

## **Towards development Oriented Technical Assistance in Intellectual Property Policymaking <sup>1</sup>**

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### **Introduction**

Technical assistance for intellectual property (IP) gained relevance during the mid-1970s when a growing number of developing countries started to join treaties administered by the World Intellectual Property Organisation (WIPO). After the adoption of the Uruguay Round package of agreements and more specifically the TRIPS Agreement, developing countries' need for IP-related technical assistance increased sharply. The fact that the Agreement contained relatively high new minimum standards of protection and enforcement – and was subject to the Dispute Settlement Understanding of the WTO – made policy-makers in the developing world understandably concerned about their capacity to fulfil obligations once their countries' transitional period for fully implementing TRIPs started to lapse in 2000.

Following the adoption of the TRIPS Agreement, new and important resources have been channelled to assist developing countries in its implementation. These have included assistance from multilateral institutions (WTO, WIPO, UNCTAD and UNDP, among others), bilateral donors (development co-operation agencies and national IP offices), philanthropic donors (foundations), as well as non-traditional providers, such as think tanks, research centres, academia and civil society organisations. These actors have delivered technical assistance on policy-making, legal reform, intellectual property rights (IPRs) administration, regulation and enforcement (Leesti & Pengelly, 2002).

The need for technical assistance has greatly expanded in recent years due to the very detailed IP chapters included in an ever increasing number of regional and bilateral trade agreements involving developed and developing countries. These 'new generation' agreements contain IP protection standards close to – and sometimes higher than – those currently applied in some developed countries and will bring many implementation challenges for the developing countries that decide to follow this avenue.

Various authors (Kostecki and Solignac Lecomte 2001) have argued that technical assistance provided by the main donors so far has only partially helped create sustained capacities in developing countries to fully assess the technical and political implications of complex trade agreements and participate actively in international negotiations. Similarly,

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the UK Commission on Intellectual Property (CIPR) Report concluded, after analysing the main current IP related technical assistance programmes and assessing their impact, that the results of those activities were neither commensurate with the efforts and resources spent so far nor always responsive to actual developing country needs (CIPR, 2002).

This study was commissioned as a background paper in the area of pro-development and pro-competitive IP policy-making, legal standard-setting and participatory processes in technical assistance for the DFID-sponsored IPR technical assistance workshop to be held in Burnham Beeches, UK, 15 and 17 of September 2004. It identifies the main concerns expressed over the provision of IP technical assistance and suggests possible ways and means to address them. It does not pretend to be exhaustive but rather to explore some options to integrate sustainable development concerns in the design, delivery and assessment of IP related technical assistance.

## 1. Defining and Advancing National Interests in the Field of IPRs: the Policy-Making Process

In order to design IP legislation and regulations that adequately reflect their specific development objectives and respond to developments at WTO and/or WIPO, developing countries must first clearly identify their national interests and needs. This will be critical in ensuring that economically disadvantaged societies make effective use of IP policy and participate effectively in international policy-making and standard-setting.

In defining those needs, countries have to bear in mind that IP protection is not an end in itself but an *instrument* for achieving specific objectives, which can vary and evolve in time according to the particular interest of a country and its level of development. There is a generally shared understanding that intellectual property policies exist to contribute to the enrichment of society by promoting the widest possible availability of new and useful goods, services and technical information that derive from inventive activity. More specifically IP policy in developing countries may aim, *inter alia*, at:

- promoting the disclosure and exploitation of innovations;
- fostering research and development (R&D) activities;
- promoting foreign direct investment and the importation of foreign technology;
- encouraging local manufacturing (e.g. through compulsory licensing);
- providing incentives for the transfer and commercial exploitation of knowledge (such as university R&D results and traditional knowledge); and
- protecting investments made (e.g. original data bases and protection of undisclosed data submitted for approval of agrochemical and pharmaceutical products).

