

34: International and Technical Cooperation and Transfer of Technology

Article 69 International Cooperation

Members agree to cooperate with each other with a view to eliminating international trade in goods infringing intellectual property rights. For this purpose, they shall establish and notify contact points in their administrations and be ready to exchange information on trade in infringing goods. They shall, in particular, promote the exchange of information and cooperation between customs authorities with regard to trade in counterfeit trademark goods and pirated copyright goods.

Article 67 Technical Cooperation

In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.

Article 66 Least-Developed Country Members

1. [...]
2. Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.

1. Introduction: terminology, definition and scope

The above-cited provisions of TRIPS create the basis for an international regime between its Members concerning international cooperation, technical cooperation and incentives for technology transfer. These three elements differ from each other and therefore need to be clearly distinguished.

International cooperation (Article 69) has the purpose of eliminating international trade in IPR-infringing goods. The provision makes explicit reference to trade in counterfeit trademark goods and pirated copyright goods and thus responds to the main concern voiced by industrialized countries prior to the Uruguay Round negotiations. According to Article 69, trade in IPR-infringing goods is to be eliminated through international cooperation. This is to be achieved by way of the establishment of contact points within Members' administrations, which will be notified to the other Members, and whose purpose is to exchange information on trade in infringing goods. In particular, the Members shall promote the exchange of information and cooperation between customs authorities with regard to trade in counterfeit trademark goods and pirated copyright goods. This provision applies to all Members regardless of their level of development. It aims to tighten up international procedures for cooperation in this field.⁵⁵

By contrast, the other provisions that contribute to this regime of cooperation are addressed specifically to developed country Members and aim to remedy particular problems experienced by developing and least-developed country Members. Two policy strands are covered: technical cooperation (Article 67) and the encouragement of technology transfer (Article 66.2). Under Article 67, developed country Members are obliged, under certain conditions,⁵⁶ to provide for technical and financial cooperation in favour of both developing country and least-developed country Members. Despite this obligation, the overall purpose of technical cooperation under Article 67 corresponds to developed countries' interests in that technical cooperation is to be provided "in order to facilitate the implementation of this Agreement".

The second policy strand applies only to the LDC Members, as expressed by Article 66.2. As opposed to the above provisions on international and technical cooperation, this provision promotes the interests of the LDCs. By obliging developed country Members to provide for incentives for the promotion and the encouragement of technology transfer to LDCs, this provision takes account of concerns that the benefits of TRIPS might bypass the world's poorest nations.

Transfer of technology may be realized through formal as well as informal means. Informal technology transfer is carried out by imitation, and is typically not based on any monetary transaction or legal agreement.⁵⁷ Formal technology

⁵⁵ Note that the rather general terms of this provision are complemented by detailed minimum requirements with respect to the enforcement, acquisition and maintenance of intellectual property rights (Articles 41–62; Article 51 referring to border measures concerning counterfeit trademark and pirated copyright goods.). For details, see Chapter 30 of this Resource Book.

⁵⁶ These conditions will be examined in detail below, Section 3.

⁵⁷ See UNCTAD-ICTSD, *Intellectual Property Rights: Implications for Development*, Policy Discussion Paper, Geneva 2003, chapter 5 [hereinafter UNCTAD-ICTSD Policy Discussion Paper].

2. History of the provisions

727

transfer is a commercial operation, based on a legal arrangement that involves monetary transaction. It includes foreign direct investment (FDI), joint ventures, whollyowned subsidiaries, licensing, technical-service arrangements, joint research and development (R&D) arrangements, training, information exchanges, sales contracts and management contracts.⁵⁸

2. History of the provisions

2.1 Situation pre-TRIPS

Prior to the adoption of TRIPS, the prevailing concern as regards IPR regimes in developing countries was the perceived lack of adequate protection. In particular, developed countries with advanced IPR protection, and the transnational corporations (TNCs) headquartered in such countries, expressed worries about the adverse effects on trade and investment stemming from inadequate IPR protection and enforcement in developing countries leading to the extensive copying of goods protected by such rights in their home countries. These copies could then be traded with ease across borders, thereby undermining the protection afforded to its owner by the IPR in question. Stronger cooperation in the elimination of such trade was therefore a major objective for the advocates of TRIPS.

