

TECHNICAL ASSISTANCE ON IPRS FOR DEVELOPING COUNTRIES: SOME STRATEGIC POLICY ISSUES AND RECOMMENDATIONS FOR FUTURE PRIORITIES FOR DONORS AND DEVELOPING COUNTRIES

I. INTRODUCTION

This short note has been commissioned by the International Centre for Trade and Sustainable Development, Geneva (ICTSD) as a background document for the *Second Bellagio Series on Development and Intellectual Property*, 18-21 September 2003 in Bellagio, Italy. The note has been prepared as a policy-oriented input into the strategic discussions at Bellagio, rather than an academic paper; seeking to provide concrete suggestions to stimulate debate and offer specific recommendations on priority areas for discussion.

The note draws significantly on the findings and outputs of the major workstream on institutional capacity and technical assistance issues for developing countries in IP administration, regulation and policymaking undertaken by the Commission on Intellectual Property Rights (CIPR) between June 2001 and September 2002. Other sources include primary material from IP technical assistance donors; the *Second WTO/OECD Report on Trade-Related Technical Assistance (July 2003)*; and the report of a conference on *Implementation of the Doha Declaration on the TRIPS Agreement and Public Health: Technical Assistance – How to Get it Right?*, organised by Medicines Sans Frontieres and Oxfam International in Geneva in March 2002.

As well as being an input to the discussions at the second Bellagio meeting, the note is an interim output of one of the workstreams in the new ICTSD project on *Integrating Sustainable Development Objectives and Intellectual Property-related Technical Assistance Services*. It is anticipated that two substantial analytical papers on IP technical assistance will be produced by ICTSD consultants as further outputs from this workstream of the project in 2004.

II. OVERVIEW

As developing countries continue implementing IP-related treaties and prepare for new negotiations at the multilateral, regional and bilateral level (WTO, WIPO, FTAA, etc), appropriate and effective capacity building will be crucial if these countries are to effectively use IP tools in the pursuit of their sustainable development goals. While some, particularly in developing country IP offices, highly value the technical assistance provided by institutions such as WTO, WIPO or bilateral donors, a number of experts and organisations have raised substantial concerns about whether this assistance has always been appropriately tailored to the circumstances of the developing country concerned.

In particular, it has been argued that the advice provided by these institutions doesn't always fully take into account all the possible options and flexibilities to accommodate public policy objectives. These criticisms relate, among others, to the fact that WIPO – one of the main technical assistance providers in this field – focuses, by its founding charter, mainly on the promotion of IPRs and does not integrate broader development concerns in its objectives and functions.

Ensuring that the limited resources allocated to IP technical assistance effectively respond to the expectations of all members of society in developing countries will require a multi-stakeholder and constructive debate highlighting the strengths and weaknesses of current programmes and exploring ways to improve them from a sustainable development perspective. Surprisingly enough, however very limited independent work has been undertaken in this area and the literature is scarce.

The rest of this note discusses the available evidence and points towards some priority areas for future consideration regarding the provision of IP technical assistance to developing countries in recent years in terms of:

- the main sources of IP-related technical assistance programmes;
- the main features and differences of these programmes;
- how IP-technical assistance is designed, implemented and monitored; and
- the effectiveness and impact of technical co-operation programmes in terms of the sustainable modernisation of the intellectual property infrastructure in developing countries.

The note concludes by offering some key questions for discussion by participants at the Bellagio meeting and proposes some possible specific recommendations to problems and priority issues discussed in the body of the paper.

III. MAIN SOURCES OF IP TECHNICAL ASSISTANCE TO DEVELOPING COUNTRIES

Under Article 67 of the TRIPS Agreement, developed country WTO Members are formally obligated to provide technical and financial assistance to developing countries and LDCs to facilitate the implementation of the TRIPS Agreement. As the annual submissions to the WTO TRIPS Council since 1995 reveal, most developed countries can be said to be providers of intellectual-property related technical assistance to developing countries (eg the European Union and its member states, the United States, Japan, Australia, Canada, New Zealand, Norway, and Switzerland).

Developed countries provide technical and financial assistance to developing countries either bilaterally (sometimes through the national development co-operation agencies but mainly by national intellectual property offices); or multilaterally (through their contributions to the United Nations agencies and other international organisations, including the European Commission in the case of the 15 member states of the European Union). This makes it fairly complex to measure or quantify the scale of commitments by any individual developed country over a given period of time.

The principal international organisations involved in the provision of IP-related technical assistance to developing countries are WIPO, EPO, the World Bank, UNDP and UNCTAD¹.

¹ Under the WTO-WIPO co-operation agreement, much of the WTO's role in the explanation of the TRIPS Agreement etc is delegated to WIPO. The WTO Secretariat, of course, continues to provide invaluable advice to WTO Member States and observers on various matters.

