

# Assessing Technical Assistance Needs for Implementing the TRIPS Agreement in LDCs

## A Diagnostic Toolkit

By Mart Leesti & Tom Pengelly

Saana Consulting

A Study Commissioned by the International Centre for Trade and  
Sustainable Development (ICTSD)

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## LIST OF ABBREVIATIONS AND ACRONYMS

ARIPO	African Regional Industrial Property Organisation
Berne	Berne Convention for the Protection of Literary & Artistic works
CBD	Convention on Biological Diversity
DAC	Development Assistance Committee
EC	European Commission
EPO	European Patent Office
EU	European Union
FAO	Food & Agriculture Organisation
FDI	Foreign Direct Investment
GCCPO	Gulf Co-operation Council Patent Office
Hague	Hague Agreement Concerning the International Deposit of Industrial Designs
ICC	International Chamber of Commerce
ICTSD	International Centre for Trade & Sustainable Development
IMF	International Monetary Fund
INPI	Institut National de la Propriété Industrielle
IPRs	Intellectual Property Rights
IPRTA	Intellectual Property Rights Technical Assistance
C	International Trade Centre
JPO	Japanese Patent Office
LDC	Least Developed Country
Madrid	Madrid Agreement Concerning the International Registration of Marks
OAPI	Organisation Africaine de la Propriété Intellectuelle
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
Paris	Paris Convention for the Protection of Industrial Property
PCT	Patent Co-operation Treaty
TRIPS	Agreement on Trade Related Aspects of Intellectual Property
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UPOV	International Convention for the Protection of New Varieties of Plants
USAID	United States Agency for International Development
USPTO	United States Patent and Trademark Office
WHO	World Health Organisation
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

# 1. INTRODUCTION

## 1.1 *Background*

Ensuring adequate capacity within a range of institutions in Least Developed countries (LDCs) for handling Intellectual Property Rights (IPRs) and implementing the TRIPS Agreement has become increasingly important in recent years.<sup>1</sup> The process of reform begun in many countries has highlighted the challenges they face in designing, implementing, enforcing and regulating pro-competitive IPR regimes, tailored to their development needs. Many LDCs also face serious constraints in participating effectively in international IPR standard setting at regional and multilateral levels. And a further central challenge – in the era of globalisation – lies in stimulating local innovation, creativity and technology transfer, as well as protection of traditional knowledge, using the IPR system to contribute to cultural, social and economic development.

These issues underline the importance – perhaps more than ever before – of high quality technical assistance and capacity building, tailored to meeting the varied needs of LDCs. They also have significant implications for the ways in which IPR technical assistance (IPRTA) and capacity building is planned, co-ordinated, designed, delivered, managed and evaluated by the range of international institutions, bilateral donors, Non-Governmental Organisations (NGOs) and other providers who are active in this sector.

Most donors and providers of IPRTA to LDCs recognize the importance of reducing duplication of work and inefficient use of resources that often results from insufficient co-ordination of activities. Major donors are therefore beginning to examine ways to increase collaboration in designing IPRTA and capacity building programs. 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 developing countries and providers of IPRTA. Among a broad range of issues that should be addressed are those that relate to improved needs assessment, planning, and the evaluation of IPRTA and capacity building.<sup>2</sup>

IPRTA activities are normally designed in consultation with the recipient country after an initial “needs assessment” and reflect the needs expressed by the recipient. 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 recipient 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 and 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 recipient 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 recipient government that have, or should have, an interest in the development of the IP regime. Moreover, there is no standard format or guidance available to donors and recipients 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 LDC institutions for establishment and enforcement of IPRs based largely on developed country models rather than on actual, clearly defined recipient needs.

## ***1.2 Purpose of the diagnostic toolkit***

### Assessing IPRTA needs for implementing the TRIPS Agreement

This document is an attempt to develop a participatory checklist, or diagnostic toolkit for assessing needs for IPR technical and financial assistance in LDCs so as to facilitate implementation of the TRIPS Agreement within the transition period set by the WTO Council for TRIPS. This document builds on an earlier IPRTA Common Diagnostic Toolkit developed by the authors in December 2004.<sup>3</sup> In this version, an attempt has been made to better tailor the toolkit to suit the special circumstances of LDCs and for the task of assessing IPRTA needs in the context of implementation of the TRIPS Agreement.

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. In practice, the transition period 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.<sup>4</sup>

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<sup>5</sup> (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 other is 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 Industrial 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.<sup>6</sup>

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.<sup>7</sup> 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 Yaounde, 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.<sup>8</sup> Information about bilateral trade agreements, including their IP components may be found on the web sites of various organizations, particularly Non-Governmental Organizations (NGOs).<sup>9</sup>

### ***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 recipients' 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.

## 2. NATIONAL DEVELOPMENT CONTEXT

The national development context, in terms of the broad range of economic, industrial human, social and institutional factors, are of great importance for the design of technical assistance and capacity building programmes in any sector – and IPRTA is most certainly no exception. This section first looks at some of the key issues and challenges related to the national development context in LDCs, before setting out a detailed checklist to guide an assessment of key factors that should be taken into account in the planning of an IPRTA programme or project.

### 2.1 *Key issues and challenges*

Donors and providers of IPRTA must be constantly aware that the development of IP systems in LDCs cannot be considered in isolation to the general development context and needs of the country concerned. For example, the sustainable provision of information technology equipment for an IP office may require consideration of financial resources and local skills to service and maintain the equipment, reliable power supply and telecommunications infrastructure or associated equipment like air conditioners.

Other factors like the level of formal IPR registration activity (eg low numbers of patenting and trademark applications) in a small or very low-income country may mean that it is not technically feasible nor economically viable for such a country to establish and sustain an IPR system comparable to developed countries in terms of capacity for administration, enforcement and regulation of IPRs.

It follows from this that the assessment of IPRTA and capacity building requirements of a developing country should be based on what that country needs, rather than on what a donor country wants, or is able, to provide. Recipients of IPRTA from LDCs obviously have a key role to play in informing such assessments, based on a broad and medium term perspective, and a wide range of stakeholders should be involved – not just national IP offices but stakeholders from other government agencies, the business sector and civil society as well. An outline for a mapping exercise of national stakeholders is provided in Annex A.

Donors do have an important role to play in this process by assisting LDCs to understand the international IP systems and their future developments, as well as sharing the lessons of their own experience. For example, IP offices of donor countries as well as other traditional and non-traditional IP technical assistance donor agencies may be able to share experiences on the use of specific legal models and administrative practices for IP protection (eg utility models, certain kinds of *sui generis* protection systems, or protocols for ensuring equitable access to, and benefit sharing from, biological material) that could be appropriate for the needs of stakeholders in developing countries.

In this way, donors can provide LDCs with sufficient information to make informed decisions about how their national systems should develop and what can be realistically achieved and delivered in the short and long term.

## **2.2 Diagnostic assessment checklist**

### **Economic development status and economic structure**

- What is the economic status of the country in terms of GDP and recent growth levels? What is the economic structure of the country, including the manufacturing, services and agricultural sectors?
- What are the main industries and sources of employment & investment in the country? How are these trends changing over time?
- What is the ownership structure in the various sectors of manufacturing, services and agriculture (local versus foreign, etc)?
- What information is available about levels of expenditure in Research & Development, levels of technology licensing activities?
- What are the levels for key telecommunications and information technology indicators, such as numbers of telephone lines per capita and internet usage?
- Are business and government agencies generally able to utilise modern IT hardware and software applications to capture efficiency and productivity gains? If not, what measures are being taken or planned to address these problems?

