

The Technical Assistance Principles of the WIPO Development Agenda and their Practical Implementation

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Published by

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Acknowledgments

This paper was commissioned under the ICTSD Programme on Intellectual Property Rights and Sustainable Development. The authors are grateful to Pedro Roffe and Ahmed Abdel Latif for their comments. ICTSD is grateful for the support of the UK Department for International Development (DFID).

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Citation: Deere-Birkbeck, Carolyn and Ron Marchant (2010). *The Technical Assistance Principles of the WIPO Development Agenda and their Practical Implementation*. ICTSD Programme on IPRs and Sustainable Development, Issue Paper No. 28, International Centre for Trade and Sustainable Development, Geneva, Switzerland.

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ISSN 1684-9825

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LIST OF ABBREVIATIONS AND ACRONYMS

ARIPO	African Regional Intellectual Property Organization
CDIP	Committee on Development and Intellectual Property
CIPR	Commission on Intellectual Property Rights
DA	Development Agenda
DFID	UK Department for International Development
ECAP	European-ASEAN Intellectual Property Rights Cooperation Programme
ERP	Enterprise Resource Planning
IIM	Intersessional Intergovernmental Meeting
INPI	Institut National de la Propriété Industrielle
IP	Intellectual property
IPR	Intellectual property rights
IPRTA	Intellectual Property Rights Technical Assistance Forum
ITU	International Telecommunications Union
JICA	Japanese International Cooperation Agency
JPO	Japan Patent Office
KEI	Knowledge Ecology International
KIPO	Korean Intellectual Property Office
LDCs	Least developed countries
MDGs	Millennium Development Goals
MSF	Médecins Sans Frontières
NFARs	Nationally Focused Action Plans
OAPI	Organisation Africaine de la Propriété Intellectuelle
OECD	Organization for Economic Cooperation and Development
OHCHR	Office of the High Commissioner for Human Rights
PCDA	Provisional Committee on the Development Agenda
PCT	Patent Cooperation Treaty
PRSPs	Poverty reduction strategy papers
SMEs	Small and medium-sized enterprises
TA	Technical assistance
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific, Cultural Organization
USAID	US Agency for International Development
USPTO	US Patent and Trademark Office
USTDA	US Trade and Development Agency
WCO	World Customs Organization
WHO	World Health Organization
WIPO	World Intellectual Property Organization

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1. Excerpts from 2008 WIPO Secretariat Progress Report on Development Agenda Recommendations related to Technical Assistance
2. Project-specific Lessons in Relation to Needs Assessment and Negotiating Technical Assistance

EXECUTIVE SUMMARY

The challenges of improving the development-orientation of the World Intellectual Property Organization's (WIPO) technical assistance (TA) has been a major subject of discussion since the proposal to establish a WIPO Development Agenda was put forward in 2004. While, the scope of the agenda, as reflected in 45 recommendations adopted by WIPO Member States in 2007, spreads much further than capacity building, this paper focuses specifically on those recommendations dealing with TA. Importantly, debates on TA are closely linked to overarching tensions within and between many developing and developed countries, and among WIPO's stakeholders about what are - and should be - the organisation's mandate and priorities, and, more fundamentally, about the role of intellectual property (IP) in development.

The paper proceeds in six parts. Part 1 briefly summarises the evolution of the WIPO Development Agenda to date and the background for its recommendations on capacity-building. Part 2 sets out the history, scope, financing, and scale of WIPO TA. Part 3 presents the core elements of the critique of this assistance. Part 4 presents a sampling of the WIPO Secretariat's efforts thus far to respond to the WIPO Development Agenda recommendations approved in 2007. Part 5 reviews the lessons learned for WIPO Member States regarding what development-oriented TA means. Drawing on these lessons, Part 6 concludes with proposals for concrete measures and options for WIPO Members and the Secretariat to pursue.

WIPO has been providing TA for more than thirty years. Up until 1995, the majority of WIPO's TA concerned the execution of projects funded by the United Nations Development Programme (UNDP), which was WIPO's most significant partner within the UN family at that time. However, from 1995, following an increase in its revenues, the organisation began to devote its own funds to these programmes and expand them in order to meet the growing needs by developing countries in connection with the implementation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Nevertheless, there were no plans to deliver that assistance in the context of the wider UN system or of development assistance to developing countries more generally.

The scope of WIPO's TA activities is broad. However, its work generally fits into one of the following categories: (a) legislative and policy advice; (b) training and human resource development for administrating IP systems (courses, seminars, workshops, etc.); (c) administrative and IT support to national governments (including automation and computerization); or (d) institutional support for improved IP enforcement.

The TA WIPO provides is on the whole, well received by intellectual property administrations in Member States. However, critics still exist in developing countries, civil society, and academia. This paper focuses on five of these criticisms: (a) poor management and cost-effectiveness; (b) weak development orientation; (c) inadequate insulation from political pressures; (d) excessive reliance on IP offices as primary interlocutors; and (e) inadequate connections with UN goals and agencies and the development community.

After five years of discussion, there are encouraging signs from the WIPO Secretariat that it is working to address some of these criticisms and to implement the WIPO Development Agenda recommendations in the area of technical assistance. Nevertheless, much remains to be done to turn aims, aspirations, and principles into the specific actions needed to secure their achievement and to ensure that the Development Agenda translates into concrete outcomes that benefit developing countries.

In this context, the paper puts forward recommendations for stakeholders on short- and medium-term solutions. These recommendations include the following:

1. WIPO should adopt guidelines that provide specific details on the meaning of ‘development-oriented’ and ‘demand-driven’.
2. WIPO’s TA should help countries devise coherent national IP policies, laws, and regulations that are linked to broader development and public policy objectives and tailored to respond to the specific needs and problems of individual countries.
3. TA programmes should include an objective assessment of the development impact of any proposed legislation or action that takes into account the needs and objectives identified by the recipient country.
4. WIPO’s TA should be unbiased, neutral, and development-focused. It should be of an advisory nature based on actual and expressed needs.
5. WIPO should extend support beyond national IP offices to other parts of government. The full range of government agencies charged with public policy in areas impacted by IP reforms (such as health, education, cultural, agricultural, and industrial agencies) ought to be involved.
6. WIPO should respond to the demands for TA as formulated by the potential recipient and cooperate in good faith with the potential recipient in determining the terms of reference for the TA, without imposing themes or activities.
7. WIPO’s accountability to members should be improved through more systematic and independent monitoring and evaluation of IP-related TA.
8. WIPO should adopt a specific code of ethics for providers of WIPO TA, including both staff and consultants, to complement the WIPO’s staff rules and code of conduct, which apply to all WIPO staff.
9. WIPO should be open to collaboration and co-organisation of events, TA projects, and training with a broadened range of organisations, including non-governmental organisations (NGOs), research centres, and business groups.
10. WIPO should improve the quality of its collaboration with the UN family, donors of bilateral IP assistance, and development cooperation agencies to help instil a stronger development orientation in its TA and training and to promote TA that better reflects broader development strategies.