On the other hand, while developing countries were perceived as having weak IPR regimes, they were also perceived as having very real problems obtaining technology that would be useful to their development. In response to such concerns, the Draft UN Code on the Transfer of Technology contained *inter alia* provisions that exhorted developed countries to implement policies aimed at encouraging technology transfer to such countries.⁵⁹ Equally, the OECD Guidelines for Multinational Enterprises, concluded in 1976, contained a chapter on “Science and Technology” which exhorted TNCs to co-operate in the science and technology policies of the countries in which they operated.⁶⁰ Furthermore, at the national level, special technology transfer regimes were adopted by many developing, and some developed, countries to regulate the terms and conditions of inward technology transfer transactions.⁶¹ Thus, prior to TRIPS, there was wide recognition of the special problems of developing countries in relation to technology transfer in both national laws and international deliberations.

2.2 Negotiating history

The negotiating history of these provisions suggests that the Agreement did not undergo any major changes. The most significant differences are outlined below.

⁵⁸ See also Keith Maskus, *Encouraging International Technology Transfer*, UNCTAD-ICTSD, Geneva 2004, available at <<http://www.iprsonline.org/unctadictsd/projectoutputs.htm#casestudies>>. [hereinafter Maskus, 2004]

⁵⁹ See S. Patel/P. Roffe/A. Yusuf, *International Technology Transfer. The Origins and Aftermath of the United Nations Negotiations on A Draft Code of Conduct*, Kluwer Law International, The Hague, 2001 [hereinafter Patel/Roffe/Yusuf]. See also UNCTAD, *International Investment Agreements: A Compendium* (New York and Geneva 1996, United Nations) Vols. I–III (See in particular chapters 2, 6 and 7 of Vol. I. at pp. 184–6, 195–8) [hereinafter UNCTAD, Compendium (IIAS)].

⁶⁰ UNCTAD, Compendium (IIAS), Vol. II. at p. 192.

⁶¹ See Michael Blakeney, *Legal Aspects of the Transfer of Technology to Developing Countries* (Oxford 1989, ESC Publishing).

728 International and technical cooperation and transfer of technology

2.2.1 Article 69

2.2.1.1 The Anell Draft⁶²

“4. International Cooperation (68)

PARTIES agree to cooperate with each other with a view to eliminating international trade in goods infringing intellectual property rights. For this purpose they shall establish and notify contact points in their national administrations, and shall be ready to exchange information on trade in infringing goods. They shall, in particular, promote the exchange of information and cooperation between customs authorities with regard to trade in counterfeit goods. (68) (See also point [–] of Part IX below.)”⁶³

2.2.1.2 The Brussels Draft⁶⁴

“PARTIES agree to cooperate with each other with a view to eliminating international trade in goods infringing intellectual property rights. For this purpose, they shall establish and notify contact points in their administrations and be ready to exchange information on trade in infringing goods. They shall, in particular, promote the exchange of information and cooperation between customs authorities with regard to trade in counterfeit goods.”

As regards Article 69 the main change involves an extension of the types of illicit trade in IPRs that are to be covered by the duty of cooperation and exchange of information introduced by this provision. Thus, while the Anell Draft and the Brussels Draft specified only “trade in counterfeit goods”, the final version refers to trade in “counterfeit trademark goods and pirated copyright goods”.

2.2.2 Article 67

2.2.2.1 The Anell Draft

“2. Technical Assistance (68); Technical Cooperation (73); International Cooperation, Technical Assistance (74)

2A Developed PARTIES shall, if requested, advise developing PARTIES on the preparation and implementation of domestic legislation on the protection and enforcement of intellectual property rights covered by this Annex as well as the prevention of their abuse, and shall grant them technical assistance on mutually agreed terms and conditions, regarding the establishment of domestic offices and agencies relevant to the implementation of their intellectual property legislation, including the training of officials employed in their respective governments. (68)

2B PARTIES to this Agreement shall provide for technical cooperation to developing and least-developed PARTIES upon co-ordination by the Committee

⁶² Document MTN.GNG/NG11/W/76, of 23 July 1990.