### **Human development status and poverty profile**

- What is the national social and economic status of the country (e.g. gross per capita income levels, level and incidence of poverty)?
- What is the general health and education situation for the population (e.g. infant mortality rate, maternal mortality rate, Under 5 mortality rate, literacy levels)? What is the level of government expenditure per capita on education and healthcare in the country?
- Is the population in the country facing acute problems in accessing key technologies for human development and poverty reduction (such as access to essential medicines, textbooks and educational materials, inputs for subsistence agriculture, etc)? If so, what measures are being taken or planned to improve access?

### **National development strategies and assistance programmes**

- What are the national development priorities, plans and strategies for poverty reduction in the country? Are these clearly articulated in published documents, such as Poverty Reduction Strategy Papers?
- Have issues related to IPR, research and development, access to technologies and knowledge products been addressed in such documents?
- What is the Official Development Assistance (ODA) framework for the country? Who are the key donors? What are the major ODA-funded programmes and future plans?
- Has an Diagnostic Trade Integrated Study (DTIS) been undertaken for the country under the Integrated Framework for Trade Related Technical Assistance? What is the current status of the Integrated Framework in the country?

- How will the proposed IPRTA project or programme relate to these ongoing or planned efforts by other donors? What lessons have been learnt by donors providing technical assistance and capacity building in the country?

### 3. INTELLECTUAL PROPERTY POLICY FRAMEWORK

This section looks at the key issues and challenges related to the legal and policy framework in LDCs, before setting out a detailed checklist to guide an assessment, based on available evidence, about the capacity of a country to formulate policy and legislation on intellectual property and to participate in international IP standards setting and negotiations.

#### *3.1 Key issues and challenges*

Most LDCs are members of the World Trade Organisation (WTO) or are in the process of accession. Compliance with TRIPS will therefore require the preparation and implementation of the full range of industrial and intellectual property laws, as prescribed under the TRIPS Agreement. At the same time, many countries are finding themselves increasingly involved in negotiations that are occurring in parallel at the international, regional and bilateral levels, negotiations that are constantly reshaping the global IPR regime. LDCs are increasingly concerned about the TRIPS-plus agreements at the regional and bilateral level, as these tend to require commitments that go beyond the minimum standards set out in the TRIPS Agreement.<sup>10</sup>

The capacity of LDCs to participate effectively in international and regional IPR rule making and standard setting varies considerably, from influential to virtual spectator.<sup>11</sup> Effective IPR policy development and implementation requires specialized technical and analytical skills and also a capacity to coordinate the policy development process in the national capacity so as to ensure the participation of key stakeholders both within and outside of government. Responsibility for IPR policy in LDCs generally falls to ministries of international trade or foreign affairs. The subsequent development of IP legislation and regulations is often delegated to ministries or departments that are, or will be, responsible for the actual administration of the IP system.

Important IPR issues facing national policy makers and legislators in developing countries include how to regulate access and protect plant varieties and plant genetic materials; how to best exploit national biological resources as envisaged under the Convention of Biological Diversity (CBD); whether and how to design and implement appropriate systems to protect traditional knowledge; how to deal with the various “flexibilities” afforded under the TRIPS Agreement; and how best to continue to adopt administrative systems and processes to keep pace with rapidly evolving international and regional IP systems and standards.

To ensure that national IPR reform processes are effectively linked to related areas of development policy, and that stakeholders participate effectively in these reform processes, IPRTA donors and providers should be mindful of the need to build the capacity of local institutions to carry out policy research and dialogue with these stakeholders, in addition to providing international expert and legal advice.<sup>12</sup>

In recent years, concerns have been expressed from a number of different sources regarding the role of donors in providing advice and technical assistance to developing countries for reform of IPR policy and legislation. While LDC IP offices typically value the technical assistance provided by institutions

such as WIPO or bilateral donors, a number of experts and organisations have raised substantial concerns about whether this assistance has always been appropriately tailored to the circumstances of the developing country concerned.

Such concerns demonstrate the potential sensitivity and importance of this area of domestic regulatory policymaking in developing countries. As many LDCs will continue to depend on technical assistance in this area for some time to come, particularly as they proceed with implementation of the TRIPS Agreement, IP technical assistance should be mindful of the need to respond positively to these concerns.

*In particular, IPRTA donors and providers should ensure that advice on legal and policy reform to LDCs in relation to implementation of the TRIPS Agreement, always fully takes into account the possible options and flexibilities to accommodate public policy objectives.*

### 3.2 Diagnostic assessment checklist

#### Key national concerns and issues

- What are the key national concerns in relation to IPR policy and legislative framework (e.g. economic development, trade – US 301 Watch List)?
- How well have such concerns been manifested or articulated by stakeholders in the country? Are these concerns based on actual documented evidence?
- Are some potentially important concerns and issues likely to surface in the near future? What are these? What measures are being taken or planned to address these?
- To what extent have the objectives of the TRIPS Agreement, Article 7,<sup>13</sup> been taken into account in formulating national IP strategy?

#### National policymaking/legislative processes & stakeholder map

- What Ministry has the lead role in ensuring the country's compliance with the TRIPS Agreement?
- What ministry or agency has the lead role in IPR policy making?
- What is the general policy making process particularly with respect to public participation in the area of IPR?
- To what extent does lobbying by particular interest groups influence policy making and legislative processes generally and in respect of IPR policy/legislation in particular?
- If the development of policy and the preparation of legislation for the various forms of IPR are the responsibilities of different ministries or agencies, what are these?
- What ministry or agency has the lead role in the drafting of IPR legislation?
- What role do IPR administrators play in policy development and the drafting of legislation and regulations?
- What is the process for developing IPR legislation, regulations and procedures (e.g. are discussion papers prepared, are stakeholders solicited for input, etc.)?

- Who are the key stakeholders in the country's process for IP policy and legislation development? (An outline for a national stakeholder map is presented at Annex A).

#### **Existing legal framework for industrial and intellectual property protection, enforcement and regulation**

- Does a statement of national policy (i.e. purpose) with regard to intellectual and industrial property exist that forms the basis for IPR laws and the administration of IPRs in the country?
- If there is no explicit statement of purpose, where can the government's expression of such purpose best be found (e.g. government decrees, jurisprudence, etc)?
- What is the nature and scope of the national legal framework for the establishment and enforcement (including private dispute resolution) of IP rights? (A template for analysing national IPR legislation is presented at Annex C).
- Does the national legal framework for IP meet all TRIPS requirements?
- If national legislation does not meet all TRIPS requirements, what areas require further attention?
- To what extent have TRIPS flexibilities been considered and reflected in national legislation?

#### **Protection of traditional knowledge, folklore and biodiversity**

- What are the broad national interests and/or concerns with respect to protection of traditional knowledge, folklore and biodiversity?
- What activities are currently under way in the country that have led or will lead to the definition of national positions (e.g. in international rule making) with respect to each?
- Are there specific issues that are of particular domestic concern or interest (e.g. "basmati" rice, "Maldives" Tuna, traditional textiles, Geographical Indications)? Who are the key stakeholders with respect to each issue?
- Does the country participate in regional or international "common interest" blocs in connection with any of these issues? If yes, what ministry or agency has the lead role? What role do the IPR administrators play in this?

#### **Recent legal changes**

- What changes in IPR legislation have been promulgated since 1990?
- Why were these changes made? Was it due to internal processes or in response to external forces such as the need to implement treaties etc?
- Did the country require TA to undertake these changes? If so, from whom was the TA obtained and under what conditions, if any, was the TA provided?
- Have the above legislative changes been implemented in practice? That is, are there implementing rules and regulations or administrative guidelines in place, and are these being actively implemented by administrators, courts and enforcement authorities?

#### **Planned legal changes**

- What legal changes that will impact IPRs are planned or pending?

- Are the planned legal changes due to internal demands/processes or is it because of international obligations or other external factors?
- When are they expected to be promulgated?