INTRODUCTION

Improving the development orientation of the World Intellectual Property Organization's (WIPO) TA has been a central component of discussions since the 2004 proposal for the Establishment of a Development Agenda for WIPO.¹ While improvements in capacity building are a central part of the Development Agenda, the scope of the agenda is much broader. Indeed, debates related to TA are closely linked to overarching tensions within and between many developing and developed countries, and among WIPO's stakeholders about what are - and should be - the organization's mandate and priorities, and, more fundamentally, about the role of IP in development.

There has been greater improvement in mutual understanding than was initially expected. Indeed, after five years of discussion, there are encouraging signs from the WIPO Secretariat. Nevertheless much remains to be done to turn aims, aspirations, and principles into the specific actions needed to secure their achievement and to ensure that the development agenda translates into concrete outcomes that benefit developing countries. It would be easy to look at the outstanding tensions and predict another five years of talk. This paper is written in the hope that more is possible and in the belief that better is needed.

Among the 45 Development Agenda recommendations approved by WIPO Member States in

2008, which form the basis for the current WIPO discussions and activities, this paper is primarily concerned with those recommendations specifically related to TA.² Of these, the paper focuses mostly on the TA principles found in recommendation 1, as well as the additional TA-related recommendations listed in Annex 1. While worthy of study, a detailed consideration of other important TA-related recommendations³ is beyond the scope of this particular paper. This paper also incorporates some comments on several recommendations related to improved organisational performance, programme management, and evaluation as each could strongly impact TA (see Annex 2).⁴

The paper proceeds in six parts. Part 1 briefly summarises the evolution of the WIPO Development Agenda to date and the background for its recommendations on capacity-building. Part 2 sets out the history, scope, financing, and scale of WIPO TA. Part 3 presents the core elements of the critique of this assistance. Part 4 presents a sampling of the WIPO Secretariat's efforts thus far to respond to the WIPO development agenda recommendations approved in 2007. Part 5 reviews the lessons learned for WIPO Member States regarding what development-oriented TA means. Drawing on these lessons, Part 6 concludes with proposals for concrete measures and options for WIPO Members and the Secretariat to pursue.

1. EVOLUTION OF THE WIPO DEVELOPMENT AGENDA AND ITS RECOMMENDATIONS RELEVANT TO TECHNICAL ASSISTANCE

The original proposal for a WIPO Development Agenda was put forward by Argentina and Brazil in the lead up to the 2004 WIPO Annual Assemblies. A further 12 developing countries co-sponsored this proposal. Together, the 'Friends of Development' concluded their submission with eight proposals, including calls for WIPO to address development in all aspects of its work, increase attention to promoting technology transfers, improve civil society involvement in WIPO's work, ensure greater development orientation in WIPO's capacity building, and establish a Working Group to discuss the implementation of the Development Agenda and related work programmes. A report was to be made to the General Assembly in 2005.

The WIPO General Assembly agreed to establish the Intersessional Intergovernmental Meeting (IIM) and then the Provisional Committee on the Development Agenda

(PCDA), which began to receive and discuss further proposals. In all, some 111 proposals were considered throughout 2006 and 2007. After the removal of duplication and overlap among proposals, the PCDA recommended that a reduced number of proposals be adopted and that a new Committee on Development and Intellectual Property (CDIP) be established. The 2007 General Assembly agreed to 45 recommendations, with 19 for immediate implementation. It also agreed to the creation of a CDIP to oversee the implementation of the recommendations and to undertake further work.

A notable feature of many of the 45 recommendations is their focus on principles that are aspirational in nature. This presents challenges to those charged with their concrete implementation. (For further discussion of WIPO's response to the Development Agenda, see Part 4 below).

2. WIPO'S TECHNICAL ASSISTANCE

2.1 Historical Background

WIPO has been providing IP-related TA for more than 30 years.⁵ Up until 1995, the majority of WIPO's TA concerned the execution of projects under the financial control of UNDP, which was WIPO's most significant partner within the UN family at that time. Additional WIPO TA was financed through trust funds supported by Member States, most notably Germany, with a total spending of about USD 8-9 million per year. WIPO's use of internal resources for TA was limited to the support for fellowships.

The era of external financing for WIPO's capacity building gave way to a new paradigm in 1995-6. In light of a growing budget and the need to meet increasing demand from developing country Members, particularly demands related to the implementation of the TRIPS and other international IP obligations, WIPO's membership decided to devote the organisation's own resources to TA. Former WIPO Director-General Kamal Idris reinforced this shift in emphasis, ushering in a series of reforms that would channel a portion of the funds raised through the increased use of WIPO's PCT-related services to TA.⁶ Thus, even as UNDP dropped its earlier activities on IP-related work, WIPO picked up the discrete area of IP-related assistance, but without plans to deliver that assistance as part of the broader UN system or its associated development strategies and evaluation frameworks for country based assistance.

2.2 Scope of WIPO's Capacity-building

The scope of WIPO's TA is broad, but generally falls into one of several categories: (a) legislative and policy advice; (b) training and human resource development for administering IP systems (courses, seminars, workshops, etc.); (c) administrative and IT support to national governments (including automation and computerization);

or (d) institutional support for improved IP enforcement.⁷

A key vehicle for WIPO's efforts to build IP capacity in developing countries is the WIPO Worldwide Academy, a training institute that provides a series of seminars and training programmes in Geneva as well as at the regional and national level using distance education. The Academy has supported the training of a high proportion of developing country IP officials now posted in IP offices around the world.

2.3 Scale and Sources of Financing

WIPO is by far the largest single specialist international agency in relation to IP-related TA. WIPO's current prominence in IP-related capacity building derives in part from agreements forged with the World Trade Organization (WTO). In 1996, the WTO and WIPO Secretariats agreed to cooperate on TA to assist developing countries in implementing the TRIPS Agreement.⁸ The heads of both organisations subsequently established two joint technical cooperation agreements. The first, launched in 1998, was to help developing countries meet their January 2000 deadline for conforming to the TRIPS Agreement. The second agreement, made in 2001, was for a programme to assist least-developed countries (LDCs) meet their original January 2006 deadline for TRIPS implementation and to make use of IP protection for their development.

The financial resources WIPO devotes to capacity building have grown over time, both in absolute terms and as a share of WIPO's overall budget. As WIPO's income from the PCT and Madrid treaties grew from 1996 to 2007, WIPO's total contribution to IP-related capacity building in developing countries reached over USD 400 million, more than doubling from about USD 25 million in 1996 to over USD 50 million in 2007.⁹ In

the 2010-2011 biennium, WIPO is expected to commit an estimated USD 120 million to development-related activities (just under one-fifth of WIPO's total budget for the same period).¹⁰ In addition, several WIPO Members have committed funds specifically for TA and for the work of WIPO's regional bureaus for TA for Africa, Asia, Latin America and the Arab world, adding an additional amount of about USD 15 million.