⁶³ Note that the referenced section of Part IX provided: “*Desirous* of providing for adequate procedures and remedies to discourage international trade in counterfeit and pirated goods while ensuring an unimpeded flow of trade in legitimate goods;”

⁶⁴ Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Revision, Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, MTN.TNC/W/35/Rev. 1, 3 Dec. 1990.

3. Possible interpretations

729

established under point 1B of Part VIII below in collaboration with the World Intellectual Property Organization, and other international organizations, as appropriate. Upon request, such cooperation includes support and advice as to training of personnel, the introduction, amendment and implementation of national laws, regulations and practices, and assistance by the Committee for settlement of disputes. (73)”

2.2.2.2 The Brussels Draft. This draft was essentially identical to the final version of Article 67.

Two main changes can be noted between the Anell Draft and the final version of Article 67. The first change involves the scope of the duty to provide technical assistance in the preparation of IPR laws and regulations. The Anell Draft used the term “shall grant them technical assistance . . .” (proposal 2A, above), suggesting a degree of compulsion in the discharge of this obligation. The final version has dropped the word “grant” and simply states that “[s]uch cooperation shall include assistance . . .”. This suggests a less directed approach to the carrying out of the assistance obligation, implying that assistance in this area may be part of a wider policy adopted by the developed country Member and may, in fact, be granted as a matter of discretion and judgment, as opposed to mandatory obligation. The second change involves the omission, from the final draft, of a proposed second paragraph to Article 67 (above, proposal 2B). This provision outlined an institutional process through which cooperation under this provision would take place. It involved the co-ordination of technical cooperation with developing and least-developed Parties through a Committee set up for this purpose in collaboration with the World Intellectual Property Organization. This draft paragraph had been dropped by the time of the Brussels Draft.

2.2.3 Article 66.2

Article 66.2 was not envisaged in the Anell Draft. It appears in the Brussels Draft in a form essentially identical to that of the final version of the provision. Like the final version of Article 66.2 TRIPS, the Brussels draft provision was addressed exclusively to LDCs.

3. Possible interpretations

3.1 Article 69

According to this provision (“Members agree to co-operate . . .”), WTO Members are committed to cooperate. The language suggests a compulsory method of cooperation through the contact points in the Members’ national administrations. The existence of these contact points must be notified to the other Members.

They must also be “ready to exchange information . . .”. Thus there is no positive duty to volunteer information to other Members, but relevant information must be made available upon request.

Finally, promotion and cooperation between customs authorities is specified in relation to trade in counterfeit trademark goods and pirated copyright goods.

730 International and technical cooperation and transfer of technology

3.2 Article 67

There are no mandatory rules or methods of cooperation imposed on developed country Members under this provision. However, the duty on developed countries to cooperate is activated upon the receipt of a request for cooperation by a developed country member from a developing or least developed country Member, followed by the conclusion of mutually agreed terms and conditions that will govern the cooperation process.

The nature of the cooperation is described as “technical and financial”. In view of the freedom to request cooperation on the part of the developing or least-developed country Member, and the concomitant freedom of the developed country Member to whom the request is made, to determine by mutual agreement the nature and scope of the cooperation so requested, that cooperation could involve technical and/or financial cooperation. The parties are free to determine this in the course of their negotiations.

The remaining parts of Article 67 add three further possible avenues of cooperation that shall be considered by the developed and developing or least-developed cooperating Members:

- assistance in the preparation of laws and regulations on the protection and enforcement of IPRs;
- assistance in the prevention of the abuse of laws and regulations on the protection and enforcement of IPRs (a matter related to the more general aims of Article 69);
- support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.

3.3 Article 66.2

This provision places a duty on developed country Members to provide incentives to enterprises and institutions in their territory for the purpose of promoting and encouraging technology transfer to least-developed country Members with the aim of creating a sound and viable technological base.