#### **Membership of international treaties and agreements**

- Is the country a Member of the WTO? Is the country acceding to the WTO?
- Is the country a full member or observer at the World Intellectual Property Organisation (WIPO)?
- Is the country a member of other key intellectual property protection, global protection system and classification treaties? (A list of the main WIPO global protection systems and treaties is presented at Annex B). If so, which ones?
- Is the country a member of bilateral or regional trade agreements that include an IP component or provisions? If so, which ones?
- The additional question could be – Have all these treaties been implemented nationally, e.g., is there evidence of implementing legislation-decrees, regulations etc.?
- Is the country a member of regional IPR treaties or agreements (e.g. OAPI, ARIPO, EAPO, etc.)? Is membership regarded as successful by the country concerned?

#### **Participation in international IP standard setting and negotiations**

- To what extent does the country participate in international IPR standard setting (e.g. WIPO, WTO)?
- Is the country currently involved in international, regional or bilateral negotiations that have an IPR component? If yes, what are these?
- Does the country have permanent representation at WTO and WIPO in Geneva?
- Who are the key IP agencies and officials in the capital? What are the mechanisms for consulting with stakeholders and co-ordinating policy positions across government?
- Does the country participate in regional trading bloc deliberations on IPRs (e.g. ASEAN, APEC, SAARC, ANDEAN Community, COMESA)?
- What role does the IP office play in supporting IPR discussions and negotiations at the regional and international levels? What resources does the IPR office have for this (e.g. skills, travel budget)?

#### **Technical assistance and capacity building programmes**

- What donors have been or are presently actively providing IP-related technical assistance in support of the development of the national IP policy and legal framework?
- How will new proposed IPRTA projects or programmes be co-ordinated with, learn lessons from and complement such other donor-supported activities?

## 4. IPR ADMINISTRATION REGIME

This section looks at the key issues and challenges related to the IPR administration regime in LDCs, before setting out a detailed checklist to guide an assessment, based on available evidence, about a country's capacity to administer IPRs effectively at the national level in line with its national development policy objectives as well as its current or future international obligations (e.g. WTO/TRIPS, regional and bilateral agreements, etc).

### *4.1 Key issues and challenges*

There is a very wide variation in the volumes of IPR applications, grants and registrations processed by developing countries and developing countries. For example, WIPO annual statistics show that in 2002, trademark application filings ranged from 378,631 in China, to 106 in Tonga. This has important implication for the kinds of institutional arrangements for IPR administration that may be appropriate for individual LDCs.

IPR application rates in any given country are determined by various factors, including the nature of the national IPR laws and their enforcement in the country, whether the country is member of a regional organization (e.g. ARIPO, OAPI) or is a member of international treaties such as the Patent Cooperation Treaty, or the Madrid Agreement in respect of trademarks.

The administration of industrial property rights (patents, trademarks, industrial designs, utility models, integrated circuit topographies and plant varieties) involves the receiving of applications, examination to ensure that applications comply with formality and substantive requirements, the granting or refusal of rights, and the registration, publication and maintenance of public records of the rights accorded. Copyright subsists upon the creation of an eligible work and registration systems, where these exist, are voluntary. Private copyright collective management societies collect and distribute royalties to members for the performance of musical works in their inventories and, in effect, assist national authorities with enforcement of copyright.

In the following section, the term IPR "office" is intended to cover all variants, including a single, integrated, organization as well as multiple organizations (e.g. where patents, trademarks and copyright may actually be administered by separate institutions). In the majority of LDCs the administration of industrial property is carried out in a department within a ministry of industry and trade, or a ministry of justice.

In a growing number of countries an autonomous government agency is responsible for the administration of industrial property. Copyright is generally administered by a department in a ministry of culture, information or education. In some instances, there is no identifiable unit with responsibility for copyright administration.<sup>14</sup> As noted in the earlier section on IPR policy and legal framework, effective IP policy development and implementation requires specialized technical and analytical skills. The same skills are needed to set up and effectively operate institutions that have been charged with the administration of those IPR policies and laws.

Often, LDCs may not have sufficient specialized knowledge and relevant expertise among their officials to enable them to define effectively their needs with regard to administration of the national IPR system. Donors and providers of IPRTA are therefore encouraged to adopt a transparent and comprehensive methodology for assessing a country's IPR administration needs, using the diagnostic assessment checklist below.

The methodology used should ensure that the recipient country itself is able to participate effectively in both the needs definition process and in the implementation and subsequent evaluation of the results of IPRTA activities, projects, and programmes.

#### **4.2 Diagnostic assessment checklist**

##### **Time series data on IPR applications and grants**

- What are the categories and volumes of IPRs that are applied for and granted or registered annually in the country? Reference should be made to the WIPO annual statistical reports at: <http://www.wipo.int/ipstats/en/publications/a/index.htm>
- What are the current and previous years' statistics for each form of IPR? (Note: Publication of WIPO Annual Statistics generally lags by about two years.)
- What significant trends may be observed from the data on IPR applications over time? What factors explain these trends? Are these trends likely to continue or change in the future?

##### **Legal basis and mandate of IP institutions in public and private sector**

- What are the laws and regulations that establish the legal mandate and basis for administration of industrial and intellectual property in the country? (A template for analysing national IPR legislation is presented at Annex C).
- Have these laws and regulations been recently adopted or been in force for some time?
- To what extent are the existing laws and regulations in compliance with the TRIPS Agreement? What are the main areas where amendments are required to bring about full compliance?

##### **Existing IPR administration processes**

- How is the responsibility for administering IPRs organized in the country?
- Are there separate offices and accountabilities for each of the various forms of IPR or are these administered from a single, integrated, IPR office?
- Are direct linkages between the stated "purposes" (if this exists) of the IPR legislative framework and the specific operational activities of the institutions responsible for administration of the legislation identifiable?
- How well does administration of the legislation appear to serve the policy goals and stated "purpose" of the IPR legal framework? What criteria are applied, and by whom, in reaching such conclusions?
- What is the quality of the IPR administration process overall? Are users satisfied with the levels of service provided by the national IPR office? If not,

what are the main priorities for improving service delivery? What measures are being taken or planned to address these issues?

#### **Human resources**

- What are the total numbers of staff involved in administering the various forms of national IPR legislation (e.g. patents, trade marks, copyright)?
- What is the allocation of IPR office staff by broad areas of functional responsibility, e.g. management, scientific and technical examination, legal, clerical?
- What are the educational and technical qualifications of IP office professional staff?
- What is the level of in-house staff training in IP law and administration (e.g. for examiners, hearing officers)?
- Are there private sector practitioners and attorneys available for each main form of IPR (patents, trademarks and copyright)? If yes, how many are there?
- Are agents and attorneys trained in IP law? By whom? Is the qualification of agents certified by the IP office? If yes, how? (e.g. by formal examination)

#### **Automation and information management systems**

- Does the national IPR office(s) have the technical resources, including project management capacity, to manage its own information management modernization program? Does the office have a strategic plan to guide future automation efforts or does it rely on ad hoc projects?
- Are the existing information management and automation systems effective and appropriate for the national IPR office(s)? Does the office have the financial and technical resources to maintain necessary computer systems?
- What automation projects have taken place (provide qualitative and quantitative descriptions of staff, equipment, software, age, origins of systems and future plans for each system)?
- Does the office have an internet web site?
- Does the Office actively use WIPOnet? If yes, for what purposes?

#### **Physical infrastructure**

- Where is the headquarters of the national IPR office located? In what part of the city (e.g. central business district, industrial park, government complex, etc.)?
- Does the IPR office have mechanisms to provide regional access to its services? What are these (e.g. supervisory ministry's regional infrastructure, agreements with other governmental agencies and organizations, agreements with academic institutions, multiple regional sites for the IPR office)?
- Are the IPR office accommodations designed to facilitate public access? Are IPR office accommodations adequate to meet projected needs for the next five years?