Different industrial structures, production models, development strategies, and the availability of natural and human resources will call for different types and extent of IP protection (Correa 2002).<sup>3</sup>

Using IP tools to support a country's sustainable development strategy requires not only analytical capacity, appropriate legal instruments, efficient enforcement and administration mechanisms, but also effective innovation systems, learning processes and

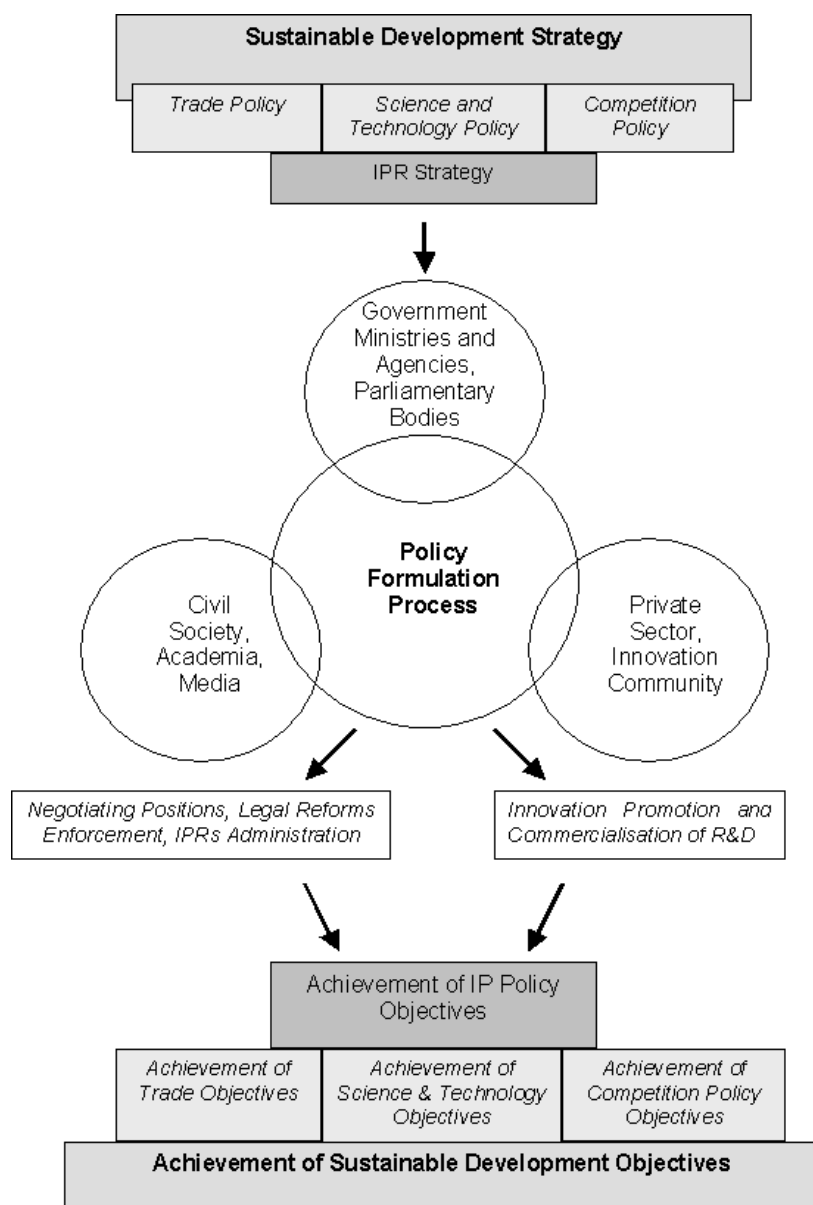
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<sup>3</sup> According to Linsu Kim, it is only after countries have accumulated sufficient local capabilities with extensive science and technology infrastructure to undertake creative imitation that IPR protection becomes an important element in technology transfer and industrial activities (Kim, 2003)

commercialisation of R&D. Coherent and effective IP policy-making processes at the national level will facilitate the definition of national interests in the framework of the country's overall sustainable development strategy; the translation of those interests into policies and negotiating objectives; and the allocation of roles and resources to advance those objectives at the national and international levels.

Following Solignac Lecomte's methodology and ICTSD's mapping of stakeholders<sup>4</sup>, Figure 1 provides a simplified illustration of the various stages of this process. Technical assistance providers should not intervene in the definition of national interests and the establishment of an IP strategy as donor countries' trade-related IP policy interests might conflict with developing country priorities. However, donors may want to enable, facilitate and support effective IP policy-making in developing countries. At the end of the day, it is also in their interest to negotiate with informed trade partners and ultimately to strengthen innovation in developing countries.

**Figure 1. Toward an Effective IP Policy-making Process**



<sup>4</sup> See Table 2 on page 8.