The precise scope and nature of that duty is not defined in any detail. Thus there would appear to be considerable discretion on the part of the developed country Member on how to discharge this duty.⁶⁵ However, it is clear that the duty exists and must be discharged. This reading is consistent with the general objectives of TRIPS, as laid out in Articles 7 and 8, where the protection of IPRs is seen as having to contribute to the promotion of technological innovation and the transfer and dissemination of technology, to the mutual advantage of producers

⁶⁵ Note, however, that some precision has been added to this provision through the decision by the Council for TRIPS concerning the implementation of Article 66.2 of the TRIPS Agreement. For details, see below, Section 6.2.3.

5. Relationship with other international instruments

731

and users of technological knowledge and in a manner conducive to social and economic welfare, and to the balance of rights and obligations. Moreover, the Doha Ministerial Declaration expressly reaffirmed the mandatory nature of the provisions under Article 66.2.⁶⁶

Finally, the obligation to encourage technology transfer includes proprietary technology and not only technology in the public domain.⁶⁷ The latter is more easily accessible, whereas the transfer of the former is in the exclusive discretion of the holder of the respective right.

3.4 The combined effect of these provisions

Thus, these provisions together create a model of cooperation between TRIPS Members, especially developed and developing or least-developed country Members which aims to:

- control international trade in counterfeit goods (Article 69);
- establish an effective legal and administrative regime for the protection of IPRs in developing and least-developed countries (Articles 69 and 67);
- encourage enterprises and institutions in developed country Members to transfer technology to least developed country Members to help in the development of a sound and viable technological base (Article 66.2).

In the light of these provisions, the Council for TRIPS regularly receives numerous notifications from developed countries of their technical cooperation programmes.

4. WTO jurisprudence

To date no dispute concerning these provisions has been brought before the dispute settlement body of the WTO.

5. Relationship with other international instruments

5.1 WTO Agreements

The WTO agreements specify, in numerous provisions,⁶⁸ the need to offer technical assistance to developing and LDC Members.⁶⁹ Each of those provisions relates specifically to the particular subject matter of the respective agreement.

⁶⁶ For details, see below, Section 6.2.2.

⁶⁷ See C. Correa, *Can the TRIPS Agreement Foster Technology Transfer to Developing Countries?* Draft of March 2003, submitted to a Conference at Duke University [hereinafter Correa, Draft].

⁶⁸ For a detailed overview of these provisions, see UNCTAD (2001), *Compendium of International Arrangements on Transfer of Technology. Selected Instruments*, New York and Geneva, p. 52 et seq. [hereinafter Compendium (TOT)].

⁶⁹ A generally flexible approach to the obligations of, in particular, the least-developed country Members is advocated by the terms of the Decision on Measures in Favour of Least Developed Countries appended to the Final Act of the Uruguay Round of 1994.

732 International and technical cooperation and transfer of technology

In particular, reference can be made to Articles 11, 12 TBT Agreement; Article IV GATS; Article 9 of the Agreement on the Application of Sanitary and Phytosanitary Measures; and Article 20.3 of the Agreement on Implementation of Article VII of the GATT 1994 (Customs Valuation Agreement).

5.2 Other international instruments

Other multilateral instruments contain provisions offering an opportunity to negotiate commitments for home country measures beneficial to developing countries.⁷⁰

6. New developments

6.1 National laws

6.2 International instruments

6.2.1 The WIPO-WTO agreement on technical cooperation

In 1996 the WTO and the World Intellectual Property Organization (WIPO) entered into a technical cooperation agreement. Of particular relevance to the provisions under discussion is Article 4 of that Agreement, which deals with “Legal-Technical Assistance and Technical Cooperation”:

“(1) [*Availability of Legal-Technical Assistance and Technical Cooperation*] The International Bureau shall make available to developing country WTO Members which are not Member States of WIPO the same legal-technical assistance relating to the TRIPS Agreement as it makes available to Member States of WIPO which are developing countries. The WTO Secretariat shall make available to Member States of WIPO which are developing countries and are not WTO Members the same technical cooperation relating to the TRIPS Agreement as it makes available to developing country WTO Members.

(2) [*Cooperation Between the International Bureau and the WTO Secretariat*] The International Bureau and the WTO Secretariat shall enhance cooperation in their legal-technical assistance and technical cooperation activities relating to the TRIPS Agreement for developing countries, so as to maximize the usefulness of those activities and ensure their mutually supportive nature.