#### **Financing and cost recovery from IPR service delivery**

- What is the size of the annual operating budget of the national IPR office(s)? What trends may be observed in terms of changes in operating costs and

revenues for the national IPR office over time? What factors explain these? Are these trends likely to continue?

- What was level of fee revenues from IPR administration in the last three years and the current year to date?
- How are operations of the national IPR office(s) funded (e.g. annual government appropriations, self-financing through user fees, or a blend of revenues income and government subsidy)?
- What level of financial reserves, if any, does the national IPR office have? Are these considered adequate for prudential reasons?
- If funding is through annual government appropriations, is there a potential for the office to access its own fee revenues?
- If the office accesses IPR fee revenues, to what extent does income offset expenditures? How regularly are fee levels reviewed by senior management of the IPR office and on what criteria?
- How do fee levels compare with similar services provided by IPR offices in other LDCs and developing countries in the region?
- What, if any, is the legal mechanism under which the IPR office accesses fee revenues and for setting fee levels?

#### **Modernisation plans and programmes**

- Does the office have a strategic plan for modernization?
- If so, to what extent has the plan been implemented?
- Have specific needs for external technical and financial assistance already been identified?
- What donors are already providing IPRTA? Are the results of the assistance that is being provided sustainable?
- What requirements are there for human resources development, including training, and what possibilities are there to exploit distance learning?
- What requirements are there for automation (both hardware and software) and streamlining of IPR administration processes?

## 5. ENFORCEMENT AND REGULATION REGIME

This section looks at the key issues and challenges related to the regime for enforcement and regulation of IPRs in LDCs, before setting out a detailed checklist to guide an assessment, based on available evidence, about a country's capacity to enforce and regulate IPRs at the national level in line with domestic legislation, national development policy objectives and its current or future international obligations (WIPO treaties, TRIPS Agreement, regional and bilateral agreements).

### *5.1 Key issues and challenges*

IPRs of all forms are useful and valuable to their holders only if they are capable of being enforced. At the same time, IPRs are also capable of being utilised by holders in ways which may unfairly restrict competition or be otherwise harmful to the public interest. This means that legal systems and regulatory frameworks and institutions must be fully effective in respect of both of these objectives. For many LDCs, the concepts of intellectual property law and its administration, enforcement and regulation are new and therefore present a challenge to enforcement authorities and regulators who may possess little, if any, specialized knowledge in the field.

IPR infringement through counterfeit or "fake" drugs, automobile parts, pesticides, foodstuff and bottled water are appearing in the marketplace at an alarming rate in some parts of the world – in both developed and developing countries. The negative implications of this, not only in financial terms but also in terms of public health and safety can be huge. Consumers can be "morally selective when it comes to purchasing counterfeit goods, and frequently view the pirating of consumer goods, especially, clothing and CDs as soft crimes".<sup>15</sup> The public therefore needs to be persuaded to refuse to knowingly purchase counterfeit goods. Increased enforcement of IPRs is also often politically sensitive as it may be seen as leading to increased costs for consumers and even the loss of access to jobs. A key element in any effort to strengthen the enforcement of IPRs is to increase public awareness and understanding of industrial and intellectual property. At the same time, clear, cost-effective, readily accessible enforcement mechanisms and procedures are required.

For most major IPRTA donors, a key policy objective going forward is to ensure that enforcement systems in developing countries address serious IPR infringements more effectively. This is seen as critically important to protect the incentives that the system offers to IPR holders. But, as the UK Commission on Intellectual Property Rights noted,<sup>16</sup> it is also important that developing countries are assisted to develop institutions capable of doing this in a balanced, pro-competitive way. Developed countries have introduced stronger IPR protection in the context of competition regimes and other regulatory regimes designed to ensure that IPRs do not harm the public interest. Seen from the institutional perspective, however, such effective regulation of IPRs is likely to present significant challenges for policymakers, administrators and enforcement agencies in LDCs.

This suggests that, as well as enforcement, building capacity for regulation of IPRs, particularly in relation to matters of special public interest (as with

compulsory licensing) or in relation to controlling anti-competitive practice by rights holders, should be given higher priority in IP technical assistance programmes for developing countries and transition economies in the future.

As well as the development of appropriate regulatory frameworks per se, an important part of effective regulation is the undertaking of regular, periodic reviews of all aspects of the national IPR regime, to ensure that these are relevant and appropriate. Donors of IPRTA could also do more to assist developing countries in this task, through providing appropriate technical assistance as well as formal and on-the-job training.

## **5.2 Diagnostic assessment checklist**

### **Analysis of the nature and status of IPR infringement**

- What are the alleged levels of infringement of different kinds of IPRs in the country? What official data is available about actual instances of IPR infringement?
- By whom are the allegations of IPR infringement being made e.g. domestic interests, USTR, BSA, copyright collectives?
- What is the nature of infringement in each of the areas of copyright, trademarks, patents, Geographical Indications etc?
- Do linkages exist between national enforcement authorities and foreign or international authorities and bodies (e.g. World Customs Organization)?

### **Levels of public awareness and awareness raising initiatives**

- Does the IP office carry out activities intended to increase public awareness and understanding of IPRs? If so, what are they?
- What are the primary objectives of such “outreach” activities, e.g. to promote innovation, to fight infringement? How extensive and well resourced are such awareness raising activities in the country?
- What are the views of stakeholders, including the domestic business sector and foreign/international stakeholders, e.g. USTR, AIPLA, BSA, ICC regarding access to IPR enforcement systems?

### **Administrative systems**

- To what extent are the enforcement of IPRs provisions of the TRIPS Agreement (Part III) being met?
- What role does the IPR office play in the enforcement of private IPRs?
- Does the IPR office provide any dispute resolution services?
- What linkages exist between the IP office and national IPR enforcement authorities?
- Is Alternative Dispute Resolution (ADR) practised in connection with IPR matters?
- If ADR is used, in what form is it practiced (e.g. negotiation, mediation/conciliation, arbitration)?
- Is the country party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

- Is collective management of copyright and related rights practised?
- Does a Copyright Tribunal, or a comparable system exist for setting royalty rates?
- Does the national IPR office administer systems for the compulsory licensing of IPRs, e.g. in cases of national interest or the abuse of rights? Does the national IPR office have appropriate professional and technical capacity in this respect? Does the country have the institutional capacity to administer, in the public interest, the compulsory licensing provisions under Article 31 of TRIPS?
- Is there a requirement and a system for registering technology transfer agreements?

#### **Judiciary**

- Are all civil and administrative procedures and remedies, as called for in the TRIPS Agreement, in place?
- What types of courts hear IPR cases? How are the courts structured to deal with IP matters (e.g. specialized IP courts, etc)? Is the judiciary in these courts generally familiar with IPR concepts, legislation and case law?
- Do prosecutors and the judiciary receive formal training in IPR law? What kind of formal training programmes are operated? Are these effective and well attended? What are the gaps?
- To what degree does the judiciary rely on lawyers, as officers of the courts, to explain the legal and/or technical issues of IPRs?
- How many IPR cases are brought before the courts on an annual basis?
- Do the courts have access to IPR registry data (e.g. IP records and registries)?

#### **Police**

- Are there special units for IPRs within the police forces?
- Are there formal linkages between the national IPR office(s) and the police? If so, what are they?
- Do police receive formal training in IPR law? What kind of formal training programmes are operated? Are these effective and well attended? What are the gaps?
- Do police have access to IPR registry information (e.g. trademark ownership, etc.)?

