

DESIGNING DEVELOPMENT-ORIENTED INTELLECTUAL PROPERTY TECHNICAL ASSISTANCE PROGRAMMES

I. INTRODUCTION

Trade-related technical assistance including for intellectual property (IP) matters dates back in some form or the other to the early independence years of many developing and least-developed countries. However, with the coming into being of the World Trade Organization (WTO), multilateral agencies and bilateral donors significantly increased the resources for technical assistance and capacity building in the area of IP. These new resources aimed at the implementation of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), were in addition to the resources that were already devoted to technical assistance activities under the auspices of the World Intellectual Property Organisation (WIPO) and by developed countries to help in the implementation of WIPO and bilateral IP treaties. While this assistance, worth millions of dollars, has resulted in the improvement of developing countries' IP policy-making and negotiating capacities, significant gaps, with serious development implications, still remain.

In particular, there is increasing concern that despite the increase in the number providers and in the resources devoted to technical assistance activities in IP; many developing and least-developed countries have not taken advantage of the development-friendly policy spaces within the TRIPS Agreement. At the same time, a number of these countries continue to engage in negotiations and/or are signing onto bilateral and multilateral agreements that further constrain these policy spaces. This has been interpreted to mean, in part, that various technical and capacity gaps which should have been filled still exist in these countries. In September 2002, the Commission on Intellectual Property Rights (IPR Commission) after reviewing the current IP related technical assistance programmes by WIPO and developed countries and assessing their impact, came to the conclusion that the results of the various activities under these programmes were not commensurate with the effort or the money so far spent.¹ In particular, the Report concluded that the design and delivery of IP related technical assistance needed to be improved to ensure that it is much better integrated with overall national development strategy of the individual developing countries. The validity of this conclusion was examined and confirmed at the First Bellagio Series of dialogues in October/November 2003 during the session titled "Towards Development-Oriented Intellectual Property Policy: Setting the Agenda for the Next Five Years".²

This paper, which is a contribution for the session titled, "Towards a Development-Oriented IPR Agenda: TRIPS-plus, Technical Assistance and Technology Transfer" at the Second Bellagio

¹ IPR Commission, (2002), *Integrating Intellectual Property Rights and Development Policy*, IPR Commission, London, p. 167. The Commission was set up in May 2001 by the then UK Secretary of State for International Development (DFID), Clare Short, to consider how intellectual property could work better for developing countries and the poor. The Commission published its final report in September 2002 in which, among other things, it concluded that for most developing countries any beneficial trade and investment effects of IP are unlikely to outweigh the costs at least in the short and medium term.

² The session was organised by the United Nations Conference on Trade and Development (UNCTAD) and the International Center for Trade and Sustainable Development (ICTSD). See the report of the meeting at <http://www.ictsd.ch/ipronline/unctadictsd/bellagioprocess.htm>.

Series, builds on these findings and conclusions. It outlines some thoughts on how to move forward the agenda for improving the design and delivery of technical assistance in the field of IP. It examines, in light of the above findings and conclusions, how development-friendly technical assistance -assistance to ensure that developing and least-developed countries tailor their IP policies and strategies to promote their development goals - should be designed and delivered. In particular, the paper examines, in turn, the following inter-related issues: (a) the current and future IP related technical and capacity gaps in developing and least-developed countries; (b) the limitations of the current IP related technical assistance programmes; (c) what needs to be taken into account in improving the designing and delivery of IP related technical assistance to make it development-friendly; and (d) possible indicators for evaluating the impact of IP technical assistance programmes.

II. THE CURRENT AND FUTURE IP RELATED TECHNICAL AND CAPACITY GAPS IN DEVELOPING AND LEAST-DEVELOPED COUNTRIES

To fully understand the scale and types of technical and capacity needs in developing countries and least-developed countries one needs to consider not only the currently known needs but also to factor in the future needs. A useful framework for mapping these needs should be situated in the context of projected important developments in the area of IP in the coming years. While not claiming to be comprehensive or definite, the listing below constitutes some of the possible major developments in IP in the next four to five years that will shape and determine the technical and capacity challenges and needs of developing and least-developed countries:

- The conclusion of the Doha Work Programme;³
- The end of all the transition periods under the TRIPS Agreement except with respect to patents for pharmaceuticals in least-developed countries;⁴
- The possible completion of the review of article 27.3b of the TRIPS Agreement;
- The possible completion of the first review of TRIPS under article 71.1 and/or the commencement of the second review under that article;
- Possible increase in IP disputes at the WTO;
- A possible amendment to the TRIPS Agreement at least in the context of TRIPS and public health and geographical indications;
- Possible negotiations on WTO Agreements on investment and competition;
- A possible diplomatic conference on a Substantive Patent Law Treaty (SPLT) at WIPO;
- The coming into force of the Patent Law Treaty (PLT)'
- The completion of the reforms of the Patent Cooperation Treaty (PCT);
- Possible negotiations on intellectual property and traditional knowledge including some aspects of genetic resources and possibly folklore and/or a diplomatic conference on the same;
- The holding of a diplomatic conference on audiovisual performances at WIPO;

³ Under paragraph 45 of the Doha Ministerial Declaration the negotiations are supposed to be concluded not later than 1 January 2005.

⁴ These include the transition periods under article 65.4 – for developing countries which did not grant product patent protection especially to agro-chemical products and pharmaceutical products- and under article 66.1- for least-developed countries subject to the possibilities of extension under that article.

- The coming into force of the Food and Agriculture Organization's (FAO) International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA);
- Conclusion of a number of Conference of Parties (COP) meetings under the Convention on Biodiversity (CBD) and the further development of guidelines/standards on access to genetic resources and benefit sharing;
- The possible conclusion of the negotiations on the Free Trade Area of the Americas incorporating IP components (FTAA negotiations);
- The conclusion of various new bilateral trade and investment agreements between developing countries and the United States and/or the European Union (EU);
- Possible negotiations or processes to explore the possibility of a research and development (R&D) treaty in the area of medicines at the World Health Organization (WHO);
- Significant increase in academic and policy literature on development and IP;
- Significant increase in the number of developing and least-developed countries IP experts;
- Significant increase in the number of universities and colleges in developing countries teaching IP and other international trade subjects such as competition policy;
- Possible significant increase in IP related litigation in developing and least-developed countries;
- The holding of two international conferences on information society;⁵ and
- Possible significant increase in the number of IP technical assistance providers.

A review of the listed developments and events show that the technical and capacity gaps in field of IP can be categorised into four main areas. These are gaps in: understanding the concepts, issues, benefits and risks;⁶ implementing and complying with binding commitments;⁷ managing and influencing on-going negotiations on further commitments;⁸ and gaps in developing strategies and setting the agenda for the future.⁹ These main gaps can be further broken down into smaller more specific components but this is not necessary for our purposes here. A review of the list also indicates that these gaps are considerable and increasing.¹⁰ While these gaps will widely vary from country to country and change over time, developing countries and least-developed countries will in general require assistance to: identify their individual as well as the region's or coalition's interests; translate these interests into policies, negotiating goals and

⁵ The World Summit on Information Society is scheduled to be held in two phases. The first phase will take place in Geneva in December 2003 while the second phase will take place in Tunis in November 2005. For more information see, <http://www.itu.int/wsis/>.

⁶ For example with respect to geographical indications and the SPLT negotiations.

⁷ This will apply, for example, in the case of the ending of transition periods, with respect to dispute settlement issues, with respect to the PLT and the ITPGRFA, the FTAA etc.

⁸ For example, there are challenges related to the FTAA and other bilateral negotiations, the SPLT negotiations, IP and traditional knowledge etc.

⁹ Examples here include developments in the area of traditional knowledge, the R&D treaty and the review under article 71.1.

¹⁰ Although, the listing indicates that there is likely to be a significant increase in academic and policy literature on IP and development, developing country IP experts and in technical assistance providers this will not have the effect of significantly reducing the technical and capacity gaps related to the other developments in the area.

positions; situate these policies, negotiating objectives and positions into their overall development framework; and allocate resources, both human and financial, to execute these policies, negotiating objectives and positions.