In practice, the amount WIPO devotes to capacity building-related activities for the benefit of developing countries may indeed be far greater than those estimated above. The sheer number of conferences, meetings, visits, and technical advice makes it very difficult to ascertain the overall figure that WIPO actually spends on TA. Indeed, one of the challenges of measuring and assessing WIPO's TA activities is that they are spread across a range of different budget lines that span the organisation's work. These include budget lines specific to activities, such as training and TA, but also include those related to outreach activities on enforcement and public education, which also have a technical assistance aspect. In the 2010-11 budget, for instance, WIPO has secured over USD 60 million for "facilitating the use of IP for development". One would also expect that some portion of work related to strategic goals, such as "a balanced normative framework for IP" would have a TA component as would activities related to the goal of providing "premier global IP services" (which at over USD 250 million accounts for the greatest portion of WIPO's work) and some portion of the work of WIPO's regional bureaus.

2.4 Internal Management and Organisation of WIPO's Technical Assistance

WIPO's internal management of its TA for particular countries and regions has evolved over time. In principle, WIPO's capacity building budget is approved by the Programme and Budget Committee on a biennial basis and then approved by the General Assembly.

Within the WIPO Secretariat, the bureaucratic structure for managing capacity building has changed several times over the past decade, but generally the core of such activities have been located within the Cooperation for Development Division, as well as in the various regional departments and through the budget line for the WIPO Academy. In each division, budgets and programme documents have been prepared by division heads and approved by the Director General. In the mid-1990s, WIPO introduced Nationally Focused Action Plans (NFAPs) elaborated in consultation with national IP administrations to move beyond individual country projects and serve as a more comprehensive envelope for providing assistance at the national level. The NFAPs were in place for one to three years. The WIPO Secretariat has also devised its own set of activities at the regional level and responded to requests from governments, usually from national IP offices. In most cases, the country in question presents a technical cooperation request to the International Bureau concerning the organisation of a seminar, legislative advice, or modernising its IP national administration. These requests are examined by the Secretariat and approved on condition of availability of resources.¹¹

2.5 WIPO's Relationship to other IP Technical Assistance Providers

While WIPO dominates the field of IP TA, it is also joined by a wide range of actors, including multilateral and regional international organisations, national and regional intellectual property offices, developed country governments, NGOs, industry groups, individual companies, academics, and leading university centres.¹² Indeed, in providing many of its capacity building activities, trainings, and seminars, the WIPO Secretariat partners with a number of these actors, often collaborating with them to deliver part or all of some programmes.¹³

At the multilateral level, other donors that provide IP-related TA, advice, or training include the International Telecommunications

Unions (ITU), the Joint United Nations Programme on HIV/AIDS (UNAIDS), the UN Conference on Trade and Development (UNCTAD), the United Nations Development Programme (UNDP), UN Education, Scientific and Cultural Organization (UNESCO), the International Union for the Protection of New Varieties of Plants (UPOV), the World Customs Organization (WCO), the South Centre, the World Health Organization (WHO), the World Bank, and the Office of the High Commissioner for Human Rights (OHCHR). To date, however, there has not been a coordinated effort among the UN family (see discussion in Part 3 below).¹⁴

At the regional level, the Secretariats of regional IP organisations such as the Organisation Africaine de la Propriété Intellectuelle (OAPI), the African Regional Intellectual Property Organisation (ARIPO), and the Andean Community operate regional IP systems (albeit each different in nature) and cooperate in the provision of TA and advice to their members. Regional bodies, such as the European Union (EU) - often in partnership with the European Patent Office - and various departments within national governments also provide IP assistance, including patent and copyright offices, development assistance agencies, foreign embassies, and ministries of foreign affairs, trade, and industry. Countries particularly active in such bilateral IP assistance include France, Japan, Sweden, Switzerland, the United Kingdom, the United States, and the EU.¹⁵ In the case of the United States, IP assistance is a multi-agency effort, involving the US Department of State, the Patent and Trademark Office (USPTO), the Commerce Department, the Trade and Development Agency (USTDA), and the US Agency for International Development (USAID), among others.

The focus of donor activities and target countries varies according to their national commercial interests, past colonial ties, and geographic proximity.¹⁶ The Philippine Intellectual

Property Office, for example, receives support from the Japanese International Cooperation Agency (JICA), the USAID, and the European-ASEAN Intellectual Property Rights Cooperation Programme (ECAP) as well as from WIPO, the US Patent and Trademark Office, the Japan Patent Office (JPO), the EPO, and the Korean Intellectual Property Office (KIPO). Francophone African countries receive the majority of their support from the French IP office (INPI), the EPO, and WIPO, while former anglophone colonies rely more heavily on WIPO and the UK Intellectual Property Office (formerly the UK Patent Office).

There have been some efforts to foster greater communication and collaboration among the various IP donors. In 2004, the UK government spearheaded this by gathering donors together to reflect on the challenges related to IP-related TA to developing countries.¹⁷ Since 2007, the UK Department for International Development (DFID) has supported the Intellectual Property Rights TA Forum (IPRTA), which brings together key IP donors and stakeholders to try to develop an action-oriented approach to evolving and mainstreaming IPR, TA, and capacity building. Such discussions also prompted the International Centre for Trade and Sustainable Development (ICTSD) to commission a Needs Assessment Toolkit for IP-related financial assistance and TA, which has now been applied in two LDCs (Sierra Leone and Uganda).¹⁸

Multinational companies and industry associations also independently provide TA, training, staff, and funding to developing country governments, think tanks, and companies to improve IP expertise, administration, and enforcement. A range of NGOs, such as ICTSD, Knowledge Ecology International (KEI), and Médecins Sans Frontières (MSF) have offered not only a critique of traditional IP-related TA, but also alternative approaches within their limited resources, particularly by focusing on alerting countries to the options available to them with respect to the use of flexibilities in international IP agreements.