#### **Customs**

- Are TRIPS special requirements related to border measures (Part III, Section 4) in place?
- Are there units within the customs authority specializing in IPRs?
- Do customs authorities receive formal training in IPR law? What kind of formal training programmes are operated? Are these effective and well attended? What are the gaps?
- Are there formal linkages between the national IPR office(s) and the customs authority? If so, what are they?

- Do customs authorities (e.g. ports and border posts) have access to IPR registry information (e.g. trademark data)?

#### **Competition policy and authorities**

- Does competition legislation exist in the country? Does existing competition legislation address IPR issues?
- Are IPR-related restrictive practices addressed in national IPR legislation?
- Does institutional capacity exist that can address IPR-related issues effectively either under competition legislation or under IPR legislation?

## 6. PROMOTING INNOVATION, CREATIVITY & TECHNOLOGY TRANSFER

This section looks at the key issues and challenges related to promoting national innovation, creativity and transfer of technology in developing countries and transition economies, before setting out a detailed checklist to guide an assessment, based on available evidence, about a country's capacity to promote these objectives through exploitation of the IPR system.

### *6.1 Key issues and challenges*

Most LDCs are able to devote few resources to innovation and generate very low levels of (industrial) intellectual property that could be protected by the formal system of patents and trademarks. For example, almost 90% of patents granted in 2000 in the US originated from the USA, Europe and Japan. To address this situation, LDCs need to have more than just the minimum administrative and institutional capacities required to provide a reasonably smooth system for administration and enforcement of IPRs.

LDCs require a wider institutional framework in order to support development of their national innovation capabilities through maximizing access to technologies and knowledge assets protected by IPRs (e.g. through subsidised patent information searching services and support to upgrade technology transfer capabilities in universities). They also need to strengthen research and education institutions and to conduct public education and awareness campaigns that focus on the merits of innovation, creativity and technology transfer.<sup>17</sup>

The evidence suggests that these imperatives are not always well reflected at present in the institutional infrastructure in LDCs or, indeed, in most technical co-operation programmes supported by donor organisations. The "cost of ignorance" regarding IPR can be high even when infringement of rights is not at issue. One need only consider the amount of needless duplication of research and development that takes place in the industrial sector. This occurs most often in the realm of small and medium enterprises (SMEs) but is not restricted to that sector. Large, well-funded governmental research organizations have also been known to have "re-invented the wheel" because they were not sufficiently aware of or knowledgeable about the IPR system. The mis-allocation of scarce R&D resources in this manner translates into significant direct costs.

Equally significant, albeit harder to quantify, are the opportunity costs associated with the reluctance of commercial enterprises to innovate for lack of understanding of IPRs. It is not uncommon for SMEs that do not understand IPRs to lack the enthusiasm to venture into areas of business where they may feel threatened by litigious competitors.

For example, a small business enterprise that does not understand that a competitor's foreign patent is not enforceable in his/her country, or that a foreign patent granted 30 years ago is no longer enforceable, is at a serious competitive disadvantage in the marketplace. Similarly, a domestic producer of goods who has relied on foreign suppliers of patented components is often not

likely to substitute his own, or domestically fabricated components, when the suppliers patent expires, if he has no basic understanding of the patent system.

The real gains for an LDC may instead lie in exploiting the intellectual effort already expended by a major foreign patent authority in establishing the TRIPS criteria for patentability, including novelty, inventiveness and industrial applicability, and focusing their own scarce technical resources on activities that offer greater payback. These might include activities such as helping domestic SMEs to access and exploit appropriate technology disclosed in patent documentation.

## **6.2 Diagnostic assessment checklist**

### **Institutions and initiatives for promoting innovation, creativity and technology transfer**

- Are government research facilities and grant award programmes for research & development available?
- Are government incentive programs and subsidies for national industries (e.g. for manufacturing or cultural industries such as film, music and publishing) and foreign investors in technology intensive sectors available?
- Are research and educational use exemptions in patent and copyright law to promote learning, research for follow-on innovation and diffusion of technical knowledge in place?
- Is research and development conducted at universities and colleges?
- Are there inventors', authors, composers, writers, musicians or handicraft societies in existence?
- How effective currently are the above institutions and initiatives in promoting national innovation, creativity and technology in the country? What are the key constraints if any?

### **Mechanisms used by the IP office to enhance public awareness and understanding of intellectual property**

- Does the national IP office have or use any of the following: a Web site; publications and audio visual materials; radio and television; speakers and lecturers?
- Are invention/innovation fairs, prizes, shows used to promote awareness?
- Are intermediary organizations (e.g. regional infrastructure of other departments and agencies) used to leverage increased IP awareness?
- Does the national IP office provide access to a modern and comprehensive patent information system database for nationals, companies and research organisations in the country to utilise? Is the database on-line? Is the database linked to other global patent databases?

### **Who are the key targets of IP office public information or out-reach activities? To what extent are the following included?**

- General public?
- Does the country promote the participation of women in IP activities?
- Musicians, artists, performers?

- Inventors and innovators?
- Politicians and senior government policy advisers?
- Judiciary and enforcement agencies?
- Government officials, including treasury, economic/ industrial development, culture, agriculture, employment, education?
- Legal community?
- Academic community (both as educators and researchers)?
- Publicly funded research and development community?
- Business community and their associations?

**Opportunities to work in cooperation with (complementing) key partners and stakeholders**

- Does a national research organization or council for science and technology exist in the country?
- Are there universities or other academic institutions that conduct research which could be of industrial application? Are such institutions well linked with industry? Do they currently utilise the IPR system and have technology transfer departments?
- Do national organizations exist that manage rights on behalf of artists, composers, performers and other copyright holders?
- Is there a national (sub-national or regional) association of IPR professionals active in the country?
- Are there associations of inventors, artists, lawyers, engineers in existence?

**Are successful examples of other domestic government programs and foreign IP organizations exploited for enhancing domestic IP awareness?**

- Do examples of successful public awareness activities by other government ministries exist?
- Is it feasible to evaluate public education and awareness activities of IPR offices in other countries and adopt/adapt best practices?
- Do international associations of IPR practitioners, IPR holders and inventors have programs that would support domestic initiatives?
- Are there regional economic cooperation programs that may support national IPR awareness activities (e.g. under APEC, SARC, ASEAN, ECA, SADC, COMESA)?

## ANNEX A NATIONAL STAKEHOLDER MAP

### Government ministries and agencies

- Industry, Trade & Commerce
- Foreign Affairs
- Finance
- Justice
- Attorney General
- Science & Technology
- Agriculture
- Health
- Information & Culture
- Communications
- Education and Labour
- Transport
- Environment
- Labour
- Competition Authority

### Enforcement Authorities

- Customs
- Police
- Military
- Judiciary
- Courts and Tribunals

### Non-Government

- IP Agents & Attorneys
- National & Regional IP Think Tanks
- Industry Associations
- Inventor Associations
- Copyright Collectives
- Academic Community
- Chambers of Commerce
- Public Interest Groups
- Consumers
- General Public

### International

- WIPO
- EPO
- WTO
- UNDP
- World Bank
- Bilateral Donors (e.g. EC, USAID, DFID, SIDA, JICA)
- Foreign IP Offices
- Others (e.g. UNCTAD, UNIDO, WHO, WCO, etc.)

