

**PRINCIPLES AND GUIDELINES FOR THE PROVISION OF TECHNICAL
COOPERATION ON INTELLECTUAL PROPERTY:
ELEMENTS FOR CONSIDERATION
(DRAFT)**

The content and modalities of technical cooperation provided to developing countries in the area of intellectual property policy have come under growing criticism from different quarters.

The technical assistance of WIPO, in particular, has raised significant concerns. Proposals on the subject are under consideration in the context of WIPO's Development Agenda. The Elaborated Development Agenda proposal from the Group of Friends of Development, submitted in June 2005, suggested that principles and guidelines be adopted by the 2005 WIPO General Assembly as the basis for all future WIPO technical assistance and capacity building. The document submitted by the Group highlights several of the issues that should be reflected in such principles and guidelines for TC.

This paper further builds on and develops some ideas on this matter. It is aimed at providing a set of principles and guidelines for the supply of TC in the area of intellectual property for use by bilateral and multilateral donors, non-state providers of TC and also by recipient countries and organisations in the design, delivery and evaluation of technical cooperation. Both the process that leads to the supply of TC and the content of the assistance provided are important. The principles and guidelines presented below deal with a number of aspects should be taken into account in that process.

Part I of this paper places IP technical cooperation within the broader context of development cooperation, arguing that assistance in this field should logically follow broader internationally-accepted principles in this respect. In so doing, it also draws attention to the responsibilities of recipient countries with respect to identifying and articulating their goals in the area of IP policy and their needs and priorities with respect to IP technical cooperation that follow from those overarching national objectives.

Part II of the paper elaborates on several aspects of the principles and guidelines proposed by the Friends of Development for adoption by the WIPO General Assembly. While the specific principles and guidelines provided here are tailored specifically to WIPO, it is our view that a version of such guidelines and principles can and should be adopted by all organisations involved in the provision of IP-related technical cooperation. Importantly, the emphasis of the proposed WIPO guidelines and principles is strongly targeted to ensure that WIPO, as an international organisation, fulfils its obligations to provide independent, unbiased and neutral assistance. For those organisations without such obligations, we would argue that many of the other principles and guidelines remain highly relevant and should be adopted.

I. Guiding Principles for Technical Cooperation

Technical cooperation in the area of IP is a subset of a broader field of development cooperation for developing and least developed countries, for which a series of widely-accepted principles, guidelines and best practices already exist. The World Bank and the OECD's Development Assistance Committee both, for example, have developed best practices in design and implementation of development cooperation. These guidelines are particularly important because IP technical cooperation often involves agencies, such as developed country IP offices, not generally engaged in the provision of development cooperation and so less familiar with the values, lessons learned and best practices in that arena.

General principles advocated by the OECD, for example, include:¹

- donors should support country-owned, country-led strategies that are linked to national development strategies (such as Poverty Reduction Strategies or equivalent national frameworks), and, in consultation with recipients, base their programming on the needs and priorities identified in these.
- development assistance should be provided in ways that build, and do not inadvertently undermine, partner countries' sustainable capacity to develop, implement and account for these policies to their people and legislature.
- co-ordination of donor practices enhances the effectiveness of aid, particularly for aid dependent countries. Aid co-ordination should, whenever possible, be led by partner [recipient] governments.
- reliance on partner government systems, where these provide reasonable assurance that co-operation resources are used for agreed purposes, is likely to enhance achievement of sustainable improvements in government performance.
- partner countries and donors have a shared interest in ensuring that public funds are used appropriately.
- donors should work closely with partner countries to address weaknesses in institutional capacity or other constraints that prevent reasonable assurance on use of co-operation resources.
- the development of appropriate partner country systems will often be a medium term process. Until donors can rely on these, they should simplify and harmonise their own procedures to reduce the burden placed on partner countries.
- no single approach is suitable for all countries [and implementation] needs to be adapted to local circumstances and institutional capacities.

¹ See Guiding Principles on Technical Cooperation, HARMONISING DONOR PRACTICES FOR EFFECTIVE AID DELIVERY – ISBN 92-64-19982-9 – © OECD 2003, page

- assistance to empower civil society and support effective organisations representing the private sector also can enhance improvements in partner government performance.