(3) [*Exchange of Information*] For the purposes of paragraphs (1) and (2), the International Bureau and the WTO Secretariat shall keep in regular contact and exchange non-confidential information.”

Thus the secretariats of both organisations will offer the same technical and legal assistance to developing countries so long as those belong to at least one of the two organisations.

⁷⁰ Due to the great number of relevant agreements, a discussion of these would go beyond the scope of this book. For an overview of international instruments on technology transfer, see the Compendium (TOT). For a detailed analysis of home country measures for the promotion of foreign direct investment (FDI) and technology transfer to developing countries in international agreements see UNCTAD, *Home Country Measures: Facilitating the Transfer of Technology to Developing Countries*. UNCTAD Series on issues in international investment agreements, New York and Geneva (forthcoming, 2005).

6. New developments

733

In addition, reference should be made to the WTO-WIPO joint initiative of 14 June 2001 to provide technical assistance to the least-developed countries aimed at helping those countries to comply with their obligations under TRIPS. The joint initiative builds on existing cooperation between WIPO and WTO⁷¹ and on each organization's own technical assistance programmes. It is also similar to a joint WIPO-WTO project⁷² launched in 1998 to help all developing countries, particularly those that are not least developed, which had to comply with TRIPS by 2000.⁷³ Least-developed countries have until 1 January 2006 to comply with TRIPS. They have to bring their laws on copyright, patents, trademarks and other areas of intellectual property into line with TRIPS.⁷⁴ They also have to provide ways of enforcing the laws effectively in order to deal with various forms of intellectual property infringement. To help these countries meet their obligations, the technical assistance available under the joint initiative includes cooperation with preparing legislation, training, institution-building, modernizing intellectual property systems and enforcement.⁷⁵ All LDCs can participate in the technical assistance offered. They do not need to be WIPO or WTO Members.⁷⁶

Technical cooperation is an important instrument to facilitate developing countries' adequate integration into the multilateral trading system. It should also be a vehicle for exploring the flexibilities inherent in TRIPS as highlighted throughout this book.

6.2.2 The Doha mandate on Article 66.2 TRIPS

At the WTO Ministerial Conference at Doha in November 2001, Members agreed, *inter alia*, on a Decision concerning implementation-related issues and concerns.⁷⁷ This Decision addresses several developing Members' preoccupations about the implementation of the WTO agreements into their domestic laws.⁷⁸ As to TRIPS, paragraph 11.2 of the Decision provides that:

⁷¹ Agreement between the World Intellectual Property Organization and the World Trade Organization, see at <<http://www.wto.org/english/tratop.e/trips.e/intel3.e.htm>>.

⁷² See the WTO press release of 21 July 1998, at <<http://www.wto.org/english/news.e/pres98.e/pr108.e.htm>>.

⁷³ Note that under Article 65.4 of TRIPS, this deadline is extended until 1 January 2005 concerning the obligation to provide product patents in areas not so protectable in a developing country Member on the general date of application of TRIPS (i.e., 1 January 1996).

⁷⁴ Note that on certain conditions, this deadline is extended under para. 7 of the Doha Declaration on the TRIPS Agreement and Public Health (WT/MIN(01)/DEC/W/2): Members agreed that "least-developed country Members will not be obliged, with respect to pharmaceutical products, to implement or apply" the TRIPS disciplines on patent rights and on the protection of undisclosed information until 1 January 2016 (independently of their right to seek further extension of transition periods as provided under Article 66.1 TRIPS). For details, see Chapter 33.

⁷⁵ Of the 50 countries defined by the UN as least developed, 31 are Members of the WTO (another nine are negotiating WTO membership). See <<http://www.wto.org/english/thewto.e/whatis.e/tif.e/org7.e.htm>>.

⁷⁶ World Intellectual Property Organisation (WIPO)/World Trade Organisation (WTO) *Press Release* (Press/231) 14 June 2001 *WIPO and WTO launch new initiative to help world's poorest countries*.