Technical assistance providers may intervene at six different but closely inter-related levels:

1. **Analysis.** Policy-makers and influencers need to fully understand the concepts, issues and different options at stake, as well as the benefits and costs associated with IPR protection in order to make informed decisions.
2. **Policy formulation.** This refers to the need to establish efficient formal and informal processes for the identification of national interest and the definition of an IP strategy to advance them at the national, regional and multilateral levels.
3. **Negotiation.** This includes the need to ensure active participation of developing countries in international rule-making and standard-setting bodies at the bilateral, regional and multilateral levels.
4. **Legal and regulatory reform.** This refers to assistance needs in the field of implementation of binding commitments and legal reforms.
5. **IPR administration, enforcement.** This refers to staffing and human resource issues, registrar services, operating procedures and automation models.
6. **Strengthening national innovation systems.** This refers to technical assistance needs in creating and promoting national innovation systems, learning processes, improvement of technological absorptive capacities and the commercialisation of the results of research and development.

The following section reviews very briefly the type of assistance provided by the major providers at the six levels identified above. It also highlights some of the concerns that have been raised in the design, implementation and assessment of technical assistance programmes.

## 2. Main Concerns Related to IP Technical Assistance Programmes

In practice, most of the technical assistance provided by major donors addresses capacity-building needs that fall under the fourth and fifth category identified above, namely: legal advice in the preparation of draft laws; support for modernising IPR administration offices; access to registrar services; or exchange of information among lawmakers, judges and enforcement. In contrast, as illustrated in Table 1 below, very little attention has been paid to addressing the needs under levels 2, 3 and 6. This is largely due to the fact that most of the main donors and providers of technical assistance such as WIPO and the WTO tend to have a fairly narrow mandate. From a sustainable development perspective it would, however, be desirable to redirect some of the assistance provided for implementation and IP administration to the facilitation of policy formulation processes and the creation of strong local analytical capacities. With respect to the orientation, content and process under which technical assistance programmes are designed, implemented and assessed, a number of experts and stakeholders have raised, among others, the following concerns:

- There is an excessive focus on IP as the solution to innovation concerns. Broad issues such as development, trade and industrial policy, science and technology, access to technological goods and enhanced competition have been addressed in a very limited manner and, in some cases, not addressed at all.

- IP-related technical assistance appears too often to be planned and delivered in isolation from development goals (CIPR, 2002). It is often considered as an end in itself and not as an instrument for achieving innovation or technological and development goals. Little attention has been given to different levels of development and cultural differences (one-size-fits-all solutions).
- There has been a tendency to over-emphasise the benefits of IP while giving very little attention to costs.
- Assistance has mostly focused on the implementation of obligations and not on the use of rights and flexibilities (Musungu, 2003).
- Technical assistance is essentially provided to a limited group of beneficiaries (mostly IP offices and certain business groups). Researchers, consumers, and civil society actors are rarely involved in policy-making and legal reform.
- Solutions are sometimes identified and designed by the providers and not by the beneficiaries of the assistance. Local capacities to find solutions are not being created. In some cases, this has resulted in biased technical assistance.<sup>5</sup>
- Emphasis has been put on ad hoc events instead of building durable relationships. Evaluation of the assistance delivered and of the results achieved by providers and beneficiaries remains insufficient.
- Most of the financial resources are concentrated on a limited number of providers. There might be a case for a more diverse supply of technical assistance to allow beneficiaries to choose among different providers.<sup>6</sup> Such 'competition' might help improving the quality of technical assistance and ensure that the services provided effectively respond to the beneficiaries' specific needs (Kostecki, 2001).

Table 1

Type of technical assistance provided		Main providers
Level 1	Analysis	<ul style="list-style-type: none"> <li>• Intergovernmental Organisations: <i>UNCTAD, UNDP, WHO, OECD, World Bank, UNESCO, WIPO CBD, South Centre.</i></li> <li>• NGOs: <i>ICTSD, Quakers, CPTech, MSF, Oxfam, CIEL, Third World Network.</i></li> </ul>
Level 2	Policy formulation	<ul style="list-style-type: none"> <li>• NGOs: <i>ICTSD, CPTech, MSF, Third World Network, SEATINI.</i></li> <li>• Intergovernmental Organisations: <i>UNCTAD</i></li> </ul>
Level 3	Negotiation	<ul style="list-style-type: none"> <li>• Intergovernmental Organisations: <i>South Centre, ACWL, AITIC</i></li> <li>• NGOs: <i>ICTSD, Quakers, CPTech, MSF, Oxfam, CIEL, Third World</i></li> </ul>