A key aspect of any successful technical cooperation program is the determination by the recipient country or regional group of its needs and objectives. In the realm of intellectual property, the party making a request should:

- determine the objectives pursued (e.g., development of national policies on IP, science, innovation and technology transfer, enactment of TRIPS compliant legislation, promotion of innovation and investment, avoiding misappropriation of traditional knowledge, etc.)
- identify technical cooperation priorities, in terms of categories of intellectual property to be covered (e.g., patents, trademarks, etc.), the substantive or procedural nature of issues to be considered, and the sectors involved (e.g., agriculture, mechanical industry, health, etc)
- identify the groups (eg., farmers, consumers, authors, small and medium-size enterprises, universities, musicians, artists, scientists) potentially affected by the outcomes of TC.
- involve representatives of all relevant ministries/departments in the determination of the TOR for the technical cooperation, through a structured consultative process,
- seek the active participation of relevant stakeholders in the assessment of technical cooperation priorities and needs and in discussions of the appropriate design, delivery, outcomes and evaluation of TC. In the area of copyright, for instance, stakeholders would include students, student and academic authors, academic users, libraries, universities, commercial publishers, commercial distributors, equipment suppliers. In the area of patents, they would include domestic industries, farmers, providers of health services, patients, etc.
- give due consideration to the possible absence of adequate representation of stakeholders, for instance, patients that may be affected by patent protection of pharmaceuticals. The fact that some groups (eg. business sector) may be better organized to influence decisions than other groups (eg. consumers, students) should also be considered. In addition, foreign business, often supported by the governments, may strongly lobby and exert pressures to increase IP protection to their benefit. Governments should recognize that the degree of influence of some social groups does not necessarily match the importance they should have for the determination of the appropriate development-oriented IP policy in certain areas.

- assess how the possible outcome of TC can contribute to the fulfillment of the development goals of the recipient country (e.g., increase employment and domestic value added, promote local and foreign investment, expand exports, foster innovation, support SMEs, etc.)
- take responsibility for defining the terms of reference (TOR) for the provision of TC.

II. Principles and Guidelines for WIPO's Provision of Technical Assistance²

The purpose of this section is to provide greater specificity to several key aspects of the principles and guidelines for technical assistance proposed by the Friends of Development for adoption by WIPO's General Assembly. In so doing, we maintain the same format and headings as those originally submitted by the Friends, but provide greater detail, concrete examples and elaborations of concepts in key areas to ensure that the principles and guidelines provide sufficient guidance.

As noted above, addressed as they are to an international organisation with obligations to ensure the independence and neutrality of its advice, these guidelines place particular emphasis on ensuring the absence of bias or discrimination in technical assistance. Irrespective of a particular organisation's duty for neutrality, we suggest that a significant portion of these guidelines are relevant to all institutions involved in the funding and/or delivery of technical cooperation and should be adopted by them to guide their work.

In practice, it may be useful for organisations to supplement these guidelines and principles with a specific manual that details best practices and appropriate content for technical assistance for each of the main areas and subjects of IP-related technical cooperation. This could include, for example, specific advice as to the kinds of issues that might be covered in assistance related to the health sector or to enforcement.

Among others, the principles and guidelines for WIPO's technical assistance, could include:

Development Focused Technical Cooperation

The provision of technical assistance should have as its objectives the fulfillment of the development goals of the recipient countries and broader development goals such as the United Nations Millennium Development Goals (MDGs). IP laws, policies and regulations should be tailored to meet each country's level of development and to respond to the specific needs and problems of individual countries and societies.

² See, the principles and guidelines for the provision and evaluation of technical assistance submitted in a proposal by the Group of Friends of Development at the First Session of WIPO's Inter-sessional Intergovernmental Meeting (IIM). See Document IIM/1/4, page 21.

In designing, delivering and evaluating technical assistance, the different levels of development of various countries should be taken into account. Technical assistance programs should include an objective assessment of the development impact of any proposed legislation/action, taking into account the needs and objectives identified by the recipient country.

Comprehensive and Coherent Assistance Programmes

Technical cooperation should assist countries to devise coherent national IP policies that are linked to broader development and public policy objectives. The existence of such policies should be recognised as a necessary part of developing a coherent approach to the implementation of international IP-related commitments.

Special attention shall be paid to developing the technical capacity of countries to fully use in-built flexibilities in international agreements to advance national pro-development policies.

Coherence and mutual supportiveness with other relevant international instruments must also be promoted.