3. POLITICAL TENSIONS AND CRITICISMS OF WIPO'S TECHNICAL ASSISTANCE

WIPO's TA activities are, on the whole, well received by intellectual property administrations in Member States. However, critics from developing country governments and also in civil society and academia argue that WIPO's TA activities are often too narrow and lack adequate development orientation.¹⁹ There have also been concerns about their effectiveness and transparency.²⁰

Public tensions about IP-related TA surfaced amidst debates on TRIPS implementation in the late 1990s. They were then recognised by the Commission on Intellectual Property Rights (CIPR) established by the UK Department for International Development, which published a ground-breaking report in 2002, making a number of recommendations on intellectual property and development, including on TA.²¹ The report states, for instance, that “[d]onors should strengthen systems for the monitoring and evaluation of their IP-related development programmes.a working group of donors and developing countries should ... commission and oversee a sector wide impact review of IP-related TA...”²²

Debates in the area of TA reflect several cross-cutting tensions about the relationship between IP and development, as well as the links between IP and innovation, technology transfer, and foreign direct investment.²³ On the one hand, for instance, some stakeholders seek further substantive and tighter harmonisation of national IP systems to meet the needs of IP right-holders operating globally, while others seek greater tailoring of national IP systems to meet local needs and interests, including through the use of TRIPS-compliant flexibilities.²⁴ For some, the purpose of TA should be to help developing countries build the capability to administer their IP system in a manner similar to that operated in developed countries, most notably by building competent IP offices and boosting IP enforcement. Critics retort that

TA should rather focus on fostering the ability of national governments and stakeholders to tune the IP system to the needs of individual developing countries, with a focus on elements such as institutions for technology transfer, compulsory licensing regimes, and countering anti-competitive behaviour by IP right-holders. They also argue that the growing emphasis of TA on stronger enforcement may serve perversely to maintain out-dated business models, limit access to knowledge, divert public resources from more urgent tasks, and continue unjustified monopoly behaviour on the part of some businesses. Indeed, such focus on enforcement without public understanding and support as to why it is necessary and beneficial - to them - is likely to make it more difficult to introduce effective and respected IP regimes. Finally, many developing countries, particularly African countries and LDCs, emphasise the need for greater support for local companies, scientists, and artists to make use of the IP system to boost local development and protect their own inventions and creations on the international market.

The following is a summary of concerns that have already arisen in the scholarly and policy literature and in the context of debates at WIPO over the past few years.

3.1 Poor Management and Cost-Effectiveness

From a management perspective, WIPO's TA has suffered important weaknesses in the area of transparency and evaluation.

The lack of transparency about the allocation of expenditures has frustrated Member States for many years. Some have complained about the lack of clarity regarding the level of resources available to their countries or how the total budget is allocated within regions.²⁵ While some countries have requested breakdowns of the resources allocated

among and within the different geographical regions, WIPO's budget reporting system, unlike those of other international organisations and UN agencies, does not make such disaggregated information easily available. Some governments have further complained of being informed that budgets have been exhausted without any detailed reporting of how money was spent, even in their own countries.

In the absence of clear mechanisms for tracking TA-related expenditure across the organisation (far less by issue or by country), both Member States and industry groups have lamented the inability to conduct meaningful evaluation of WIPO's performance in terms of effectiveness and cost-efficiency. These difficulties have been further exacerbated by the lack of clear, qualitative objectives for TA - and the absence of meaningful benchmarks. While WIPO's NFAPs have existed for some time, their narrow scope has frustrated the prospect of any meaningful performance-based measures of WIPO's effectiveness in TA much less measures that would properly account for their contribution to development.

In practice, deliberations during WIPO's budgetary process have generally been centred on the amount of resources allocated to technical cooperation. Where indicators or results have been listed, they have been similarly quantitative, referring to the number of trainings, visits, missions, meetings, participants, etc, but not to the ultimate contribution of such activities to particular development objectives or outcomes. In-depth, substantive discussions on the orientation of this cooperation and its overall assessment have rarely taken place within the Program and Budget Committee. As noted in a report by the UN's Joint Inspection Unit: "few program evaluations have been undertaken; only one of these involved technical cooperation."²⁶ The existing evaluation framework for WIPO's TA is clearly inadequate.

3.2 Weak Development-Orientation

A core criticism put forward in the Development Agenda discussion is that decision-making and implementation on TA has been too much in the hands of the WIPO Secretariat and not connected to countries' broader strategic development goals. More damaging are concerns about bias in the provision of TA and legislative advice that has gone against the interests of developing countries. A core concern here is that WIPO has not done enough to highlight the flexibilities available under international agreements, such as TRIPS, or to foster an IP system that is the servant of, or tool for, local economic development. Indeed, critics have charged that the starting point for WIPO's assistance has been how best to implement the existing IP system to offer the highest possible protection to IP rights holders. Many critics attribute this to a broader organizational pro-IP culture within WIPO that has developed over several decades.²⁷ After several years of debate on the Development Agenda, one now reads and hears somewhat more nuanced statements from some WIPO staff on the relationship between IP and development (at least compared with earlier assertions on the absolute benefits of stronger IP protection for development).²⁸ Many key WIPO staff probably do realize that there is no simple link between stronger IP protection and development. That said, there remains a strong belief among WIPO staff in the benefits of owning and commercialising intellectual endeavours, without sufficient consideration of empirical evidence of costs and benefits that may arise in the contexts of different member states or what should remain outside the scope of IP protection in the public interest.

To date, WIPO has not developed a comprehensive programme or methodology for assisting developing countries to assess their development needs, IP capabilities, or the appropriate strategies to tackle these objectives, although such work is in progress in some regions. In the absence of

such strategies, initiatives are often taken on a piece-meal basis at the national level, usually at the request of IP offices, or by way of inter-regional conferences. In both cases, activities tend to be restricted to specific IP objectives and implemented prior to a thorough determination by the developing country of its own development priorities.

3.3 Inadequate Insulation of WIPO's TA from Political Pressures

The nature and scale of WIPO's TA is linked to a suite of broader activities in which the Secretariat is involved. Most important, the scale of WIPO's TA is linked to funding derived from the administration of a series of international IP treaties (or what are described by WIPO staff as its "business operations").²⁹ Furthermore, critics argue that decisions regarding WIPO's TA have too often been linked to political considerations and dynamics that arise in the context of WIPO's facilitation of discussions and negotiations on the norms, treaties, and principles for international IP regulation.

As noted above, WIPO's services related to its core treaties bring in the bulk of the organisation's income and finance the majority of its TA. Developed countries' businesses and researchers are the biggest users of the treaty system. Although use by actors in some developing countries (e.g. Brazil, China, and Korea) is growing, it remains true that WIPO's treaties operate primarily for the benefit of developed country interests. While developed countries often perceive the spending of "their" money to be ineffective and inefficient, developing countries often perceive developed countries and industry groups as acting as if they "own" WIPO and therefore have the right to determine the scale, distribution, and focus of its TA.