<sup>5</sup> Solignac Lecomte identifies two main types of bias, namely negative and positive discrimination. Negative discrimination implies a reluctance to give technical assistance in areas perceived as detrimental to the donor's or provider's interests, such as the use of compulsory licensing. Positive discrimination refers to providing assistance to areas, which generate benefits for the donor's or provider's own economy/constituency. An example would be providing assistance to UPOV-like plant variety protection and not for *sui generis* systems.

<sup>6</sup> This presupposes the beneficiaries' ability to make actual choices and highlights the importance of effective policy formulation in developing countries.

		<i>Network, SEATINI.</i>
Level 4	Legal reform and regulation	<ul style="list-style-type: none"> <li>• Intergovernmental Organisations: <i>WIPO, WTO, UPOV, UNCTAD, WHO, EPO, South Centre, the World Bank (Global HIV-AIDS Program, providing concrete recommendations and model laws for the implementation of the Doha Decision on Para.6)</i></li> <li>• Bilateral Donors, e.g. <i>USPTO, USAID, DFID, SIDA, CIDA</i></li> <li>• NGOs: <i>ICTSD, MSF, CIEL, CPTech</i></li> </ul>
Level 5	Implementation and IP administration	<ul style="list-style-type: none"> <li>• Intergovernmental Organisations: <i>WTO, WIPO, UPOV, EPO, OAPI, ARIPO, World Bank.</i></li> <li>• Bilateral Donors, e.g. <i>USPTO, USAID, DFID, SIDA, CIDA</i></li> <li>• Business and Lawyer Associations: <i>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).</i></li> </ul>
Level 6	Strengthening national innovation systems	<ul style="list-style-type: none"> <li>• Intergovernmental Organisations: <i>UNCTAD, UNESCO, UNDP, WIPO, ITC.</i></li> <li>• Philanthropic organisations: <i>Rockefeller Foundation, Ford Foundation, etc.</i></li> <li>• Academia: <i>national academies of science and technology.</i></li> <li>• NGOs: <i>ICTSD, IP light years, etc.</i></li> </ul>

### 3. Towards Development-oriented Technical Assistance in Intellectual Property Policy

Ensuring that the limited resources allocated to IP-related capacity-building effectively respond to the expectations of society will require a constructive multi-stakeholder debate highlighting the strengths and weaknesses of current programmes and exploring ways to improve them from a sustainable development perspective. This is beyond the scope of the present paper. Instead, this section suggests some elements for a development-oriented approach to IP-related technical assistance at the six levels identified above and in light of Millennium Development Goals (MDGs). It does not pretend to be exhaustive nor to cover all technical assistance needs in developing countries. Taking into account the criticism highlighted above, it rather tries to identify specific gaps or needs, which are not properly addressed by the main providers of TA and where current assistance might be redirected.

#### 3.1. Strengthening analytical capacities

##### *Enhancing understanding of concepts issues and implications*

One of the main gaps in technical assistance identified by various authors (Musungu, Dutfield, Leesti, Pengelly, 2002 and 2003) is the understanding of the concepts, issues and implications surrounding the IP system and scientific and innovation policies. Most of the experience in IP and other policy instruments comes from developed countries and, in many cases, the solution is simply transferred while the discussion and experience in interpreting or applying those standards are not. Understanding the concepts and issues, as well as their implications, may also vary according to the legal system (i.e. common law vs continental law) or in light of national/regional laws and jurisprudence. Full understanding is necessary before engaging in negotiations or before implementing international standards.