## ANNEX B INTELLECTUAL & INDUSTRIAL PROPERTY TREATIES

### Intellectual Property Protection Treaties

- Berne Convention for the Protection of Literary and Artistic Works
- Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite
- Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms
- Madrid Agreement for the Repression of False and Deceptive Indications of Source on Goods
- Nairobi Treaty on the Protection of the Olympic Symbol
- Paris Convention for the Protection of Industrial Property
- Patent Law Treaty (PLT)
- Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations
- Trademark Law Treaty
- Treaty on the International Registration of Audiovisual Works (Film Register Treaty)
- Washington Treaty on Intellectual Property in Respect of Integrated Circuits
- WIPO Copyright Treaty (WCT)
- WIPO Performances and Phonograms Treaty (WPPT)

### Global Protection System Treaties

- Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure
- Hague Agreement Concerning the International Deposit of Industrial Designs
- Lisbon Agreement for the Protection of Appellations of Origin and their International Registration
- Madrid Agreement Concerning the International Registration of Marks
- Patent Cooperation Treaty (PCT)

### Classification Treaties

- Locarno Agreement Establishing an International Classification for Industrial Designs
- Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks
- Strasbourg Agreement Concerning the International Patent Classification
- Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks

## ANNEX C TEMPLATE FOR NATIONAL LEGISLATION REVIEW

LEGISLATION	TITLE	EFFECTIVE DATE	ASSESSMENT OF TRIPS COMPLIANCE
<b>A. Industrial Property</b>			
Patents			
Trade Marks			
Industrial Designs			
<b>B. Copyright and Related Rights</b>			
Copyright			
Related Rights			
<b>C. Other Country-specific Legislation or Regulations</b>			
Utility Models			
Appellations of Origin / Geographical Indications / Indications of Source			
Computer Programs			
Protection of Undisclosed Information			

LEGISLATION	TITLE	EFFECTIVE DATE	ASSESSMENT OF TRIPS COMPLIANCE
Layout- Designs of Integrated Circuits			
Plant Varieties Protection			
Protection of Folklore & Traditional Knowledge			
Transfer of Technology			
Control of Anti-Competitive Practices in Contractual Licenses			

## ANNEX D FURTHER READING &amp; RESOURCES

**Further reading**

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#### Internet resources and websites

Intellectual Property Rights Online (IPRSONline) – <http://www.iprsonline.org>

World Intellectual Property Organisation (WIPO) – <http://www.wipo.int>

European Patent Office (EPO) – <http://www.european-patent-office.org>

EC-ASEAN Intellectual Property Rights Co-operation Program (ECAP project)  
<http://www.ecap-project.org/ecap/site/en>

United States Agency for International Development (USAID) Trade Capacity Building Database – <http://qsdb.cdie.org/tcb/index.html>

World Trade Organisation: TRIPS Gateway –  
[http://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/trips_e.htm)

Commission on Intellectual Property Rights (IPRC) – <http://www.iprcommission.org>

## ANNEX E OVERVIEW OF THE TRIPS AGREEMENT

### (A) Introduction

The agreement on Trade Related Aspects of Intellectual Property, commonly known as the "TRIPS Agreement", was negotiated and concluded as an integral part of the multilateral trade negotiations under the Uruguay round of the General agreement on tariffs and trade (GATT). It came about in recognition of the fact that widely differing standards of protection and enforcement of intellectual property rights, and the absence of a multilateral framework of principles, rules and disciplines to deal with the international trade in counterfeit goods had become a serious tension in international trade relations.<sup>18</sup>

The Agreement came into effect on January 1, 1995, and addresses the availability, scope, use and minimum term of protection for intellectual property rights. The Agreement, in Part II, defines intellectual property to include:

- Copyright and related rights
- Trademarks
- Geographical Indications
- Industrial designs
- Patents
- Layout-designs (topographies) of integrated circuits
- Protection of undisclosed information (trade secrets)

The Agreement also addresses the control of anti-competitive practices in contractual licenses related to IPRs.

The Agreement sets out the minimum standards of intellectual property protection which Members must provide in their domestic laws but leaves it to the discretion of Members to determine how best to implement these minimum standards in their domestic legislation and practice. Members are also free to implement in their laws more extensive protection than is required by the Agreement.<sup>19</sup>

Members are obliged "to accord the treatment provided in this Agreement to the nationals of other Members",<sup>20</sup> where "nationals of other Members" is to be understood to be those natural or legal persons that would meet the criteria for eligibility for protection provided for in key intellectual property conventions as if all members of the WTO were members of these conventions. These conventions are administered by the World Intellectual Property Organization (WIPO) and are:

- The Paris Convention for the Protection of Industrial Property (1967).
- The Berne Convention for the Protection of Literary and Artistic Works (1971).

- The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (The Rome Convention, 1961).
- The Treaty on Intellectual Property in Respect of Integrated Circuits (1989).

#### **(B) Relationship between international IP conventions and TRIPS obligations**

The TRIPS Agreement requires Members to comply with the substantive provisions of the key international intellectual property conventions including the Paris Convention (1967)<sup>21</sup> and the Berne Convention (1971),<sup>22</sup> whether or not they are members of those conventions. Further, in regard to integrated circuit layout-designs (topographies), Members are required to provide protection in accordance with some of the provisions of the Treaty on Intellectual Property in Respect of Integrated Circuits.<sup>23</sup>

The Agreement supplements, or adds to, the obligations set out in the aforementioned conventions and treaty. Thus, for example, the TRIPS Agreement requires Members to provide for rental rights in the areas of “at least” computer programs and cinematographic works.<sup>24</sup> The Agreement also requires Members to provide protection for plant varieties either by patents or by an effective *sui generis* system,<sup>25</sup> or by any combination thereof.

Therefore, in order to comply with the requirements of the TRIPS Agreement when implementing their national systems of intellectual property protection, Members would have to comply with both the substantive provisions of the above mentioned conventions and treaty as well as with the additional new obligations set out in the Agreement itself.

#### **(C) National treatment and Most-Favoured-Nation treatment**

The TRIPS Agreement requires Members to adopt and adhere to the key principle of national treatment and most-favoured-nation (MFN) treatment. These principles already exist in other intellectual property conventions and multilateral agreements such as the Paris Convention.

#### **(D) Exhaustion**

Article 6 of the TRIPS Agreement states that, for the purposes of dispute settlement under the Agreement, subject to the provisions Article 3 (National Treatment) and Article 4 (Most-Favoured-Nation Treatment):

“... nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.”

Thus, subject to compliance with Articles 3 and 4, Members may define their own positions on the issue of parallel imports. For example, an LDC may choose to recognize that an IPR owner’s right is “exhausted” when a good or service is first sold or marketed outside its own borders. Under such interpretation, a first sale or marketing under a patent, trademark or copyright abroad would exhaust the IPR owner’s rights and allow “parallel importation” of that good or service.

## **(E) Objectives**

The TRIPS Agreement states that:

“The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”<sup>26</sup>

It is useful to note the wording of the preamble to the Agreement for establishing a context for future interpretation.

## **(F) Principles**

The TRIPS Agreement permits Members to adopt, in their domestic legislation, measures which they deem necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this agreement.<sup>27</sup>

The Agreement also recognizes the possible need for Members to adopt appropriate measures “to prevent abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology”.

## **(G) Availability, scope and use of IPRs under TRIPS**

TRIPS requirements concerning the availability, scope and use of intellectual property rights (Part II of the Agreement) are addressed below in the relevant sections and chapters that follow.

## **(H) Enforcement**

### **Section 1: General obligations**

This section of the TRIPS Agreement sets out general obligations and principles that pertain to the enforcement procedures required by this part of Agreement. It requires Members to ensure that enforcement procedures are available under their national laws to permit effective action against infringement of intellectual property rights.