Important tensions also arise between WIPO's TA function and its norm-setting activities. WIPO hosts several negotiations for treaties and legal guidelines that aim to harmonise

the form and impact of IP legislation and practice internationally.³⁰ The original proposal that developing countries made for a WIPO Development Agenda was at least in part a reaction to the perceived thrust by WIPO and developed countries in favour of "levelling-up" the scope and application of patent laws through substantive harmonisation.³¹ The concern critics express is that the WIPO Secretariat, in collaboration with key developed member states and industry stakeholders - and independently - has used its TA function to help promote the uncritical ratification of existing international agreements and to further upward harmonisation of IP standards in ways that mitigate against the interests of developing countries.³²

3.4 Excessive Focus on IP Offices as Primary Interlocutors

A further critical issue concerns the particular relationships that develop over time between WIPO officials, IP officials, and diplomats. While WIPO does sometimes engage parts of governments beyond IP offices, these have traditionally been WIPO's core interlocutors and remain their main focal points in capitals. While the financial structure and institutional arrangements for national and regional IP offices vary widely, in most cases national IP offices rely heavily on WIPO and other developed country donors for technical, financial, and in-kind assistance.³³ In most cases, IP offices are technical agencies at the domestic level, and attract little interest from their ministries or the relevant Minister. Because of this, there are few links to broader national development strategies and thus, few contacts between IP officials and other government departments. This makes the IP Office focus on relationships with IP-based donors in isolation from relationships and planning related to broader economic development planning.³⁴

In the area of IP, TA is often simply a direct effort to 'buy' stronger IP administration and enforcement in developing countries. Through

the provision of IT infrastructure, computer software, training, staff salaries, buildings, equipment, and direct financing of IP offices, WIPO directly increases the capacity of recipient countries to undertake and enforce IP reforms. Beyond the 'hardware' and staff resources, WIPO also helps build the capabilities, know-how, and institutional knowledge necessary for countries. On the one hand, such investments in the IP infrastructure and administration of developing countries IP offices can help developing countries exploit the IP system to the benefit of their own innovators. On the other hand, superior technical knowledge of IP issues, access to information, and the ability to harness professional communities, lend donors such as WIPO the power to promote their particular perspective on IP protection. Material incentives, such as training and travel opportunities, consultancy contracts, and lucrative per diems associated with attending conferences, can also sometimes personally influence government IP decision-makers.³⁵ These can also serve to cultivate a transnational peer group of IP professionals, who identify more closely with a network of international IP policy experts and officials - and with the objectives of WIPO - than with other colleagues within national governments or with national development objectives. Indeed, in diplomatic circles, anecdotes abound about developing country officials promised enticements in exchange for promoting particular perspectives on IP policy and laws at the national level or taking certain positions in WIPO meetings. At the national level, success in bringing in 'hard cash' from foreign donors for particular local capacity building projects or conferences that might boost the local economy can also bring kudos to the particular IP official responsible.

3.5 Inadequate Connections with UN Goals and Agencies and the Development Community

WIPO's TA has also been criticised for its lack of connection to the broader development goals of the United Nations (UN) and its family

of organisations.³⁶ As a specialized agency of the United Nations, developing countries have argued compellingly that WIPO's work should, for instance, be propelled by UN priorities, such as the challenges of meeting the UN Millennium Development Goals (MDGs). Notably, IP does not figure as part of the needs assessments or country development strategies conducted under the auspices of the UN Development Assistance Framework documents prepared for each country nor of the World Bank's Poverty Reduction Strategy Papers (PRSPs). In addition, IP is not part of the diagnostic tool used for the Integrated Framework - the multilateral mechanism for assistance to LDCs for trade-related assistance. It also has not been featured as a prominent issue in the Aid-for-Trade Discussion under way in the international trade arena. One negative implication of this is that WIPO's TA on IP operates in a 'silo' or as a stand-alone issue apart from broader development strategies. Importantly, the 'neglect' of IP issues in such processes may reflect not only a lack of technical awareness of the issues, but also a broader sense that they are simply not key development priorities for many countries. Another implication is that WIPO's TA has not benefited from the debates and lessons learned within the UN system and among bilateral development donors about promoting local ownership and demand-driven assistance.³⁷ Further, where strategic IP goals are devised, governments and WIPO have difficulty leveraging complementary resources from the bilateral development agencies that contribute funding to the core UN programmes and specialized budgets for development-related work, as many of these do not have well-articulated goals or interests in IP-related issues. While WIPO now appears to be making efforts to improve links with the UN family (in part to leverage UN and bilateral resources to the cause of IP for development), WIPO has hitherto not been part of the coordination processes among UN agencies on matters related to funding of development assistance.

4. WIPO'S RESPONSE: WHAT HAS BEEN ACHIEVED THUS FAR?

At its 2008 General Assemblies, the WIPO Secretariat reported on its progress in relation to several recommendations related to TA (see Box 1),³⁸ and Member States authorized further work by the Secretariat and through the CDIP.³⁹ Under the leadership

of its new Director-General, Francis Gurry, the WIPO Secretariat has also taken up the Development Agenda as a central component of its 'strategic realignment' plans.⁴⁰ The following is a brief update on activities in these two areas in 2009.

Box 1. Excerpts from 2008 WIPO Secretariat Progress Report on Development Agenda Recommendations Related to Technical Assistance

In terms of overall strategy, WIPO states that its technical assistance programs and activities are: *“undertaken at the request of Member States and are designed, formulated and implemented in close consultation and cooperation with the countries concerned in order to respond to their specific needs, and dovetailed with their development priorities.”*

WIPO also states that it has been: *“reorienting its programs and activities by consistently and comprehensively taking into account country specific needs, priorities and the level of development, particularly the special needs of least developed countries (LDCs). In line with the Program and Budget document for 2008/09, this is increasingly done by assisting countries to formulate nationally focused intellectual property plans and strategies, after a careful assessment of their specific needs and taking into account the particular development requirements of each country and involving all stakeholders. The assessment of needs and country demands will be reviewed with the country and the plan updated every biennium. Mechanisms will be developed to dovetail and integrate them with national plans. Over time, project design frameworks will be standardized for WIPO to ensure full project definition and description, quality control and approval processes, objective setting and monitoring activities, risk identification and management, performance and results definition and appraisal. Program evaluation will be undertaken in line with the recently approved WIPO Evaluation Policy (presented at the 2007 session of the WIPO General Assembly).”*

In order to ensure that the principles contained under this and other recommendations (e.g. recommendations 6, 13, and 15) are adequately mainstreamed into the activities of the organization, the WIPO Secretariat proposed at the 2008 Assemblies:

(a) To issue an office instruction to all WIPO staff and consultants advising them to adhere to the principles contained in this and other similar recommendations;

(b) To ensure that adequate consideration is given to the introduction of these principles into future policy documents designed to establish the strategic direction of the organisation in the short, medium and long term (e.g., program and budget document, vision and strategic direction papers, etc.);

(c) To ensure that any new guide or manual on technical assistance that may be developed in the future will also incorporate the principles contained in this recommendation.

The WIPO Secretariat also stated that it would endeavour to include information on the Development Agenda and the principles contained therein (including under this recommendation) in other publications and information materials describing the work of the organization (e.g. the next edition of publication No. 1007E “WIPO: An Overview”).