*The need for systematic cost/benefit analysis*

A solid understanding of the costs and benefits of strengthened IP protection together with the possible options to advance MDGs and public policy objectives, such as health, food security, education, the environment and innovation policies, is a *sine qua non* condition for informed decision-making. Empirical evidence on the role of IP protection in promoting innovation and sustainable development in developing countries remains limited and inconclusive.<sup>7</sup> In practice, however, there is a tendency to overstate the benefits and avoid discussion on costs. In this respect, there is a need for IP-related technical assistance to more explicitly recognise that there are both benefits and costs from IP protection (CIPR, 2002). Assessment of costs should not only include administrative reform and implementation; it should also address the effects on the national economy and other social and environmental costs when relevant (i.e. impact of monopoly rights on prices and access). While certain economic indicators of the relative importance of IPRs in developing countries have been identified (Lall, 2003), no effort has been made to design methodologies for assessing the impacts of introducing new IP standards in developing countries. UNCTAD and the World Bank could be the most suitable organisations for undertaking the design of such a methodology.

*Strengthening national and regional centres of excellence*

Most of the analysis produced in the field of IPRs is generated in developed countries, while only limited capacities exist in developing countries to monitor ongoing developments at the international level and undertake applied research at home. Most existing technical assistance programmes are still conceived as a transfer of knowledge and solutions from the North to the South: IP experts come to lecture developing country officials or train IP offices staff. This is not sufficient. Effective policy-making can only happen in the long run where there is a critical mass of actors able to understand the different options, define their interests and pursue them at the national and international levels. Building sustainable backstopping analytical capacity in developing countries is therefore a priority. Such an endeavour requires strengthening centres of excellence (universities, think tanks) that look at IPRs in the broader context of sustainable development at the national or regional levels, and which can provide informed inputs into the policy-making process.

These capacities need to be built in institutions, which work closely with governments but remain independent. Experience has shown that such institutions tend to be more durable and less sensitive to changes in government, while at the same time maintaining close contacts with policy-makers. Donors also need to be aware of the risks associated with favouring individual capacity-building over institutional development. Technical assistance programmes targeted at individuals all too often result in those people leaving the civil service for more lucrative positions in the private sector once they have accumulated some expertise. The creation of specific academic curricula addressing the issue of IPRs in the

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<sup>7</sup> What evidence exists suggests that appropriate levels of protection will vary widely. For example, developing countries that are relatively advanced in economic and technological terms have greater opportunities to benefit from IPRs than least-developed countries, for which the implementation of international IP rules represents a net short-term financial loss that is unlikely to be offset by economic and social gains for a long time.

broader context of development in developing countries universities might contribute to filling this important gap.

### 3.2. Enhancing the IP policy formulation process

#### *Promoting participation*

IPR regulations affect a broad scope of stakeholders concerned with multiple agendas, such as the protection of traditional knowledge, the right of farmers to save and exchange seeds, patentability criteria for living organisms, access to medicines and technology transfer. This cross-cutting nature of IPRs makes it difficult for governments to understand the complex web of interests and concerns surrounding IP policy, which are only partially – and sometimes inconsistently – addressed by a variety of international instruments such as TRIPS, the CBD, the FAO International Treaty on Plant Genetic Resources and UPOV.

While governments should maintain their role as decision makers and arbitrators between different national interests, inclusiveness and participation in policy-making and standard setting are fundamental for assuring legitimacy and acceptable results for the society at large. Article 7 of the TRIPS Agreement clearly indicates that, “protection and enforcement of intellectual property rights should contribute to the mutual advantage of producers and users of technological knowledge”. At the international level, intergovernmental organisations dealing with IP will also greatly benefit from integrating a wider group of constituencies with an interest in the IP system into policy-making process, such as consumers, public interest civil society groups, and small and medium enterprises (CIPR, 2002).

Traditionally, the conception of stakeholders or constituencies in the IP field has been narrow, including primarily IP offices, ministries of trade and the main users of the IP system, such as business associations and practitioners. The users of technology and creations have usually been under-represented in IP policy-making and generally receive scant attention from the main providers of technical assistance. Table 2 below provides a non-exhaustive list of stakeholders who should be involved more actively in policy-making from a sustainable development perspective.