WIPO has around 60 full-time professional staff working in its Development Cooperation division (including the WIPO Worldwide Academy), whilst the EPO has about 40 staff in its Directorate for International Technical Co-operation.

This makes WIPO and the EPO the most significant donor organisations in terms of human resources deployed in management of IP-related technical co-operation activities. UNDP and the World Bank, in contrast, have devoted mainly financial resources, either directly to developing countries or via contributions to WIPO trust funds. UNCTAD advises some developing countries in accession to WTO on implementation of the TRIPS Agreement and undertakes research on intellectual property and development issues².

A number of other smaller organisations are also active in undertaking research and providing technical assistance to developing countries in the area of intellectual property. For example, the South Centre, ICTSD (both in Geneva) and the International Development Research Centre (IDRC) in Canada both have active policy research programmes. In the area of collective copyright management, KOPINOR, the Norwegian Reproduction Rights Organisation, provides assistance to collection societies in Africa with funding from the Norwegian government.

IV. MAIN FEATURES OF IP TECHNICAL ASSISTANCE PROGRAMMES

The requirements for IP technical assistance and capacity building which developing countries have are many and various, relating *inter alia* to IP policymaking, legal reforms, administration, regulation and enforcement of IPRs (Leesti & Pengelly, 2002). Accordingly, the types of technical assistance that have been provided by donor organisations fall into the following broad categories (Lehman, 2000b):

- (a) general and specialised training;
- (b) legal advice and assistance with preparing draft laws;
- (c) support for modernising IPR administration offices (including automation) and collective management systems;
- (d) access to patent information services (including search and examination);
- (e) exchange of information among lawmakers and judges; and
- (f) promoting local innovation and creativity.

Training and human resource development, such as that provided through the WIPO Worldwide Academy for example, has been a major focus. More recently, assistance for automation of IP administration in developing countries and regional intellectual property organisations has also become significant, including the WIPO Net programme³ at an estimated cost of over CHF97m between 2000 and 2005 (WIPO, 2001b).

² UNCTAD, in collaboration with the ICTSD, is also currently implementing a project to provide developing countries with policy guidance on implementation of the TRIPS Agreement and on the upcoming reviews of the TRIPS Agreement. The project is financed by the UK Department for International Development.

³ WIPO Net will provide on-line services such as secure electronic mail, secure exchange of intellectual property data, hosting of national IPR agency websites, and Internet connectivity to 154 intellectual property offices around the world.

As most of the implementing agencies of IP technical assistance (ie WIPO, EPO and developed country patent offices) do not have agencies in the field, short-term advisory missions and consultants are normally deployed in developing countries to plan, deliver and monitor programme activities.

Interestingly, in the countries that have received World Bank-funded assistance in this area (eg Brazil, Indonesia, Mexico), upgrading of the national IP systems has sometimes been approached as one component of much broader programmes of policy reform and capacity building aimed at stimulating R&D spending and improving industrial productivity and competitiveness.

Unfortunately, only a small number of such programmes have been undertaken and detailed evaluations do not appear to be available. Potentially, these could provide a model for better integrating IP reforms and related-capacity building within the broader national development plans of developing countries and the assistance strategies of their donor partners.

V. SCALE AND COVERAGE OF IP-TECHNICAL ASSISTANCE PROGRAMMES

Providing an accurate picture of expenditures on IP technical assistance programmes across the developing world in recent years is very difficult due to lack of available data sources. That said, it is possible to give some indication, in broad terms, of the scale and coverage of such programmes undertaken by some of the principal international organisations and bilateral donors in recent years.

Beginning with WIPO, between 1996 and 2001, WIPO's budgeted expenditure on development co-operation was around CHF174m (CHF45m in 1996-1997; CHF58m in 1998-1999 and CHF71m in 2000-2001)⁴. For the 2002-2003 biennium, however, WIPO's expenditure on development co-operation is budgeted at approximately CHF100m, with around 20% of this in trust fund contributions from bilateral and multilateral donor agencies (Japan alone will contribute about CHF5m)⁵.

Analysing the geographical distribution of these expenditures amongst developing countries is not possible with the data WIPO provides publicly. However, WIPO's trust fund resources are mainly concentrated on Latin America and Asia-Pacific regions. In the 2000-2001 biennium, WIPO's development co-operation budget allocation for Africa was only around CHF7m. At the country level, in the same period budget allocations for national programmes with African nations would typically have been in the range of only CHF80-120,000 over 2 years.

⁴ These figures represent the revised budget amounts taken from the WIPO documents for the following biennium and cover the following programmes only: Co-operation with Developing Countries; Co-operation with Certain Countries in Europe/Asia; and WIPO Worldwide Academy.