III. THE LIMITATIONS IN THE CURRENT DESIGN AND DELIVERY OF IP TECHNICAL ASSISTANCE

The adoption and entry into force of the TRIPS Agreement changed the international intellectual property regime in a significant way by introducing the principle of minimum intellectual property standards. For this reason, the TRIPS Agreement became the de facto instrument for globalising intellectual property. In relation to technical assistance, although developing countries faced various challenges with respect to WIPO administered treaties and bilateral treaties and were, as already noted, receiving IP related technical assistance both from WIPO and bilateral donors, TRIPS had the effect of significantly exacerbating these challenges. Consequently, from 1995 the TRIPS Agreement became the main focus of IP related technical assistance by international and bilateral agencies. At the same time, the coming into effect of the TRIPS Agreement and the eventual controversies surrounding its implementation in developing countries also led to evolution of major international and national efforts to provide IP related technical assistance by other international organisations, business and lawyers associations and civil society groups.

Today, there are therefore a multiplicity of providers of technical assistance in the area of IP including multilateral agencies such as WIPO, the WTO, UNCTAD, the International Trade Centre (ITC), the United Nations Development Programme (UNDP), WHO, FAO, and the World Bank. There are individual programmes and some inter-agency projects such as the Joint Integrated Technical Assistance Programme (JITAP). Aside from the major agencies, there are a variety of other providers of IP technical assistance ranging from the secretariats of intergovernmental organisation such as the African Union (AU) and the South Centre, secretariats of regional intergovernmental bodies such as the Secretariat of the Common Market for Eastern and Southern Africa (COMESA), the Andean Community, the Association of South East Asian Nations (ASEAN), research and academic institutions both in developed and developing countries as well as civil society groups at the international, regional and national levels.

The types of technical assistance provided by the various organisations and entities are varied and fall into a number of broad categories. They include, general and specialised training, legal advice and assistance with preparing laws, support for modernising IP administration and collective management systems, access to patent information services, exchange of information among law makers and judges and promotion of local innovation and creativity.¹¹ Others include support in international and bilateral IP negotiations, training of police and customs officials and development of IP teaching courses. In order to assess the limitations in the current design and delivery of technical assistance in the field of IP, an important starting point is therefore to map the various types of technical assistance providers and the focus of their assistance. This is important since different limitations apply to different providers.

¹¹ IPR Commission (note 1 above), p. 167.

For these purposes, the various providers of IP related technical assistance can be divided into seven broad groups. The groups are based on fairly broad characteristics and should therefore not suggest homogeneity of the group. These include:

- (a) International organisations that administer IP treaties. In this category would fall WIPO, WTO, FAO, CBD, the International Union for the Protection of New Varieties of Plants (UPOV), the European Patent Organisation (EPO), the African Regional Intellectual Property Organization (ARIPO) and the African Intellectual Property Organization (OAPI). The primary concern of this group of technical assistance providers is the implementation of the treaties administered by them.
- (b) United Nations agencies and other intergovernmental organisations. Under this category would fall UNCTAD, UNDP, UNESCO, WHO, the World Bank, the Organization for Economic Cooperation and Development (OECD), the WTO Advisory Centre, the South Centre, and the Agency for Trade Information and Cooperation (AITIC). While the primary focus of the various organisations in this group varies considerably they, in one form or another, work on issues related to IP and development and/or economic growth.
- (c) Developed country development agencies and patent offices. In the context of article 67 of the TRIPS Agreement, most developed countries provide IP related technical assistance. Examples include DFID, United States Agency for International Development (USAID), the United States Patents and Trade Marks Office (USPTO), the Swedish Agency for International Development (SIDA), the Canadian Agency for International Development (CIDA), and the Japanese Patent Office. With a few possible exceptions, the primary focus of this group of providers is helping developing and least-developed countries upgrade their IP systems so as to comply with international and bilateral IP agreements and to better protect the IP of foreign nationals.
- (d) Civil Society groups. This category comprises the largest and most diverse group of IP technical assistance providers. In the category would fall both international groups such as the Third World Network, ICTSD, and Oxfam among others, regional groups such as the Southern and Eastern Africa Trade and Information Network (SEATINI) and various national groups. Although their approaches and focus vary widely, these organisations' activities are largely related to IP and development and related concepts such as poverty alleviation.
- (e) Business and lawyers associations. This category also comprises a fairly large group of organisations. Examples include the American Bar Association (ABA), the American Intellectual Property Law Association (AIPLA), the International Federation of Pharmaceutical Manufacturers Associations (IFPMA) and the International Association for the Protection of Industrial Property (AIPPI). The activities of the organisations in this category mainly focus on the implementation of international and bilateral agreements and other activities related to better enforcement of IP for their members or clients in developing and least-developed countries.
- (f) Philanthropic Foundations. Apart from funding other organisations providing IP technical assistance, a number of these foundations also to some extent provide technical assistance. Examples include the Rockefeller Foundation and the Ford Foundation. In the main, the organisations in this category have focused on activities related to IP and development and issues of justice and poverty alleviation.