⁷⁷ Decision on Implementation-Related Issues and Concerns, WTO document WT/MIN(01)/17 of 20 November 2001.

⁷⁸ See the third consideration of the Decision, reading as follows: "*Determined* to take concrete action to address issues and concerns that have been raised by many developing-country Members regarding the implementation of some WTO Agreements and Decisions, including the difficulties

“Reaffirming that the provisions of Article 66.2 of the TRIPS Agreement are mandatory, it is agreed that the TRIPS Council shall put in place a mechanism for ensuring the monitoring and full implementation of the obligations in question. To this end, developed-country Members shall submit prior to the end of 2002 detailed reports on the functioning in practice of the incentives provided to their enterprises for the transfer of technology in pursuance of their commitments under Article 66.2. These submissions shall be subject to a review in the TRIPS Council and information shall be updated by Members annually.”

According to the second sentence of the Decision, developed country Members shall report on the “functioning in practice” of their respective incentive regimes for the transfer of technology. It has been suggested that this language could be interpreted as committing developed country Members to establish an incentives regime that actually promotes successful technology transfer.⁷⁹

6.2.3 Recent developments in the Council for TRIPS

Pursuant to the Doha Decision on Implementation-Related Issues and Concerns, the WTO Council for TRIPS adopted, on 19 February 2003, a Decision concerning the implementation of Article 66.2.⁸⁰ In essence, it lays down an obligation for developed country Members to submit reports on actions taken or envisaged (including any specific legislative, policy and regulatory framework) to provide incentives to enterprises and institutions in their territories for the promotion of technology transfer to LDC Members. Such reports are to be updated annually, and new detailed reports have to be submitted every third year. The reports are to be reviewed by the Council for TRIPS at its end of year meeting with a view to providing other Members with the opportunity to pose questions and request additional information. Developed country Members are obliged to disclose certain information concerning their incentive regimes, particularly on the functioning in practice of these incentives.⁸¹ Finally, the arrangements contained in this Decision are subject to a review after three years by the Council with a view to improving them.

This Decision constitutes an important step forward in the attempt to operationalize Article 66.2. It considerably reduces developed Members’ discretion as to their implementation of it.

and resource constraints that have been encountered in the implementation of obligations in various areas;”

⁷⁹ See Correa, Draft.

⁸⁰ See WTO document IP/C/28.

⁸¹ According to paragraph 3(d) of the Decision such information includes:

- statistical and/or other information on the use of the incentives in question by the eligible enterprises and institutions;
- the type of technology that has been transferred by these enterprises and institutions and the terms on which it has been transferred;
- the mode of technology transfer;
- least-developed countries to which these enterprises and institutions have transferred technology and the extent to which the incentives are specific to least-developed countries; and
- any additional information available that would help assess the effects of the measures in promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.”

6. New developments

6.2.4 The WTO Working Group on Trade and Technology Transfer

In paragraph 37 of the Doha Ministerial Declaration, Members agreed to establish a Working Group on Trade and Technology Transfer. Its mandate is as follows:

“37. We agree to an examination, in a Working Group under the auspices of the General Council, of the relationship between trade and transfer of technology, and of any possible recommendations on steps that might be taken within the mandate of the WTO to increase flows of technology to developing countries. The General Council shall report to the Fifth Session of the Ministerial Conference on progress in the examination.”

6.2.5 The Conference of the Parties to the Convention on Biological Diversity

At its seventh meeting in February 2004, the Conference of the Parties (COP) to the Convention on Biological Diversity (CBD) decided to invite the Secretariat of the CBD, WIPO, UNCTAD and other relevant organizations to prepare:

“technical studies that further explore and analyse the role of intellectual property rights in technology transfer in the context of the Convention on Biological Diversity and identify potential options to increase synergy and overcome barriers to technology transfer and cooperation, consistent with paragraph 44 of the Johannesburg Plan of Implementation. The benefits as well as the costs of intellectual property rights should be fully taken into account.”⁸²

6.3 Regional and bilateral contexts

6.3.1 Regional context

6.3.1.1 Agreements between developed and developing country Members. The 2000 Cotonou Agreement⁸³ is intended to encourage developing country parties to integrate more fully into the global economy. To this end, cooperation between the EC and developing contracting parties in the field of economic sector development includes the development of scientific, technological and research infrastructure and services, including the enhancement, transfer and absorption of new technologies (see Article 23(j) of the Agreement).