⁵ A significant proportion of these expenditures (around 40% for 2002-2003) are staff-related expenses rather than programme costs, though of course WIPO staff are directly engaged in delivering and managing some technical co-operation activities. These budget figures for development co-operation do not include expenditure on WIPO Net, however.

Moving on, for the period 1990 to 2005, another important donor, the European Commission, has committed over €30m in programmes being implemented by the EPO across the developing world. About €4.5m of this was for programmes in China alone and a further €9.5m was allocated to countries in Eastern Europe. In addition, from its own resources, EPO committed almost €19m in IP technical assistance programmes between 1996 and 2001 (this figure excludes the EPO's own staff costs).

Concerning bilateral donors, accurate information is even harder to obtain, as so many countries are involved, and often through a number of different national agencies. Moreover, a further difficulty for analysis is that much IP technical assistance tends to be through a large number of small scale discrete activities (eg training courses). However, the *Second WTO/OECD Report on Trade-Related Technical Assistance (July 2003)* does provide some data on technical assistance linked to the TRIPS Agreement. According to the donor survey data in that report, in 2001 bilateral donor expenditures on IP technical assistance amounted to a total of US \$13m, with 53 activities reported. The total expenditure level by bilateral donors on IP technical assistance fell to US \$9m in 2002, but the number of activities reported increased to 99.

VI. EFFECTIVENESS AND IMPACT OF IP TECHNICAL ASSISTANCE

An important constraint in discussing IP technical assistance for developing countries is the lack of formal evaluation literature and meaningful information on key aspects of specific technical co-operation programmes (such as financial information) in the public domain. Given the lack of evaluation literature in particular, it is very difficult to comment authoritatively on the impact and effectiveness of IP technical co-operation programmes undertaken by the various donor organisations in specific countries or regions. Notwithstanding the above, based on evidence available, there are a number of broad remarks that can be made.

On the one hand, it is clear that there have been some considerable achievements in the last 5-10 years in terms of modernising the IP infrastructure and developing the associated human resources in the developing world. Large numbers of people, from a variety of professional backgrounds, have received general and specialised training in intellectual property subjects. Equally, many developing countries have over-hauled their IP legislation and have taken advantage of international co-operation mechanisms like the PCT and Madrid systems to make important efficiency gains and provide improved service levels. As a result of increasing automation of IP administration, developing countries are now processing effectively more applications for all forms of industrial property rights.

Perhaps the regions where there has been the biggest impact from IP technical assistance are Latin America and Eastern Europe. But there has also been significant development of institutional capacities in other developing countries like China, Morocco, Vietnam, Trinidad, and India, as well as in the regional IP organisations such as OAPI and ARIPO.

At the same time, many low-income countries, and particularly LDCs, still face considerable challenges in participating in international IP rule-making and developing their IP infrastructure in ways compatible with their development needs. Furthermore, there are important issues for the financing, design and delivery of technical co-operation to these countries that need be addressed. Three priority areas are discussed in the next section.

VII. PRIORITIES FOR FUTURE ACTION AND DISCUSSION BY IP-TECHNICAL ASSISTANCE DONORS AND DEVELOPING COUNTRIES

- i) How can we make IP technical assistance for developing countries more effective?

Design and delivery of IP technical assistance to developing countries needs to be improved. At times, technical assistance activities have not been well co-ordinated by the multiple donors involved (in Vietnam, for example, 8 different donor agencies provided assistance in the country between 1996 and 2001); or by the recipient countries. The result is duplication of efforts or, at worst, waste of resources and conflicting advice.

More positively, there is much *ad hoc* co-operation between donors and some good instances of more formalised collaboration (eg the WIPO-WTO co-operation agreement). Donors should build on these successes. One option for improving donor co-ordination and delivering comprehensive assistance programmes, integrated within the national development strategies, could be to incorporate IP technical assistance fully under the Integrated Framework for Trade-Related Technical Assistance for LDCs.

Donors and developing countries also need to find new ways of working together better. In particular, better use could be made of the existing institutional mechanisms, at the national, regional and international levels, for understanding the IP related capacity building needs of developing countries, for sharing information on technical assistance projects, and for undertaking collaborative sector-level reviews as a part of a continuous impact evaluation and elaboration of best practice. There are some encouraging recent signs that some donors – for example DFID and the EPO – are interested in promoting such initiatives. These need to be followed-up.

- ii) Is the role of donors in providing IP technical assistance in developing countries always appropriate? If not, what can be done?

In recent years, concerns have been expressed from a number of different sources regarding the role of donors in providing advice and technical assistance to developing countries for reform of intellectual property legislation. For instance, at the conference on *Implementation of the Doha Declaration on the TRIPS Agreement and Public Health: Technical Assistance – How to Get it Right?*, organised by Medicines Sans Frontieres and Oxfam International in Geneva in March 2002, a main focus was the role of WIPO – although the same concerns could apply to other donors – and the quality and emphasis of its technical assistance. In particular, participants at the conference voiced concerns that WIPO's mandate to strengthen IP protection worldwide may not be consistent with the need for more nuanced levels of IP protection that take into account varying stages of economic development and local conditions in developing countries, especially in light of the crisis in access to essential medicines.