4.1 Secretariat Activity

In October 2008, the new Director General launched a “Strategic Realignment Program.” The programme has three streams. Stream 1, *Changing the Corporate Culture*, focuses on encouraging a performance culture through the introduction of improved results-based management, evaluation, and appraisal processes and the promotion of a culture of customer service and value for money. Stream 2, *Re-engineering Horizontal Business Processes*, focuses on improving the level and efficiency of service and preparing for the introduction of an IT-based Enterprise Resource Planning (ERP) system. Under this stream, WIPO’s core administrative and management processes, including human resources processes, IT systems, procurement, and budgetary and financial processes, will be reviewed and redesigned. Stream 3, *Restructuring Processes and Resources*, focuses on realigning WIPO’s programme structure to relate it to nine re-defined strategic-level goals established by the Revised Program and Budget 2008/09, namely: balanced evolution of the international normative framework for IP; provision of premier global IP services; facilitating the use of IP for development; coordination and development of global IP infrastructure; world reference source for IP information and analysis; international cooperation on building respect for IP; addressing IP in relation to global policy issues; a responsive communications interface between WIPO, its Member States and all stakeholders; and an efficient administrative and financial support structure to enable WIPO to deliver its programmes. Clearly these goals are intimately related to the objectives of the Development Agenda and, if implemented, could offer the opportunity for real progress.

In his foreword to the Secretariat’s 2010-11 budget proposal submitted to the 2009 WIPO General Assemblies, the WIPO Director-General highlighted ‘better integrating TA and capacity building with innovation and expanding its funding’ as one WIPO’s strategic objectives. At that meeting, WIPO Members approved a non-personnel budget of some SFr 2.24 million for Development Agenda-related

activities, with additional provisions for personnel costs of some SFr 1.4 million. The 2009 General Assembly also agreed to continue funding those projects already agreed to in 2008. In total, development activities will account for some 19.1 percent of WIPO’s total budget in the 2010/11 biennium (compared with 18.7 percent in 2008/09).⁴¹ WIPO Member States expressed support for a project-based approach to the Development Agenda, and the General Assembly urged the CDIP to develop a coordination mechanism for monitoring, assessing, and reporting on the implementation of recommendations.

Another notable activity on the part of the WIPO Secretariat was reflected in a donor conference in November 2009, when it aimed to build WIPO’s relationship with the broader donor community and help WIPO Members mobilize resources for IP-related development projects and TA, including extra-budgetary resources for WIPO to advance implementation of the WIPO Development Agenda. The conference advanced the WIPO Development Agenda’s call for the mobilization of additional resources and the establishment of funds in trust and other voluntary funds for LDCs and countries in Africa to promote the use of IP for social, economic, and cultural development. However, neither the conference description nor the programme reflected many of the broader Development Agenda debates and principles. Missing from the programme, for instance, was any critical attention to engaging donors and the broader UN community in dialogue on the appropriate IP rules and policy framework to promote country specific development objectives, despite the interest of many development agencies in ensuring that IP rules do not damage their efforts to promote goals, such as public health and access to education. Instead, the emphasis was on ‘explaining’ to donors the positive benefits of IP, its role in development, and showcasing how countries can use IP for development. (For more on this point, see the section on *Improving Development-Oriented Through Greater Collaboration with the UN Family and Development Agencies* in Part 6 below).

4.2 The CDIP

The meeting of the Committee on Development and Intellectual Property (CDIP) held in spring 2009 (27th April-1st May) considered a number of papers produced by the Secretariat, reporting on progress with respect to a number of recommendations, setting out a methodology for implementing recommendations as well as proposing projects relating to specific recommendations, and listing consultants used by WIPO. The meeting also considered specific proposals by Japan and Korea to assist developing countries in their use of IPRs.⁴² The April/May 2009 CDIP meeting yielded a new project-based approach to implementation of its recommendations.⁴³ The 2010-2011 Program and Budget document approved at the 2009 WIPO Annual Assemblies proposes that work proceed in a series of themes to enable the CDIP to act more efficiently.⁴⁴ The CDIP also discussed mechanisms for monitoring, reporting, and assessing the implementation of the Development Agenda recommendations and invited proposals for the November 2009 CDIP meeting.⁴⁵

The agenda for the November CDIP 2009 meeting included: a proposal from Japan for a Web-based set of case studies showing how IP has been used successfully by businesses in developing countries; a proposal from Korea to help farmers and producers in LDCs create brands for their products (using the existing experiences of the fair trade movement); and a second Korean proposal on mechanisms for identifying appropriate technologies and facilitating transfer to developing countries. While each of these proposals does offer practical solutions, they clearly do not address all of the Development Agenda principles. Each proposal also assumes the effective use of IP systems to benefit the developing country as well as considerable similarity across national contexts. The effectiveness of such projects will demand careful consideration and evaluation of measurable impacts.

A number of broader issues were also on the November 2009 CIDP agenda, with Algeria,

Brazil, and Pakistan proposing a series of actions to report and monitor on Development Agenda activities, and with Group B proposing alternative methods to minimize the compliance cost of monitoring and reporting. The meeting also reviewed progress reports on a number of projects resulting from previous decisions of the CDIP, including projects on competition, technology transfer, access to information, and evaluation.⁴⁶ As implementation is not yet advanced, it is too soon to say whether these projects will deliver all that is implied by the Development Agenda principles, but it is clear that all parties will need to continue close and detailed assessment of the work programme. The WIPO Secretariat also reported at the November 2009 CDIP on its work to improve the design of national strategies on IP and on the evaluation of its work.

Reports from the CDIP November meeting indicate that there is greater understanding among WIPO Members of their respective positions. However, the fact that continued disagreements postponed decisions until the April 2010 CDIP meeting brings back a sense of cold reality about likely progress. Notably, the development agenda discussions began in 2004 with a proposal from the “Friends of Development”, at the November 2009 meetings a “like-minded” group of developing countries submitted proposals. The choice of terminology, which differentiates the ‘like-minded’ from those that are presumably not, highlights that basic disagreements between developed and developing countries persist.⁴⁷

While it is clear that the WIPO Secretariat has launched many internal processes to respond to the development agenda recommendations that are for immediate implementation and to implement the thematic projects, it remains too early to see actual improvements or to assess concretely how the aspirations for the future will translate into concrete improvements on the practices of the past. Thus, it is not yet clear what impact this WIPO-centric discussion will have on developing countries.

5. LESSONS LEARNED: WHAT KIND OF TECHNICAL ASSISTANCE IS NEEDED?

A combination of better specified requirements from developing countries and more focused development-oriented delivery on the part of WIPO's TA - and that of others - would enable considerable and quantifiable advances. To summarise the debates to date, there is broad consensus on the following six lessons on the kind of TA needed and how it could be improved.⁴⁸ Building on past lessons, several concrete proposals have been made in recent years for the improvement of WIPO TA that merit careful consideration in the implementation of the WIPO Development Agenda principles on TA.

