

Toward Development-oriented Technical Assistance in Intellectual Property Policy-making

Following the adoption of the TRIPs Agreement, new and important resources have been channelled to assist developing countries in intellectual property (IP) policy-making, legal reform, administration, regulation and enforcement. However, a number of stakeholders have raised substantial concerns about whether this assistance has always been appropriately tailored to the circumstances and the specific needs of the developing country concerned. This article reviews some of these concerns and suggests ways to improve the design and implementation of IP-related Technical Assistance (IPRTA) programmes.

Policy- and law-makers in developing countries have a formidable agenda in intellectual property (IP) reform. This agenda includes the implementation and the review of the TRIPs Agreement, and the negotiation of new treaties such as WIPO's draft Substantive Patent Law Treaty. At the bilateral level, some OECD countries are encouraging developing countries to adopt higher standards of IP (TRIPs-plus), which limit their use of the flexibilities provided under the TRIPs Agreement.

In order to design IP legislation and regulations that adequately reflect their specific needs and commitments under the WTO and/or WIPO, developing countries must first and foremost clearly identify their national priorities as part of their overall sustainable development strategies; translate those interests into policies and negotiating objectives; and allocate roles and resources to advance them at the national and international levels.

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. Different industrial structures, production models, and the availability of natural and human resources will call for different types and extent of IP protection.

Technical assistance is needed at six different but closely inter-related levels:

- Analysis. Policy-makers and influencers need to fully understand the concepts, possible options, as well as the benefits and costs associated with IPR protection.
- Policy formulation. This refers to the need to establish formal and informal processes for the identification of national interest.
- Negotiation. This includes the need to ensure active participation in international rule-making and standard-setting.

- Legal and regulatory reform. This refers to assistance needs in the field of implementation of binding commitments.
- IPR administration and enforcement. This refers to staffing and human resource issues, registrar services, operating procedures and automation models.
- Strengthening national innovation systems. This refers to the promotion of national learning processes, enhancing technological absorptive capacities and the commercialisation of R&D.

In practice, most TA addresses capacity-building needs with regard to legal advice on the preparation of draft laws; support for modernising IPR administration offices and enforcement. This is largely due to the fact that the main providers such as WIPO and the WTO have a fairly narrow mandate and can not intervene at other levels. From a sustainable development perspective, however, it would make sense to redirect some of the current assistance to address the other needs identified above. The following section suggests some elements for a development-oriented approach to IP-related technical assistance at the six levels identified above. It does not pretend to be exhaustive but rather to identify specific gaps and unattended needs.

Analytical capacities

Understanding the concepts, implications and the costs and benefits of strengthened IP protection is a *sine qua non* condition for informed decision-making. In practice, however, there is a tendency to overstate the benefits and avoid a real discussion on costs including social and environmental costs. In addition, most technical assistance programmes are still conceived as a transfer of knowledge and solutions from the North to the South and local analytical capacities are not created. Building such backstopping capacities requires strengthening centres of excellence (universities, think tanks) at the national or regional levels, which can provide informed inputs into the policy-making process. The creation of specific academic curricula addressing the issue of IPRs in the broader context of development in those countries universities might contribute to filling this important gap.

The IP policy formulation process

IPR regulations affect a broad scope of stakeholders concerned with multiple agendas, such as the protection of traditional knowledge, farmers' rights, patents on life forms, public health and technology transfer. This cross-cutting nature of IPRs calls for inclusiveness in decision-making. However, the main providers of TA have so far only paid very limited attention to stakeholders such as parliamentarians, consumers, farmers, indigenous people, or NGOs.

In this context there is an urgent need to establish formal and informal mechanism where this public-private dialogue can take place. Reichman has proposed the establishment of permanent Advisory Councils for Trade Related Innovations Policies to ensure interagency co-ordination and the integration of IP-related policies into the domestic legislation, as well as their relation with national innovation systems.¹ In practice, however, developing countries have devised very few mechanisms of this sort, and there are concerns among those who have, that they tend to remain 'empty shells' due to lack of political leadership or a low level of understanding of IP policy issues among the different stakeholders.

Negotiations in international rule making and standard setting bodies

From a developing country standpoint, the Doha Declaration on TRIPs and Public Health is one of the most successful negotiating outcomes. Surprisingly enough, traditional technical assistance providers only played a marginal role in this process. Most assistance was provided

by a broad coalition of IGOs, NGOs and IP experts. This group of non-traditional providers was particularly successful in helping developing countries translate their specific public policy concerns into concrete negotiating positions, as well as putting developed countries under pressure through highly visible public relations campaigns.

Legal reform and regulation

TA should incorporate in its design and content the guidance of the Millennium Development Goals, as well as obligations under human rights conventions and multilateral environmental agreements. Furthermore, when advising on the design of legal reforms at the national level, donors need to look at all rights and obligations including exceptions (e.g. patentability of plants), legal options (e.g. UPOV-type vs *sui generis* protection), flexibilities (e.g. use of compulsory licensing), transition periods and technology transfer clauses. Furthermore, developing countries have an interest in IP systems that are not limited to facilitating registration of foreign IPRs, but also encourage domestic innovation. In this context, donors should help design systems that are open to alternative models of protection, such as liability regimes and utility models.

The need for a pro-competitive approach to IPRs

The tendency to broaden the scope of IP protection raises might affect competition. 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. These apprehensions over potential anticompetitive effects of strengthened IP protection are common to both developed and developing countries, as reflected in a recent US Federal Trade Commission (FTC) report on Proper Balance of Competition And Patent Law and Policy, which highlights the need for a better balance between competition and patent law and policy. With only about one third of developing countries having competition laws in place, there is an urgent need to enhance TA in this field.

IPR administration and enforcement

A large, perhaps disproportionate, portion of IP-related technical assistance resources are currently allocated to IPR administration and enforcement. However, in low-income countries with few patenting and trademark applications, it might not be economically viable to establish and sustain an IP system comparable to developed countries in terms of capacity for administration, enforcement and regulation of IPRs. In those cases, donors might want to redirect some of the assistance provided in this field to other areas such as strengthening innovation systems and transfer of technology, as suggested in TRIPs Article 66.2.

Strengthening national innovation systems

IP policy should be designed as an important component of scientific, innovation and cultural policies and take into consideration issues such as:

- The role of foreign direct investment in technology-intensive sectors;
- The structure and functioning of the national innovation systems (national research and industry linkages, 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 into account when designing scientific and innovation policies. These 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.

This article is a summarised version of a background note prepared by ICTSD for the DFID-sponsored IPR Technical Assistance workshop in Burnham Beeches, UK, on 15-17 September 2004.

¹ Reichman, Jerome, (2003), *Managing the Challenge of a globalised intellectual property regime*. ICTSD-UNCTAD. Paper prepared at the Second Bellagio Series of Dialogues, Bellagio, 18-21 September 2003.

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