The use of model intellectual property laws without careful evaluation of their effects should be discouraged. WIPO should inform recipients about experiences, including information on comparative law, from other countries that are relevant to the TC and presenting the range of options available.

Integrated Approach

The intellectual property system cannot work in isolation from competition policy and other related regulatory regimes.

In designing technical assistance programmes, there is a need to expand its coverage to include matters related to the use of competition law and policy to address abuses of intellectual property and practices that unduly restrain trade and the transfer and dissemination of technology.

Neutral, Unbiased and Non-Discriminatory

The provision of technical assistance should be unbiased, neutral and development-focused. They should be of an advisory nature based on actual and expressed needs. The assistance should not discriminate among recipients or issues to be addressed and should not be perceived as being a reward system for supporting certain positions in international negotiations.

Technical cooperation that is neutral and unbiased is that which is:

- guided by the principles and objectives contained in Articles 7 and 8 of the TRIPS Agreement. Article 7, entitled “Objectives”, recognizes 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. Article 8, entitled “Principles”, recognizes the rights of Members to adopt measures for public health and other public interest reasons and to prevent the abuse of intellectual property rights, provided that such measures are consistent with the provisions of the TRIPS Agreement.
- recognises that more protection of IP does not necessarily mean better outcomes for development. The design of TC should reflect the reality that IP protection may bring about benefits and costs, depending on the nature of protection provided and the circumstances in which they apply.
- takes into consideration the needs of various stakeholders in recipient countries (see above) and not only the interests and objectives of intellectual property offices and rightholders.
- fully informs recipients about the flexibilities available under existing IP agreements, such as Article 1, 30, 31 and 39 of the TRIPS Agreement, as well as about the Doha Declaration on the TRIPS Agreement and Public Health. TC should be provided in a way that promotes coherence and mutual supportiveness of IP policies with other relevant international instruments, such as the Convention on Biological Diversity, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Treaty on Plant Genetic Resources for Food and Agriculture.
- specifically addresses how proposed legislation/action may affect broad public policy objectives (such as access to medicines, access to educational materials, and the progressive realization of human rights, such as the right to health).
- provides information and guidance on non-intellectual property-type and/or non-exclusionary systems for fostering creativity, innovation and the transfer of technology, for example, open collaborative models for research, open and free software development, compensatory liability systems and the development of technology for the public good.

Tailor-made and Demand-driven

The technical assistance programmes and activities should ensure that intellectual property laws and regulations are tailored to meet each country’s level of development and are fully responsive to the specific needs and problems of individual societies.

The assistance should correspond to the needs and global political objectives of developing and least developed countries, taking also into account the legitimate interests of various stakeholders.

WIPO should respond to the demands of TC as formulated by the potential recipient and cooperate in good faith with the potential recipient in determining the TOR for the TC, without imposing themes or activities. The assistance should correspond to the needs of various stakeholders in developing and least developed countries and not just the intellectual property offices and rightholders.

The recipient should have the right to: approve or object proposed staff or consultants for the provision of TC; propose alternate staff or consultants; require statements or disclosure of any potential conflict of interest from potential providers; request that consultants agree to comply with a Code of Ethics for technical cooperation providers; and request evidence of the qualifications, prior work experience and evaluations (where available) of proposed providers of TC.

Independence of Providers

WIPO technical assistance staff and consultants should be fully independent and potential conflicts of interest should be avoided.

All individuals involved in the provision of technical assistance should follow a Code of Ethics for IP Technical Cooperation Providers.

They should provide professional advice that is both timely and relevant to the beneficiary, responding to expressed requests and defined needs in a flexible and adaptable manner.

WIPO should take a multi-disciplinary approach to the issues, utilizing professionals and experts from different backgrounds and disciplines, harnessing and building local expertise, and incorporating inputs from a variety of international sources.

Continuous Evaluation of Effectiveness

WIPO's technical assistance programmes and activities should be continuously evaluated both internally and independently to ensure its effectiveness, employing a relevant and publicly-available set of indicators and benchmarks, based on the principles and guidelines outlined above.

As is the case in broader areas of development cooperation, donor agencies should submit their technical cooperation programs to peer review by other donors and by recipient countries.

Transparency

All information about design, delivery, cost, financing, beneficiaries and implementation of technical assistance programmes as well as the results of internal and external independent evaluation should be publicly available.