Such procedures must provide expeditious remedies to prevent infringements and remedies which will deter further infringements.<sup>28</sup>

At the same time, the Agreement requires that such procedures must be applied in a manner to avoid the creation of barriers to legitimate trade and also to provide for safeguards against their abuse.<sup>29</sup>

The procedures must be fair and equitable, not unnecessarily complicated or costly, or entail unreasonable time limits or unwarranted delays.<sup>30</sup> Decisions on the merits of a case must be based on evidence in respect of which the parties were offered the opportunity to be heard, should preferably be in writing,

reasoned, made available without undue delay<sup>31</sup> and subject to judicial review (except in respect of acquittal in criminal cases).<sup>32</sup>

The Agreement does not, however, require a Member to put in place a special judicial system for the enforcement of intellectual property rights nor does it impose any obligations with respect to the distribution of resources as between the enforcement of intellectual property rights and the enforcement of laws in general.<sup>33</sup>

## **Section 2: Civil and administrative procedures and remedies**

This Section of the TRIPS Agreement requires that Members make available civil judicial procedures concerning enforcement to right holders, subject to the general obligations and principles set out in Section 1 above. The Section sets out the range of powers and authorities which a Member shall and may accord to its judicial authorities to ensure that effective civil judicial procedures are in place.

Specifically, Section 2 deals with matters pertaining to:

- Fair and equitable enforcement procedures (Article 42).
- Evidence of proof (Section 43), including the adduction of evidence and the protection of confidential information.
- Injunctions to require a party to desist from an infringement (Article 44).
- Damages, right holder expenses (including attorney's fees) and ordering recovery of profits from infringing activities (Article 45).
- Other remedies (Article 46), including the disposal and destruction of infringing goods and the materials and implements used predominately to make them.
- Right of information to order the identification of third persons involved in infringing activities (Article 47).
- Indemnification of the defendant in the event of abuse of enforcement procedures (Article 48).

## **Section 3: Provisional measures**

Article 50 of the TRIPS Agreement requires certain procedures under which judicial authorities shall have the powers to order prompt and effective provisional measures to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry of infringing goods into their jurisdiction's channels of commerce.

The Article sets out guidelines for these procedures which deal with:

- The preservation of relevant evidence (Article 50.1).
- The adoption of provisional measures to protect evidence before the other party has a right to be heard, provided notice and right to a hearing are given within a reasonable time (Article 50.2 and 50.4).

- The production of evidence and the provision of a security (Article 50.3).
- Compensation for injury of the defendant where there is no final determination of infringement (Article 50.7).
- Information necessary for identification of goods (Article 50.5).
- Revocation of provisional measures if proceedings are not initiated within a certain period of time (Article 50.6).
- The requirement for administrative procedures which can result in provisional measures to conform to the principles of this Section (Article 50.8).

#### **Section 4: Special requirements related to border measures**

Article 51 of the TRIPS Agreement states that:

“Members shall, in conformity with the provisions set out below, adopt procedures<sup>34</sup> to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods<sup>35</sup> may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods”.

Members may implement corresponding procedures in respect of goods which involve other infringements of intellectual property rights, and infringing goods destined for exportation.

Articles 52 to 60 set out detailed guidelines with which border measures must conform:

- Application for suspension of release of goods by customs authorities (Article 52).
- Requirement for security or other assurance (Article 53).
- Notification of suspension to the importer and the applicant (Article 54).
- Duration of the suspension (Article 55).
- Indemnification of the importer and the owner of the goods (Article 56).
- Right of inspection by the right holder and importer and information regarding the importers and the quantity of goods (Article 57).
- Ex officio actions (Article 58).
- Remedies (disposal or destruction of the goods (Article 59);
- Allowed exclusion of small quantities of goods of non-commercial nature (Article 60).

## **Section 5: Criminal procedures**

The TRIPS Agreement requires that Members provide for criminal procedures and penalties be applied at least in the case of “wilful trademark counterfeiting or copyright piracy on a commercial scale”.

Remedies available shall include:

- Imprisonment and/or
- Fines

In appropriate cases, the remedies available shall include:

- Seizure
- Forfeiture
- Destruction

of the infringing goods and of any materials used predominantly in the commission of the offence.<sup>36</sup>

### **(I) Acquisition and maintenance of IPRs**

Part IV (Article 62) of the TRIPS Agreement sets out principles intended to ensure that the formalities and procedures for the acquisition and maintenance of intellectual property rights in Members are reasonable and that final administrative decisions in a Member are subject to review by a judicial or quasi-judicial authority.

In Part V, in Article 63, calls for “transparency” of laws, regulations and final decisions and administrative rulings made by Members. Thus, such laws, regulations, etc., which relate to the subject matter of the Agreement are to be published or at least made publicly available, so that governments and right holders may become acquainted with them.

### **(J) Transitional arrangements**

Developed country Members were required to apply the provisions of the Agreement by January 1, 1996. Developing country members and members of countries in transition from centrally planned to market to driven economies were able to delay implementation until January 1, 2000, with an additional delay of five years for the application of the agreement's provisions on product patents, where such did not exist.<sup>37</sup>

The delay for implementing the TRIPS Agreement provisions discussed above does not, however, apply to the implementation of Articles 3, 4 and 5, the National Treatment and Most-Favoured-Nation Treatment principles in the Agreement, and the obligations under multilateral treaties on the acquisition and maintenance of intellectual property rights.

A further exception to the implementation delay provisions of the TRIPS Agreement relates to patent protection for pharmaceutical and agricultural chemical products.<sup>38</sup> In this regard, the Agreement provides that where a Member does not make available on the date of entry into force of the WTO

Agreement, namely January 1, 1995, patent protection for pharmaceutical and agricultural chemical products commensurate with its TRIPS obligations, that Member shall:

“Notwithstanding the provisions of Part VI (Transitional Arrangements) provide as from the date of entry into force of the Agreement Establishing the WTO a means by which applications for patents for such inventions can be filed”.

Least-developed country Members were provided an additional 10 years to implement the provisions of the Agreement until January 1, 2006, the implementation of TRIPS obligations, with the exception of Articles 3, 4 and 5, as was the case with regard to developing country Members.

On November 29, 2005, the TRIPS Council further extended this to July 1, 2013, and confirmed these countries’ right to seek further extensions afterwards. That extension did not affect the transition period for patents for pharmaceutical products, which had been agreed in 2002 - least-developed countries will not have to protect these patents until 2016.

Where least-developed countries do provide some kinds of intellectual property protection even though they are not required to do so under the TRIPS Agreement, they are obliged not to reduce or withdraw the protection that they currently give.

#### **(K) Institutional arrangements and final provisions**

Part VII of the Agreement sets out the role of the Council for TRIPS, calls upon Members to cooperate with each other to eliminate the international trade in goods that infringe intellectual property rights, particularly between customs authorities with regard to trade in counterfeit trademark and pirated copyright goods.

This Part also addresses the treatment of acts and subject matter that existed before the coming into force of the Agreement. This includes obligations regarding protection for pharmaceutical and agricultural chemical products where the Member does not yet make available patent protection.

Finally, this Part sets out exceptions to address Members’ national security interests.