**Table 2**

Map of relevant stakeholders in IP policy-making (ICTSD, 2001)

<i>Stakeholder Groups</i>	<i>Relevant Institutions</i>
1. <i>Government: Executive</i>	Ministries of Trade, Industry, Environment, Agriculture, Health, Education and Intellectual Property/Patent Offices
2. <i>The Judiciary</i>	Members of the Judiciary
3. <i>The Legislature</i>	Parliamentary Associations, National Parliaments
4. <i>Innovation Communities</i>	Universities, Research Management Associations, Science and Technology Institutes, Database Organisers, Venture Capitalists, Science Councils, Associations of Creators and Artists
5. <i>Scientists</i>	Academies of Sciences, International Councils on Science
6. <i>Academic/Research Organisations</i>	Universities, Think Tanks, Research Networks, Law, Business and Engineering Schools



<b>7. Civil Society Organisations (CSOs)</b>	Consumer Organisations, Development and Environment CSOs, Community-based Organisations, Indigenous Peoples
<b>8. Industry and Industry Associations</b>	Farmers Organisations, Biotech Industry, Pharmaceutical and Generic Industry, Practitioners, Chamber s of Commerce
<b>9. Media</b>	Press Agencies; Leading Newspapers

### *Institutionalising the Policy-making Process*

The active participation of relevant and well-informed stakeholders is not sufficient in itself. It is equally important to put in place a number of formal (inter-ministerial committees and public-private dialogue platforms) and informal (lobbying) mechanisms where interaction can take place (Solignac Lecomte, 2002). Developing countries have devised very few formal and informal mechanisms to encourage the participation of a wide range of society in policy-making for intellectual property reform (Leesti and Pengally, 2002). There are concerns among those who have established such co-ordination mechanisms that they might remain 'empty shells' due to lack of political leadership or a low level of understanding of IP policy issues among the different bodies participating in such committees.

Donors could play a role in facilitating the strengthening of interagency governmental committees to address IP policy issues, including bilateral, regional and international negotiations, with the participation of relevant ministries, the private sector, the research community and civil society. In this context, Reichman has proposed the establishment of permanent Advisory Councils for Trade Related Innovations Policies (ACTRIPS). These councils would be the focal point for interagency co-ordination and the integration of IP-related policies into the domestic legislation and evolving international legal standards, as well as their relation with national innovation systems (Reichman, 2003).

### **3.3. Negotiations in international rule making and standard setting bodies**

#### *Building strategic alliances*

The need for active developing country participation in rule-making and standard-setting bodies such as WIPO and the WTO must not be disregarded. From a developing country standpoint, the Doha Declaration on TRIPS and Public Health is probably one of the most successful negotiating outcomes. During this process, developing countries benefited from 'technical assistance' of a broad coalition of IGOs, civil society organisations and IP experts. This group of non-traditional providers of technical assistance was particularly successful in helping developing countries translate their specific public policy concerns into coherent and concrete negotiating positions, as well as putting developed countries under considerable pressure through highly visible public relations campaigns. This a prime example of how the support of non-traditional providers – through assisting counties in bringing out the development perspective and articulating their own proposals – can promote the achievement of results in international negotiations that strengthen the multilateral system.

#### *Managing multilevel negotiations*

A major concern in this area is that most activities aimed at supporting negotiating capacity have so far focused on the WTO (and to some extent on WIPO), but very little

attention has been paid to IPR chapters in bilateral free trade agreements, which increasingly contain 'TRIPS-plus' provisions. As developing countries engage in such negotiations, technical assistance is increasingly needed to help them identify clear negotiating strategies and weigh the pros and cons of improving market access at the cost of accepting tightened intellectual property protection standards, as well as limiting other spaces for sustainable development policies. Such assistance is particularly needed since developing countries remain in a weaker position when negotiating bilateral deals, as opposed to multilateral negotiations, where bargaining power can be substantially increased through coalition-building.

### 3.4. Legal reform and regulation

#### *Promoting coherence among international instruments and organisations*

IP treaties cannot be applied regardless of other international commitments. In 2000, all nations of the world forged the Millennium Development Goals (MDGs) to, among others things, eradicate extreme poverty and hunger, achieve universal education, promote gender equality, reduce child mortality, improve health, combat HIV/AIDS and other diseases, ensure environmental sustainability and create global partnerships for development. These goals are the basic guidance for all UN Agencies in implementing their respective mandates and for Members of the international community when designing national development goals.