Of particular relevance is the commitment of all parties, in Article 46, to ensuring an adequate and effective level of protection of IPRs and other rights covered by TRIPS. This includes, *inter alia*, an agreement to strengthen cooperation on the preparation and enforcement of laws and regulations in this field, the setting up of administrative offices and the training of personnel.

⁸² See UNEP/CBD/COP/7/L.20 of 19 February 2004, page 11.

⁸³ European Commission (EC) (2000), *Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou, Benin on 23 June 2000*. (See <<http://www.acpsec.org/gb/cotonou/accord1e.htm>>.)

736 International and technical cooperation and transfer of technology

In a similar vein, agreements concluded between the EC and Latin American economic integration groups contain a commitment to economic cooperation that includes the encouragement of technology transfer.⁸⁴

6.3.1.2 Agreements between developing country Members. Certain intra-regional economic integration agreements among developing and least-developed country Members contain provisions encouraging the development and transfer of technology by enterprises operating within the region. These may be divided into two main groups: general provisions stressing cooperation in areas relevant to the development and transfer of technology within the region, and specialized provisions establishing regional multinational enterprises, which, in turn, serve the purpose of developing technology and transferring it across the region.⁸⁵

6.3.2 Bilateral context

Although almost all bilateral investment treaties (BITs) are silent on the question of technology transfer, it should be noted that the Dutch model agreement of 1997 states, in its Preamble, that “agreement upon the treatment to be accorded to investments [by the nationals of one Contracting Party in the territory of the other Contracting Party] will stimulate the flow of capital and technology and the economic development of the Contracting Parties”.⁸⁶ Thus the Dutch model agreement makes a clear connection between the promotion and protection of investors and their investments (arguably including IPRs) and the stimulation of technology transfer. However, it is far from certain that enhanced IPR protection will automatically result in more transfer of technology (see the discussion under Section 7 below).

7. Comments, including economic and social implications

7.1 Technical cooperation

Considering the lack of experience and expertise in IP issues prevailing in many developing and least-developed country Members, the need for technical assistance for those countries is obvious. It is of crucial importance in this respect that

⁸⁴ See Framework Agreement for Cooperation Between the EC and the Cartagena Agreement and its Member Countries, 1993, Article 3 (UNCTAD, *International Investment Agreements: A Compendium* (New York and Geneva, 2000) [hereinafter UNCTAD, 2000], Vol. V, p. 187); and EC-MERCOSUL/R Interregional Framework Cooperation Agreement, 1993, Articles 11(2) and 16(2)(b) (UNCTAD, World Investment Report 2001, pp. 162–164).

⁸⁵ For the general provisions, see, e.g., the Treaty Establishing the African Economic Community of 1991 that calls upon the Community to harmonize national policies on science and technology and to promote technical cooperation and the exchange of experience in the field of industrial technology and implement technical training programmes among member States (Articles 4(2)(e) and 49(h), in UNCTAD 2000, Vols. IV–V, in Vol. V, pp. 16–18). A similar commitment can be found in Article 26 (3)(i) of the Revised Treaty of the Economic Community of West African States (ECOWAS) of 1993 (UNCTAD, 2000a, Vol. V, p. 40), and in Articles 100 (d) and 103 (2) of the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA) of 1993 (UNCTAD Compendium (IIAS), Vol. III, p. 102). For the specialized provisions, see, e.g., Article 101 (2) (iv.) of the COMESA Treaty (UNCTAD Compendium (IIAS), Vol. III, p. 103).

⁸⁶ UNCTAD, 2000, Vol. V, p. 333.

7. Comments, including economic and social implications

737

policy makers and providers of technical cooperation are fully aware of the TRIPS-inherent flexibilities that may be used for the realization of development goals. Concerns have been voiced in this respect as to the appropriateness and nature of the technical assistance offered to developing countries.⁸⁷ In particular, any organization or institution involved in technical IP assistance should take account of the different levels of development of their target countries, and those countries' different needs with respect to IP implementation.