One problem here is that, for several reasons, it is quite difficult to verify accurately and objectively whether such concerns are justified or not. Each case has its own unique set of circumstances; required data sources are not readily available; and it is not clear who would be the right interlocutors from developing countries. Moreover, in any given developing country, there is likely to be a range of opinions as to what should be the right level of IP protection and

such opinions will clearly inform judgements as to whether technical assistance has been appropriate or inappropriate to the national circumstances.

However, even if such concerns about IP technical assistance turn out to be not as justified as some fear, they do certainly demonstrate the potential sensitivity and importance of this area of domestic regulatory policymaking in developing countries. As many developing countries will continue to depend on technical assistance in this area for some time to come, particularly as they proceed with implementation of the TRIPS Agreement, it seems important that IP technical assistance donors need to develop mechanisms and strategies to respond positively and clearly to these concerns. A related issue is whether the scope of IP technical assistance has been too narrowly focused on rewriting national legislation to implement the provisions of TRIPS – but this begs the question of how broader-based IP capacity programmes could be financed and delivered.

ii) How could an expansion of IP technical assistance be financed?

While some assistance is on offer now to developing countries, it seems insufficient even for the narrower task of supporting better participation in IP rule making and modernising IP administration – let alone the much bigger job of broadening the scope of IP assistance programmes to encompass a package of policy reforms and capacity building aimed at increasing access to essential IP-protected products (such as medicines, farm inputs and textbooks) or stimulating more local innovation through R&D to improve productivity and competitiveness. More finance clearly needs to be brought on stream over the next few years, particularly as many developing countries are still struggling to implement the TRIPS Agreement, compatible with their development needs.

Given the very low levels of IPR creation in most developing countries, IP technical assistance is unusual in that a significant share of the resultant direct benefits can be expected to go to foreign IPR holders – who are mainly from the developed countries. Of course, even the poorest countries may obtain some indirect benefits from modernising the IP (through increased technology transfer for example), but these are less certain and likely to depend on a range of other factors. Therefore, it is appropriate that the financing required for technical assistance aimed at modernising the national IP infrastructure in these countries should normally be raised from IPR holders in the form of service user fees.

In fact, organisations like WIPO, EPO and the patent offices of some developed countries already adopt this approach to a large extent (eg WIPO's total projected income of CHF530m includes service fee revenues of over CHF455m). Additional financing for IP technical assistance to developing countries could be relatively easily and equitably generated in this way. Indeed, if WIPO's PCT fees had remained at the level of the 1996-1997 biennium – rather than being substantially reduced – WIPO's income for the 2002-2003 biennium would have been CHF279m higher (WIPO, 2001b); and this sum would have been of enormous significance as additional funding for technical assistance to developing countries.

VIII. SOME POSSIBLE SPECIFIC RECOMMENDATIONS TO CONSIDER

Finally, we conclude this note by offering some potential responses, in the form of five specific recommendations, to the priority issues for donors and developing countries in IP technical assistance.

First, delivery of IP technical assistance to developing countries should usually be through multi-year, broad-based programmes and not just one-off events. Assistance should cover support for one-time expenditure such as premises, automation, equipment, communications, staff training, consultancy support, international travel, public awareness raising programmes, patent information systems, website development, policy research and legislation development. Financial sustainability of IP institutions should be a key objective from the outset; and a wide range of stakeholders should be involved.

Second, in order to meet the special needs of developing countries in developing the IP regime and wider innovation and technology infrastructure they require, donors should plan to significantly expand their commitments to IP technical assistance programmes in developing countries over the next 5-10 years. This should be financed through income generated from IPR service user-fees in developed countries and at WIPO.

Third, donors should strengthen their present systems for monitoring and evaluation of IP technical assistance programmes. A rolling programme of external impact evaluations should be undertaken and published.

Next, to address concerns regarding appropriateness of IP technical assistance, WIPO should take the lead in developing detailed due-diligence procedures for its staff and consultants on the provision of technical assistance to developing countries for reform of domestic intellectual property legislation, including for implementation of TRIPS.

Finally, a work programme on better donor co-ordination and best-practice for IP technical assistance should be established. The work programme would be undertaken by a group of experts from donors and developing countries and should be based on a series of detailed case studies on different developing countries/regions. The output of the work programme would be a set of detailed donor guidelines for improving the delivery of IP technical assistance, but the process in itself would also be useful in improving dialogue and information sharing amongst donors.

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