5.1 Development-Oriented TA with Clear and Specific Development Objectives

- IP issues need to be understood and defined in the context of national development objectives. IP TA should in turn be developed as part of overall economic, development, industrial, science and technology, innovation, and business sector development strategy. It should not simply be reactive to international treaty requirements.
- To be pro-development, IP TA should support the growth of local business and innovative capacity, while taking into account local socioeconomic realities and public policy needs with respect to public health, access to education, and so forth. It should seek to foster local creative and cultural industries and create an enabling environment for innovation, taking into account the realistic competitive and comparative advantages of particular countries.
- IP TA must adhere to a series of widely accepted principles, guidelines, and best practices for the broader field of development cooperation. The World Bank and the OECD's Development Assistance Committee both, for example, have developed best practices in the design and implementation of development cooperation,⁴⁹ and in 2005, over 100 Ministers, heads of agencies and senior officials agreed

to a Paris Declaration on Aid Effectiveness, which set out principles for improving the local ownership of assistance.⁵⁰ These guidelines are particularly important, because IP technical cooperation often involves agencies, such as developed country IP offices, not generally engaged in the provision of development cooperation and, therefore, less familiar with the values, lessons learned, and best practices in that arena.

5.2 Conduct Needs Assessments

- Each country should develop its own national needs assessment for TA as well as a strategy for soliciting and managing the assistance it receives so that it meets these goals. Here, countries can draw upon or use existing toolkits designed to assist developing countries to carry out such assessments.⁵¹ Within these broad needs and objectives, targeted specific goals for particular projects could be set.
- The country requesting TA should determine the objectives pursued (e.g. development of national policies on IP, science, innovation and technology transfer, enactment of TRIPS-compliant legislation, promotion of innovation and investment, avoiding misappropriation of traditional knowledge, etc.) and assess how the possible outcome of assistance could contribute to the fulfillment of the development goals (e.g. increase employment and domestic value added, promote local and foreign investment, expand exports, foster innovation, support SMEs, etc.). Countries should also identify technical cooperation priorities, in terms of categories of intellectual property to be covered (e.g. patents, trademarks, etc.), the substantive or procedural nature of issues to be considered, and the sectors involved (e.g. agriculture, mechanical industry, health, etc.). See Box 2 on project-specific lessons related to needs assessment.

Box 2. Project-specific Lessons in Relation to Needs Assessment and Negotiating Technical Assistance

- Ensure self-definition and clarity of objectives
- Agree program and implementation methodology with desired outcomes, actions, and timescales specified
- Identify most useful resources and use expertise available from NGOs, national IP offices, WIPO, other government programmes, and other international agencies (i.e. IPRTA, audits, toolkits)
- Take control of process for negotiating and implementing assistance projects
- Demand proper external evaluation of projects
- Adopt a multi-disciplinary approach that involves many parts of government and stakeholders and a team of TA providers that have economic, legal, and issue-specific expertise as well as local knowledge
- Encourage the use of local/regional experts
- Commit internal institutional and human resources
- Ensure appropriate political sponsorship and support from relevant government agencies

5.3 Take Responsibility, Build Internal Support and Coordinate

A top priority for developing countries should be to the relative autonomy of many national IP offices in decision-making about national IP regulation and to embed national IP decision-making within a broader, development-oriented public policy framework.

- WIPO members should also carefully consider boosting the attention given to building a national IP strategy relative to building administrative and technical capacity.
- Greater attention should be given to studying the appropriate governance, structure, mode of financing, and scope of patent offices, copyright offices, and collecting societies - at both the regional and national levels - to ensure that they are tailored to respond to the particular circumstances and priorities of each country.
- Coordination within national governments can help ensure that TA projects and objectives attract the broad government support and sponsorship necessary for success. While IP offices have an important role to play, the prospect for the use of TA to advance development-oriented IP policies will be highest where governments have effective inter-agency coordination and public consultation. Progress in this area will also help ensure that the design and implementation of IP policies and laws supports development goals, particularly in the areas of innovation, public health, education, and technological development. To date, however, most developing country governments still lack effective systems and processes for internal coordination within the government on IP decision-making. Furthermore, there is minimal engagement of legislative branches in IP decision-making and limited consultation with non-government stakeholders and experts in the assessment and development of IP policy and laws.
- Instead of delegating to IP offices to serve as the sole negotiators of TA with WIPO, governments should involve representatives

of all relevant ministries and departments in the determination of the terms of reference for the technical cooperation, through a structured consultative process.

- Governments should also consider ‘cooling off’ periods for all officials and diplomatic staff who leave government service to take up positions in international organisations where they previously had a representative role.

5.4 Consult with National Stakeholders

IP decision-making must not be viewed as a technical issue that can be delegated to a small, technocratic community of IP officials, lawyers, representatives of narrow commercial interests, and international experts (whether IP proponents or sceptics). With this in mind, the lessons learned from TA to date are that governments should:

- Identify and consult the groups potentially affected by the outcomes of TA to get their ‘buy-in’ (e.g., farmers, consumers, authors, small and medium-size enterprises, universities, education, business, finance, musicians, artists, and scientists);
- Seek the active participation of relevant stakeholders in the assessment of technical cooperation priorities and needs and in discussions of the appropriate design, delivery, outcomes, and evaluation of TA.
- Give due consideration to the possible absence of adequate representation of stakeholders, for instance, patients that may be affected by patent protection of pharmaceuticals. The fact that some groups (e.g. business sector) may be better organized to influence decisions than other groups (e.g. consumers or students) whose views should also be considered. In addition, foreign business, often supported by their governments, may strongly lobby and exert pressures to increase IP protection to their benefit. Governments should recognise that the degree of influence of some social groups does not necessarily match the importance they should have for the determination of the appropriate development-oriented IP policy in certain areas.

5.5 Recognise that Social and Economic Context Matters: IP is Not Everything

IP alone will not stimulate innovation, investment, or new business growth. Attention must simultaneously be given to fostering a regulatory and institutional environment suitable for promoting business activity, supporting the educational system, fostering a national science and technology policy, ensuring appropriate financial and legal mechanisms, and providing the appropriate infrastructure (including transport, information technology, and telecommunications). As the global economy evolves, the opportunities within countries also change.

- The specifics of IP assistance programs must be adaptable. Some areas of assistance have greater prospects to yield development outcomes than others. For instance, in some countries, greater use of trademarks or copyright can help bolster the niche and returns from certain export products, whether textiles or music. On the other hand, while greater understanding of how to use of geographical indications is of great interest to some countries, others have already concluded that the costs of implementing such rights and enforcing them at the global level is beyond those they can reasonably afford.
- Amidst the current global economic downturn, some countries may receive less support in their efforts to build IP capacity. The downturn also exacerbates the existing tensions within countries over competing fiscal and social priorities. For many developing countries, stronger IP protection is simply not a pressing internal development need when seen against challenges of political stability, health crises, natural disasters, and education. For developing countries already working to implement existing international IP commitments,

external pressures - whether through trade agreements or TA - to forever-higher IP standards and enforcement are frequently a source of frustration.