- (g) The seventh category comprises of organisations and entities that do not neatly fall into any of the above groups such as universities and research institutions, IP teaching associations etc.

The sheer numbers of providers of IP technical assistance with different institutional orientations, levels of technical know how and underlying objectives raises several important questions. For example, how do we determine the limitations of the current design of IP related technical assistance? Do we proceed on the basis of provider by provider or category of providers? Are there limitations which can be eliminated and those which are inherent in the institution etc. that can not be removed?

In the recent past WIPO's technical and legal assistance activities have come in for criticism for a variety of reasons. The organisation's activities under the Cooperation for Development Programme which include courses, seminars and legislative services,¹² have been criticised, in particular, because they are geared to 'facilitate the implementation' of TRIPS and other Agreements meaning that the emphasis of the programmes is on performance of the obligations in the Agreements by the developing countries and least-developed countries. It is argued that this assistance is unlikely to help developing countries tailor their IP laws to meet their development objectives. But to what degree can WIPO possibly do this? Is the problem the fact that WIPO is putting emphasis on the wrong things etc. or is it rather that WIPO is doing a little too much when it is not suited to do certain kinds of things? Similar questions would arise with respect to the assistance provided by developed countries and business associations.

While the focus on WIPO and developed countries IP technical assistance is an important development it should not be taken to mean that the other categories of technical assistance providers have performed excellently.¹³ It is beyond the scope of this paper to attempt to detail the limitations attaching to each of the various groups above. However, suffice it to say that the IPR Commission's conclusion that the results of the technical assistance provided in the area of IP by WIPO and other bilateral donors so far is not commensurate with the effort and money spent applies also, albeit in varying degrees, to all the other categories of providers. WIPO might be the biggest culprit because of its reach and massive resources, but to ensure the overall improvement of IP related technical assistance will require improvements and adjustments by all the groups of providers. The first step, as correctly identified by the IPR Commission, is therefore to carrying out a sector-wide review of IP related technical assistance from 1995 with a view to assessing what has been put in and what has been achieved. A necessary corollary of such an evaluation would be the development of a framework for continuous evaluation and review in future.

¹² WIPO Annual Report for 2002.

¹³ While some excellent results have been achieved by individual programmes and projects an overall assessment of programmes run by the organisations under categories b, d, f and g does necessarily give a rosy picture.

IV. DESIGNING A FRAMEWORK FOR DEVELOPMENT-ORIENTED IP TECHNICAL ASSISTANCE

Key to any effort to improve the design of IP technical assistance across the board is the need to define certain basic issues and concepts and to move towards developing a framework for assessing the impact of IP related technical assistance. There exist significant literature and other reviews and critiques of trade-related technical assistance most of which covers IP and it is not my intention to recapitulate those here.¹⁴ This section attempts to identify ways of moving towards a possible sector-wide review by discussing some important conceptual issues and how such an evaluation could be structured or approached.

IV.1 Some conceptual issues

As noted above, quite a number of critiques have been written about the approaches in technical assistance covering various subjects including IP related technical assistance. However, there are some important issues that have not been discussed much although they are critical elements that should underpin efforts to improve the design of IP related technical assistance. These include the concepts of targeting and sustainability of technical assistance, bias, neutrality and professional responsibility.