IP-related technical assistance should incorporate in its design and content the guidance of the MDGs, as well as obligations under human rights conventions and multilateral environmental agreements, especially in areas where IP could have an important impact on policy goals. While there have been efforts to create synergies at the international level among UN agencies and with the WTO and World Bank; (e.g. joint rule-making under the Rome Convention, the co-operation agreement between the WIPO and the WTO, the MoU between the WIPO and the CBD, etc.), there are few cases of provision of technical assistance under common collaborative frameworks and under a broad international law perspective (e.g. joint design of technical assistance activities by various UN agencies, co-ordinated legal advice taking into account various international commitments, joint training courses, exchange of experts among secretariats, etc.). In that sense, there is still plenty of room for improving donor and provider co-ordination and delivery of IP-related technical assistance. The example of the Integrated Framework for Trade related Technical Assistance<sup>8</sup> for least-developed countries has been proposed as a potential alternative for improving the delivery of IP technical assistance (CIPR, 2002 and Pengelly, 2003).

#### *Achieving balanced legal reforms: the inclusion of rights and obligations*

When advising on the design and undertaking of legal reforms at the national level, providers of technical assistance need to look at all rights and obligations derived from international agreements. It is obvious that advice should cover what countries have to do nationally to fulfil their international obligations, but emphasis should be also placed in the use of the rights conferred by international agreements, including exceptions (e.g. patentability of plants and patent holder rights), legal options (e.g. UPOV-type or *sui generis* protection), flexibilities (e.g. use of preamble language and compulsory licensing; national discretion to define IPR key terms such as patentability criteria), special and

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<sup>8</sup> First mandated by the 1996 WTO Singapore Ministerial Conference in 1996. Participating agencies are the IMF, ITC, UNCTAD, UNDP, the World Bank and the WTO.

differential treatment clauses (e.g. periods of implementation) and technology transfer clauses. The advice also needs to look at various possible interpretations of obligations so as to allow the implementing countries to maximise the potential benefits derived from IP agreements and to frame their obligations in light of development objectives. Finally, most developing countries have an interest in designing an IP system that is not limited to facilitating registration of foreign IPRs, but also encourages domestic innovation and creativity. In this context, technical assistance providers might want to help developing countries design systems that are open to alternative models of protection, such as liability regimes and utility models.

An example of an effort to promote deeper understanding of the rights and obligations of the TRIPS Agreement is the *Resource Book on IPRs and Development* (2004)<sup>9</sup> prepared by UNCTAD and ICTSD with the support of DFID.

#### *The need for a pro-competitive approach to IPRs*

Apprehensions over potential anticompetitive effects of strengthened IP protection are common to both developed and developing countries. All countries, despite of economic disparities, share the common interest in preserving an appropriate balance between public and private interests. While a degree of 'privatisation' stimulates new investment in research and development, the tendency to multiply and strengthen intellectual property rights beyond what is necessary raises the cost of innovation and impedes follow-up applications. In particular, inappropriately stringent IPRs foster refusal to deal, barriers to entry and thickets of rights, which discourage firms in developing countries from undertaking adaptations and improvements tailored to local interests (Reichman, 2003). In this line of ideas, the US Federal Trade Commission (FTC) report on *Proper Balance of Competition And Patent Law and Policy* has expressed preoccupation with regard to the necessary balance between competition policy and patent law in the United States (Federal Trade Commission, 2003). According to the FTC, although the patent system works well, some modifications are needed to maintain a proper balance between competition and patent law and policy. Among the problematic areas identified by the FTC were the lack of patent quality examination, overly wide patentability standards (non-obviousness), excessive defensive patenting and burdensome and complicated licensing.

IP-related technical assistance should be expanded to cover competition law and policy. Presently, only about one-third of developing countries have competition laws and very few have the institutional capacity to implement such policies (UNCTAD, 2003). Technical assistance programmers should look at the relationship between IP and competition policy and promote pro-competitive regimes designed and implemented at the national level.

Such activities would be perfectly in line with Articles 6, 8 and 40 of the TRIPS Agreement. Donors and providers of IP-related technical assistance and competition policy co-operation could undertake a common effort to create more synergies among current programmes. Co-ordination among the World Bank, the OECD, UNCTAD, WIPO and the WTO could be of great help in this area.