## ANNEX F LDC MEMBERS OF WTO, WIPO &amp; IP TREATIES

Country	WIPO	Regional agreements	Paris	Berne	Madrid	Hague	UPOV	PCT
<b>WTO members</b>								
Angola	Yes	No^	No	No	No	No	No	No
Bangladesh	Yes	No	Yes	Yes	No	No	No	No
Benin	Yes	OAPI	Yes	Yes	No	Yes	No	Yes
Burkina Faso	Yes	OAPI	Yes	Yes	No	No	No	Yes
Burundi	Yes	No	Yes	No	No	No	No	No
Cambodia	Yes	No	Yes	No	No	No	No	No
Central African Rep	Yes	OAPI	Yes	Yes	No	No	No	Yes
Chad	Yes	OAPI	Yes	Yes	No	No	No	Yes
Congo (DR)	Yes	No	Yes	Yes	No	No	No	No
Djibouti	Yes	No	Yes	Yes	No	No	No	No
Gambia	Yes	ARIPO	Yes	Yes	No	No	No	Yes
Guinea	Yes	OAPI	Yes	Yes	No	No	No	Yes
Guinea-Bissau	Yes	OAPI	Yes	Yes	No	No	No	Yes
Haiti	Yes	No	Yes	Yes	No	No	No	No
Lesotho	Yes	ARIPO	Yes	Yes	Yes	No	No	Yes
Madagascar	Yes	No	Yes	Yes	No	No	No	Yes
Malawi	Yes	ARIPO	Yes	Yes	No	No	No	Yes
Maldives	Yes	No	No	No	No	No	No	No
Mali	Yes	OAPI	Yes	Yes	No	Yes	No	Yes
Mauritania	Yes	OAPI	Yes	Yes	No	No	No	Yes
Mozambique	Yes	ARIPO	Yes	No	Yes	No	No	Yes
Myanmar	Yes	No	No	No	No	No	No	No
Nepal	Yes	No	Yes	Yes	No	No	No	No
Niger	Yes	OAPI	Yes	Yes	No	Yes	No	Yes
Rwanda	Yes	No	Yes	Yes	No	No	No	No
Senegal	Yes	OAPI	Yes	Yes	No	Yes	No	Yes
Sierra Leone	Yes	ARIPO	Yes	No	Yes	No	No	Yes
Solomon Islands	No	No	No	No	No	No	No	No
Tanzania	Yes	ARIPO	Yes	Yes	No	No	No	Yes
Togo	Yes	OAPI	Yes	Yes	No	No	No	Yes
Uganda	Yes	ARIPO	Yes	No	No	No	No	Yes
Zambia	Yes	ARIPO	Yes	Yes	Yes	No	No	Yes
<b>Non-WTO members</b>								
Afghanistan*	Yes	No	No	No	No	No	No	No
Bhutan*	Yes	No	Yes	Yes	Yes	No	No	No
Cape Verde*	Yes	No	No	Yes	No	No	No	No
Comoros	Yes	No	Yes	Yes	No	No	No	Yes
Equatorial Guinea	Yes	OAPI	Yes	Yes	No	No	No	Yes
Eritrea	Yes	No^	No	No	No	No	No	No
Ethiopia*	Yes	No^	No	No	No	No	No	No
Kiribati	No	No	No	No	No	No	No	No
Laos*	Yes	No	Yes	No	No	No	No	No
Liberia	Yes	No^	Yes	Yes	Yes	No	No	Yes
Samoa*	Yes	No	No	Yes	No	No	No	No
Sao Tome & Principe*	Yes	No	Yes	No	No	No	No	No
Somalia	Yes	ARIPO	No	No	No	No	No	No
Sudan*	Yes	ARIPO	Yes	Yes	Yes	No	No	Yes
Tuvalu	No	No	No	No	No	No	No	No
Vanuatu*	No	No	No	No	No	No	No	No
Yemen*	Yes	No	Yes	No	No	No	No	No

Source: WTO website, WIPO website

\* In process of accession to WTO.

^ Observer status in ARIPO.

## ENDNOTES

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<sup>1</sup> A list of the LDCs and their membership of WTO, WIPO and other IP treaties is provided at Annex F.

<sup>2</sup> See the Report of the DFID Workshop: "Reflecting on IPR Technical Assistance for Developing Countries & Transition Economies", 15-17 September 2004, Burnham Beeches, UK.

<sup>3</sup> Available for download from [www.iprtaforum.org](http://www.iprtaforum.org)

<sup>4</sup> For further information and analysis of the WTO TRIPS Agreement and the implications for LDCs, reference should be made to the UNCTAD/ICTSD publication *"Resource Book on TRIPS and Development: An authoritative and practical guide to the TRIPS Agreement"* (2005) available from ICSTD or UNCTAD and at [www.iprsonline.org](http://www.iprsonline.org)

<sup>5</sup> See Annex B for a summary listing and the WIPO web site at <http://www.wipo.int/treaties/en/> for details.

<sup>6</sup> Detailed information on ARIPO may be found on their web site at: <http://www.aripo.org/>

<sup>7</sup> Detailed information on OAPI may be found on their web site at: <http://www.oapi.wipo.net/en/OAPI/index.htm>

<sup>8</sup> Available on the WIPO website at: [www.wipo.int](http://www.wipo.int)

<sup>9</sup> An illustrative list of web sites that carry information about intellectual property from a developmental perspective is included in Annex A.

<sup>10</sup> See Vivas-Eugui, David (2003) *"Regional and bilateral agreements and a TRIPS-plus world: the Free Trade Area of the Americas (FTAA)"*, ICTSD, Geneva.

<sup>11</sup> See Leesti, M. & Pengelly, T. (2002) *"Institutional Issues for Developing Countries in Intellectual Property Policymaking, Administration and Enforcement"*, Background Paper 9, page 27 (Report of the Commission on Intellectual Property Rights (CIPR).

<sup>12</sup> See *"Integrating Intellectual Property Rights and Development Policy"*, Final Report of the Commission on Intellectual Property Rights (CIPR), London, September 2002, page 140.

<sup>13</sup> Article 7 reads: "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

<sup>14</sup> See Institute for Economic Research (1996) *"Study on the Financial and Other Implications of the Implementation of the TRIPS Agreement for Developing Countries"*, WIPO, Geneva.

<sup>15</sup> *"Counterfeiting in the new millennium"*. (ICC Commercial Crimes Services, London, 13 January 2000)

<sup>16</sup> Commission on Intellectual Property Rights (2002), Chapter 7, *"Final Report"*.

<sup>17</sup> See Leesti, M. & Pengelly, T. (2002)

<sup>18</sup> The preamble to the TRIPS Agreement states that it is the desire of Members: "to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade".

<sup>19</sup> Article 1.1 of the TRIPS Agreement provides that: "Members may, but shall not be obliged to, implement in their domestic law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice".

<sup>20</sup> Article 1.3 of the TRIPS Agreement

<sup>21</sup> Article 2.1 of the Agreement reads: "In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1-12 and 19 of the Paris Convention (1967)".

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<sup>22</sup> Article 9.1 of the TRIPS Agreement reads: "Members shall comply with Articles 1-21 and the Appendix of the Berne Convention (1971). However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom".

<sup>23</sup> Article 35 of the TRIPS Agreement reads: "Members agree to provide protection to the layout-designs (topographies) of integrated circuits (hereinafter referred to as "layout-designs") in accordance with Articles 2-7 (other than paragraph 3 of Article 6), Article 12 and paragraph 3 of Article 16 of the Treaty on Intellectual Property in Respect of Integrated Circuits...".

<sup>24</sup> Article 11 of the TRIPS Agreement

<sup>25</sup> Article 27.3(b) of the TRIPS Agreement

<sup>26</sup> Article 7 of the TRIPS Agreement

<sup>27</sup> Article 8 of the TRIPS Agreement

<sup>28</sup> Article 41.1

<sup>29</sup> Ibid.

<sup>30</sup> Article 41.2

<sup>31</sup> Article 41.3

<sup>32</sup> Article 41.4

<sup>33</sup> Article 41.5

<sup>34</sup> The TRIPS Agreement contains the following footnote: "It is understood that there shall be no obligation to apply such procedures to imports of goods put on the market in another country by or with the consent of the right holder, or to goods in transit."

<sup>35</sup> The TRIPS Agreement contains the following footnote: "For the purposes of this Agreement:

- counterfeit trademark goods shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;

- pirated copyright goods shall mean any goods which are copies made without the consent of the right holder or person duly authorized by him in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation."

<sup>36</sup> Article 61 of the TRIPS Agreement

<sup>37</sup> Article 65 of the TRIPS Agreement

<sup>38</sup> Articles 70.8 and 70.9 of the TRIPS Agreement