Another important aspect of technical assistance is the facilitation of active participation of developing countries in the ongoing negotiations in Geneva and their ability to be represented by experts to international meetings on IPRs. Here, two lines of assistance have been identified:⁸⁸ first, the expansion of funding schemes of international organizations to cover the related costs; second, the improvement of the quality of developing country participation through permanent advice in the area of intellectual property rights.

7.2 Technology transfer

Given the increasing dependence of a country's wealth and competitiveness on its ability to produce high technology products for the world market, the technological gap between developed and developing countries has become one of the main obstacles to a successful integration of developing nations into the globalized economy.⁸⁹ Considering that most developing countries are net importers of new technologies, incoming technology transfer is a critical source of technical change.⁹⁰ Article 66.2 takes account of this by obliging Members to provide incentives for the promotion and encouragement of technology transfer to least-developed country Members.

However, the effect of Article 66.2 on the encouragement of technology transfer to the LDCs, and on the development of a sound technological base in those

⁸⁷ Such criticism comes not only from many NGOs, but has also been expressed by the IPR Commission (see p. 158 of the Report): "We recognise that WIPO has a role to play in promoting IPRs. However, we believe that it needs to do so in a much more nuanced way that is fully consistent with the economic and social goals to which the UN, and the international community are committed. A more balanced approach to the analysis of IPRs, and, in consequence WIPO programmes, would be beneficial to both the organisation and the developing world, which forms the majority of its membership." See also p. 161 of the Report: "There is also evidence that, in cases where WIPO's assistance has been acknowledged, the result has not incorporated all TRIPS flexibilities. For instance, the revised Bangui Agreement for the OAPI countries, where WIPO's assistance is acknowledged, has been criticised in various quarters for going further than TRIPS. It obliges LDC members (the majority of OAPI members) who ratify it to apply TRIPS in advance of need; it restricts the issuance of compulsory licences to a greater extent than required by TRIPS; it does not explicitly allow parallel imports; it incorporates the elements of UPOV 1991 in the agreement and it provides for a copyright term of 70 years after the death of the author." See also S. Musungu/G. Dutfield, *Multilateral agreements and a TRIPS-plus world: The World Intellectual Property Organisation (WIPO)*, TRIPS Issue Paper 3, Quaker United Nations Office, Geneva 2003 (available at <[http://www.geneva.quino.info/pdf/WIPO\(A4\)final0304.pdf](http://www.geneva.quino.info/pdf/WIPO(A4)final0304.pdf)>).

⁸⁸ Ibid., p. 165.

⁸⁹ The importance of this gap may be illustrated by the following figures from 2000: only 10 developed countries accounted for 84% of global R&D annually, received 91% of global cross-border technology licence fees and royalties, and took out 94% of the patents granted in the USA between 1977 and 2000. Figures from Correa Draft, Table 1.

⁹⁰ See Policy Discussion Paper, chapter 5, and Maskus, 2004.

738 International and technical cooperation and transfer of technology

countries, has been very limited.⁹¹ This raises concerns as to the appropriateness not only of Article 66.2, but of TRIPS in general to foster effective transfer of technology.⁹² The decisive issue is whether enhanced IPR protection in developing countries and LDCs, as promoted by TRIPS, will actually result in increased technology transfer to these countries. Opinions differ widely in this respect, and the available empirical evidence is inconclusive.⁹³

⁹¹ See Keith Maskus, *Intellectual Property Rights in the Global Economy* (Washington DC, Institute for International Economics, 2000), p. 225. See also the IPR Commission, p. 26.

⁹² See IPR Commission, p. 26. See also Correa, Draft, in his conclusions: "The TRIPS Agreement was essentially conceived as a means of strengthening the control by titleholders over the protected technologies, and not with the objective of increasing the transfer and use of technology globally. The transfer of technology was not, in fact, a concern of TRIPS proponents, and the possible effects of the new protectionist standards on such transfer were never seriously considered during the negotiations."

⁹³ See Policy Discussion Paper, Chapter 5, and Maskus, 2004.