by WIPO greatly simplify and reduce the costs of making applications or filings for obtaining intellectual property rights protection in member states.

The third category includes a set of four classification treaties that organize information concerning inventions, trademarks and industrial designs into structured and searchable indexes, to facilitate retrieval. There are also various regional treaties and agreements that have been established that allow members to share the benefits of cooperating with others in sharing the common work relating to the promotion, granting and enforcement of IPRs and the dissemination of information.

Many African LDCs are members of the African Regional Intellectual Property Organization (ARIPO) or the Organisation Africaine de la Propriété Intellectuelle (OAPI) and could therefore benefit significantly in terms of the local administration of patents, industrial designs and trademarks. ARIPO was established mainly “to pool the resources of its member countries in industrial property matters together in order to avoid duplication of financial and human resources”. The functions of ARIPO include, among others, the acceptance of applications for patents, industrial designs and trademarks, and their examination and registration for effect in member countries.^{ix}

OAPI has as its mission the issuing of protection titles, handling and dissemination of documentation and information, and involvement in the development of its member states.^x OAPI operates a common system of protection of intellectual property that is characterized by common legislation

among member states and centralized procedures at the headquarters of the Organization, in Yaoundé, Cameroon.

Finally, there are increasing numbers of bilateral and regional trade treaties being established that often also include sections relating to the treatment of intellectual property. The IP provisions in these trade agreements often go significantly beyond the basic requirements of TRIPS. One potential example of significance for many LDCs is the EU-ACP Economic Partnership Agreements which are currently under negotiation.

The reader's attention is drawn to WIPO's Intellectual Property Manual, Chapter 5, entitled: "International Treaties and Conventions on Intellectual Property", for further information regarding WIPO-administered treaties.^{xi} Information about bilateral trade agreements, including their IP components may be found on the web sites of various organizations, particularly NGOs.^{xii}

1.3 Conducting a needs assessment with the diagnostic toolkit

This diagnostic toolkit is intended to be used collaboratively by donor organisations and stakeholders from recipient institutions in LDCs at the earliest stages of planning an IPRTA programme. It is intended to support the definition and design of an IPRTA project from its earliest conceptual phase through to the eventual post-implementation evaluation phase. At the same time, it is intended to serve as an outline or framework for IPRTA project documentation that may, with the consent of all parties, be shared among donors.

In the typically compressed project definition phase of most IPRTA programmes, use of the common diagnostic tool by project stakeholders should lead to a better understanding of contextual and background situation in the recipient country. A fully effective initial needs assessment may be expected to take approximately 2 weeks in the case of a country that has either minimal or no existing IPR administrative infrastructure. If the country already has some administrative infrastructure in place, the initial needs assessment may be expected to be more complex. In such cases, a thorough initial needs assessment may be expected to take 3 weeks or longer.

In either case, it should be noted that beneficiaries' needs will frequently evolve during implementation of an IPRTA programme. Often this is a result of recipients acquiring increased internal capacity to better define their own needs as the project unfolds. Experience has shown that failure to recognize and to take this need for flexibility in programming activities into account can undermine the effectiveness of an IPRTA project.

It is important therefore to repeat the needs assessment using the diagnostic toolkit at regular intervals during the project cycle, and specifically at any point during the project at which there is a clear indication that a significant change in direction may be called for.