### **3.5. IPR Administration and enforcement**

#### *Shifting the emphasis*

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<sup>9</sup> See <http://www.iprsonline.org/unctadictsd/ResourceBookIndex.htm>

A large, perhaps disproportionate, portion of IP-related technical assistance resources are currently allocated to IPR administration and enforcement. This includes institutional capacity, such as organisational and management arrangements; training, staffing and human resource issues; and operating procedures and automation models. However, some authors (Pengelly 2004) have convincingly argued that in small or very low-income countries with few patenting and trademark applications, it might not be technically feasible nor economically viable to establish and sustain an IP system comparable to developed countries in terms of capacity for administration, enforcement and regulation of IPRs. This probably applies to most LDCs. In those cases, donors might want to redirect some of the assistance provided in this field to other areas. One such area could be strengthening their technological base, as suggested in TRIPS Article 66.2, and thus increasing the possibilities of reaping off benefits from incentives and the IPR regime and other innovation policies.

### **3.6. Strengthening national innovation systems**

#### *The neglected issue of innovation and creativity*

As mentioned earlier, IP policy should be designed as an important component of scientific, innovation and cultural policies. Those policies are exactly the ones required to create or improve the technological and knowledge base needed for taking advantage of potential IP benefits under TRIPS Articles 7, 8, 66.2 and 67. Innovation and creative policies tend to include, among other issues, the following:

- the role of foreign direct investment in technology-intensive sectors;
- scientific and technological performance and capacity;
- the national R&D and cultural development budget;
- prioritisation of lines for public research;
- the structure and functioning of the national innovation systems (national research and industry linkages);
- industrial structures and private investment in R&D;
- education-related policies and supply of educational materials; and
- incentives and economic instruments to promote research and innovation (subsidies, prizes, innovation shows, alternative R&D and creativity models, etc.).

A number of IP issues should be taken fully into account – and structured according to the level of development of the country – when designing scientific and innovations policies. These issues include the maintenance of, and access to, patent databases; the scope of research exceptions in patent laws; exceptions in copyrights laws; quality of patent examinations; the relationship of the IP offices with the private and public research sectors; possible limitations to follow-up innovations that might arise from overbroad protection; and alternative IP schemes such as utility models.

## **Conclusions**

Policy and lawmakers in developing countries have a formidable agenda in intellectual property reform (Leesti and Pengelly, 2002) at all levels. This agenda includes the finalisation of the implementation of the TRIPS Agreement, accession processes for new members of the WTO, signature and ratification of WIPO treaties by developing countries, and the negotiation of 'new generation' bilateral and regional trade agreements with IP

chapters. Nevertheless, the implementation of international IP commitments is not the end of the story.

All countries must implement their IP commitments in a manner supportive of other international obligations, including the Millennium Development Goals, human rights treaties, multilateral environmental agreements and scientific co-operation treaties. Developing countries also need to frame IP policy and legal reform according to their own national development agenda, including scientific and technological policies in a manner that promotes competition among all economic actors.

There is a great deal of scope for improving the delivery and co-ordination of assistance in the IP field (CIPR, 2002). First and foremost, the provision of technical assistance should be demand-driven and integrated into national development policies instead of planned and delivered by donors in isolation from development goals. The Second Bellagio Dialogue<sup>10</sup> in 2003 stressed the need for broad participation in the design and implementation of technical assistance in order to ensure that it was appropriate to the development needs of recipient countries. This would require a much more comprehensive approach from donors and traditional technical assistance providers.

Policy-making at the national level needs effective co-ordination and participatory processes according to national priorities; and the ability of developing countries to co-ordinate policies across the government is crucial (CIPR, 2002). In addition to the relevant ministries, key national stakeholders should be involved. Technical assistance should allow the creation and development of co-ordinating mechanisms, as well as centres of excellence that would facilitate the generation of solid IP policies that reflect the entire range of national development interests.

Finally, the evaluation of IP-related technical assistance requirements should be based on developing country needs rather on what a donor might want or is able to provide (Pengelly, 2004). Surveys by donors and providers could allow them to target more precisely the type of requirements for reforming IP-related policies. The result of these surveys should be reflected in the strategic plans and budgets of donors.

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<sup>10</sup> The Bellagio Dialogues involve a diverse group of specialists, government experts and members of international and non-governmental organisations who meet in their personal capacity to assess current international trends on intellectual property and development. Through strategic discussions, the Dialogues aim to identify concrete recommendations that could contribute to the formulation of development-oriented IP policies.  
See [http://www.iprsonline.org/unctadictsd/bellagio/dialogue2003/bell2\\_description.htm](http://www.iprsonline.org/unctadictsd/bellagio/dialogue2003/bell2_description.htm)

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