IV.1.1 Appropriate Targeting of IP Related Technical Assistance

The targeting of technical assistance and capacity building activities is a crucial consideration in assessing the effectiveness of the design of the programmes. Appropriate targeting means that there is congruency between the policy and development objectives of the country or groups of countries and the prioritisation of the technical assistance activities and funding. The concept of better targeting of IP technical assistance is therefore one important element that requires to be factored into the design of the proposed sector-wide review of IP technical assistance. Closely related to the issue of targeting is the question of sustainability. Sustainability is a concept that goes beyond just allocation of adequate resources. Sustainable financing, in particular, should be seen to mean dedicating adequate resources to particular activities based on the targeting priorities.

IV.1.2 The Concept of Neutrality in Technical Assistance Provision

There are attendant risks in any technical assistance set up because of the institutional orientations of the providers as well as other factors such as political considerations. If these risks are not managed well, they can be especially dangerous. Lecomte, identifies the risks of bias such as negative discrimination, positive discrimination, tied aid and buy offs.¹⁵ To these one can add the risk related to the concept of neutrality when applied to the provision of technical

¹⁴ See, e.g. Kostecki, M., (2001) "Technical Assistance Services in Trade Policy: A Contribution to the Discussion on Capacity Building in the WTO" *Sustainable Development and Trade Issues: ICTSD Resource Paper No. 2*, ICTSD, Geneva.

¹⁵ See, Lecomte, H., (2001) *Building Capacity to Trade: A Road Map for Development Partners, Insights from Africa and Caribbean*, ECDPM/ODI, Maastricht, p. 21-22.

assistance. Technical assistance in many ways is a service to promote and enhance policy formulation and review.¹⁶ There are various limitations that attach to the different providers and in respect of different technical assistance activities. This is an inherent factor tied to the type of institution etc. Clearly, what WIPO, WTO, UNCTAD, ITC, UNDP or the World Bank can do is limited by their institutional orientations, political considerations and other limitations. This in itself should not be a problem. Problems arise when there is no clarity as to what neutrality means or implies and what responsibilities attach to such ‘neutral’ technical assistance providers.

The provision of the so-called neutral technical assistance is an attempt by international organisations administering IP treaties, in particular, to be objective. However, objectivity which is interchangeable with neutrality in this case is rarely workable especially in a situation of strong economic, political and ideological conflicts. In this context, the concept of neutrality can be problematic and may impede the effectiveness of the technical assistance. Neutral can mean not taking sides but it can also mean indifference or avoiding.¹⁷ The implication is that neutral technical assistance will likely fall far short of the assistance needed to help a country develop IP policy let alone helping it situate such a policy in its overall development framework. These shortcomings have long been recognised. The results can be devastating especially with respect to legislative assistance. As Drahos, quoting WIPO sources, points out,

The inclination on the part of the international Bureau was to provide laws and advice to a developing country that would avoid any danger of that country becoming involved in dispute resolution (‘we don’t want them to get into trouble with WTO’ ...). Obviously the way in which to guarantee this is to provide TRIPS plus models¹⁸.

The statement would equally apply to any other organisations providing ‘neutral’ technical assistance. This raises the question of responsibility and what various providers should or should not do. In other words, it may be that in order to improve the design and delivery of IP technical assistance the question we need to ask is what should we legitimately expect from the various providers and not whether they are neutral or not.

IV.1.3 Professional Responsibility in IP Technical Assistance Provision

The concept of professional responsibility is particularly pertinent in relation to IP technical assistance because, as pointed out above, IP policy making today is done against a background of strong economic, political and ideological conflicts within countries and regions and between the North and the South. The provision of technical assistance should be akin to provision of professional services in the context of the relationship between the providers and recipients. This requires a certain level of responsibility and certain standards of professionalism from the providers. In this case it may only be moral responsibility as opposed to legal responsibility that attaches but the responsibility must be taken as a heavy one. This means that with the

¹⁶ For discussion of some basic concepts of technical assistance in trade policy see for example Kostecki (note 14 above).

¹⁷ Kirkpatrick, B., (eds.) (1998) *Roget’s Thesaurus*, Penguin Books, London, p. 1088.

¹⁸ See, Drahos, P., (2002) “Developing Countries and Intellectual Property Standard Setting”. A study prepared for the UK Commission on Intellectual Property Rights, p. 22. Available at <http://www.iprcommission.org>.

institutional orientation and limitations of both ‘neutral’ and ‘biased’ technical assistance providers, recipients should be clearly put in the picture about these orientations and limitations.

In this regard, technical assistance providers should be prepared to acknowledge their limitations either institutionally or in respect to technical know how. An additional important component of the classical professional responsibility concept, applicable in these discussions, is the duty to refer. The duty is for the providers to know and define their positions in relation to other providers and for them to direct recipients to others where, either due to technical know how or institutional limitations, they can not provide appropriate assistance. In setting up a framework for the sector-wide evaluation of the current IP technical assistance account will have to be taken of the concept of professional responsibility in order to define if it has any role to play in improving the design and delivery of assistance.

IV.2 Possible indicators for evaluating the impact of technical assistance

While the inability of developing and least-developed countries to incorporate the TRIPS policy flexibilities in their laws and policies and to situate their IP policies within the overall development framework can be said to constitute evidence of poor design and delivery IP technical assistance, it is not sufficient to enable a conclusive determination. Attempts to evaluate the success or failure of technical assistance activities require a highly nuanced approach and the consideration of numerous factors. Although a lot of literature exists on how to evaluate technical assistance in various trade-related areas which would apply to IP technical assistance developing a credible criteria to evaluate the impact of technical assistance activities especially in the long-term is not easy. An example would suffice to illustrate this point. According to the 2002 Annual Report of WIPO,¹⁹ it measured the relevance and impact of its technical assistance during the reporting period through “Participants Evaluation Survey”. The results were that some of the meetings under the Cooperation for Development Programme were highly effective and earned very high marks. The report concludes, *inter alia* that: “Although only a pilot project, the results were extremely encouraging: 78 percent of the participants were “totally” or “highly” satisfied.”

This contrasts sharply with the assessments of most independent observers of WIPO’s technical assistance meetings. The point, however, is that WIPO’s approach is not necessarily wrong. Many other organisations use participants’ evaluation to get the feedback of technical assistance recipients. The evaluation is event based and the context is very limited. The lesson here may be that there is not necessarily the right or wrong way of assessing the impact of technical assistance because as some commentators argue, evaluation is not a straight-forward exercise because technical assistance has multiple publics, objectives and constraints.²⁰ The bottom-line should be that whichever method is adopted the results are looked at in context and account is taken of all the factors that affect the accuracy of the results. The best criteria would be a broad one based on whether the assistance contributed or failed to contribute to the overall goal helping developing and least-developed countries minimise the risks related to IP especially with respect to the poor while maximising the benefits.

¹⁹ see, p. 10 of the Report

²⁰ Kostecki (note 14 above), p. 23.

The challenge is therefore not how to evaluate individual projects or programmes of particular institutions (this is fairly easy), but how to develop a framework that can help us know where we are and what the problems are; to evaluate, overtime, the overall contribution of the many programmes and projects to the ultimate goals of ensuring that countries put in place IP regimes that are appropriate for their development; and to know when and how to change approaches. While scientifically developed indicators can be developed to assess the impact of IP related technical assistance, developing or identifying such indicators may not be the important part of the process to improve IP technical assistance. In particular, it is doubtful that we know enough about the nature and the types of IP related technical assistance, the providers and recipients of such assistance and funding agencies to start developing specific evaluation criteria and indicators.

V. CONCLUSIONS

To significantly improve the design and delivery of IP related technical assistance, a sector-wide review and evaluation of the current programmes run by the various categories of providers is a necessary prerequisite. The model proposed by the IPR Commission could be refined and used to carry out this evaluation. Overall the process can begin by efforts to better map the needs of developing and least-developed countries in the context of the projections of the possible major developments in IP in the coming years; by recognising the multiplicity of providers and the different limitations that apply to each provider or category of providers; by better understanding the concepts of targeting, sustainability, neutrality and bias and professional responsibility in the provision of technical assistance; and by finding innovative ways to set an overall framework to carry out this process. The review and evaluation process should help us better understand the nature and types of IP technical assistance, the providers and recipients of IP technical assistance and funding agencies. Only when we know enough should we consider whether and how to develop impact assessment indicators beyond those that are already fairly well known.