5.6 Choose the Right Strategy, Projects and Providers

The involvement of a vast array of donors in IP-related capacity building has both positive and negative aspects. The vast quantities of assistance, training and international travel opportunities available to some developing country IP officials may also compromise the perceived scope for policy autonomy on the part of officials in IP offices who find themselves

beholden to donors upon whom they rely for career rewards and opportunities.

There are prospects for cooperation among agencies with different types of technical and local expertise in providing capacity building and the combining of resources. In principle, countries could select their source of TA, choosing providers they deem most likely to address their needs. On the other hand, however, few countries have a strategic approach to managing the TA they receive. Competition among donors means that countries may receive competing legislative advice and particular officials may receive repeat training opportunities not linked to their performance.

6. MOVING THE PROCESS FORWARD: PROPOSALS FOR WIPO MEMBER STATES AND THE WIPO SECRETARIAT

As the WIPO Secretariat works to put into practice the aspirations the principles embody - namely to adopt a development orientation, be inclusive, be specific to individual country needs (especially for LDCs), and be consistent with WIPO neutrality - Members will need to carefully monitor and control the application and interpretation of these principles with regard to specific activities. The following proposals may help to move the process forward.

6.1 Translate Development Principles into Actions

- WIPO should adopt guidelines that provide specific detail on the meaning of 'development-oriented' and 'demand-driven', both in terms of substance and process.⁵² The emphasis of the proposed WIPO guidelines should be, as an international organisation, to fulfil its obligations to provide independent, unbiased, and neutral assistance. It would be useful to supplement these guidelines with a specific manual that details best practices and appropriate content for TA for each of the main areas and subjects of IP-related technical cooperation. This could include, for example, specific advice as to the kinds of issues that might be covered in assistance related to the health sector or to enforcement.
- In designing, delivering and evaluating TA, the different levels of development of various countries should be taken into account. WIPO's TA should help countries devise coherent national IP policies, laws, and regulations that are linked to broader development and public policy objectives and tailored to respond to specific needs and problems.
- TA programmes should include an objective assessment of the development impact of any proposed legislation or action, taking into account the needs and objectives identified by the recipient country. Special attention should be paid to developing the technical capacity of countries to pursue a coherent approach to the implementation of international IP-related commitments and to decide whether and how to fully use in-built flexibilities in international agreements to advance pro-development policies. Coherence and mutual supportiveness with other relevant international instruments must also be promoted.
- The use of 'one size fits all' model IP laws without careful evaluation of their country specific effects should be discouraged. WIPO should inform recipients about experiences, including information on comparative law, from other countries that are relevant to the TA and present the range of options available.
- WIPO should draft the Development Agenda principles into its programme and performance frameworks and staff evaluations with an eye to ensuring that these include clear benchmarks and indicators for measuring and evaluating success.
- To improve the breadth of experience and understanding of WIPO staff, as well as to promote a more development-oriented culture and mindset within the organisation, WIPO's staff recruitment process should be expanded to target candidates beyond the traditional pool of IP experts to other fields (development economics, business development, politics, non-IP fields of law, health, agriculture, etc.) and from non-IP organisations. In addition, a programme of staff secondments to and from WIPO that would go beyond the traditional focus on national IP offices to include other UN agencies, TA providers, and parts of national governments would broaden the pool of expertise and experience within WIPO.

6.2 Neutral, Unbiased and Non-Discriminatory

- WIPO's TA should be unbiased, neutral, and development focused. It should be of an advisory nature based on actual and expressed needs. The assistance should not discriminate among recipients or issues to be addressed and should not be perceived as being a reward system for supporting certain positions in international negotiations. Importantly, the concept of WIPO neutrality remains unclear to many - on both sides of the debate - who have competing views on what the call for neutrality demands of the WIPO Secretariat. For some, the focus is on neutral with respect to the particular interests of stronger Member States. For others, the emphasis is on neutrality in regard to the benefits and costs of particular IP strategies and laws. Furthermore, it is possible that some interpret the 'neutrality' provision to mean neutral with respect to the development of aspirations of particular WIPO Member States. Such an interpretation could inhibit the adoption of the very development orientation that the recommendation seeks to implement.

6.3 Support Coordination and Consultation by Recipients

- WIPO should extend support beyond national IP offices to other parts of government. The full range of government agencies charged with public policy in areas impacted by IP reforms (such as health, education, cultural, agricultural, and industrial agencies) ought to be involved. Capacity building should strengthen the full range of national policy expertise on IP issues, rather than just legal expertise. Where appropriate, and this may be frequently, projects should be drawn up jointly with other agencies. This is a multidisciplinary task that should involve civil society, industry, and academic analysts active in the fields of IP, investment, innovation, development, science, and technology.

- WIPO should financially support consultation and engagement with the full range of relevant non-government stakeholders in the formulation and delivery of IP-related TA and in IP policymaking generally.
- WIPO should review with regional IP offices and their national constituents how TA and capacity building can best be delivered to these agencies to improve the synergies between these bodies and to ensure the development of policymaking expertise and knowledge necessary to provide oversight over regional IP arrangements where they exist.
- WIPO should continue its efforts to engage relevant ministers from developing countries in its work generally and also in devising its TA.

6.4 Tailor-made and Demand-driven Based on Needs Assessment

- WIPO should respond to the demands of TA as formulated by the potential recipient and cooperate in good faith with the potential recipient in determining the terms of reference for the TA, without imposing themes or activities. The assistance should correspond to a comprehensive needs assessment at the national level, undertaken with input from relevant government departments and stakeholders. WIPO should be careful not to duplicate existing efforts to develop and use toolkits for such needs assessments or audits, but rather should coordinate with such efforts.⁵³ The main principles on which the ICTSD/Saana Consulting needs assessment toolkit (see above) is built, could and should, also inform work done by WIPO in helping countries create a programme to develop and implement an IP strategy.⁵⁴
- TA recipients should have the right to approve or object proposed staff or consultants for the provision of TA; propose alternate staff or consultants; require statements or disclosure of any potential conflict of

interest from potential providers; request that consultants agree to comply with a code of ethics for technical cooperation providers; and request evidence of the qualifications, prior work experience, and evaluations (where available) of proposed providers of TA.⁵⁵

- TA recipients should be made aware of the demands likely to be made on their own resources - institutional, human and financial - in undertaking needs assessments and TA programmes and be prepared to adjust proposed projects in order to better align with available internal resources or commit accordingly.

6.5 Transparency and Accountability

- Improve accountability to WIPO Members through more systematic and independent monitoring and evaluation of IP-related TA. All information about design, delivery, cost, financing, beneficiaries, and implementation of TA programmes as well as the results of internal and external independent evaluation should be publicly available. Greater transparency and accountability are a necessary, albeit insufficient, response to the tensions caused by the fact that WIPO's work on TA is mainly funded from the profit generated by the international patenting activity of major US, European, and Japanese corporations, which are the primary users of WIPO's treaty-related services. Notably, as currently financed, any increase in the scale of WIPO's development activities will rely primarily on increased support from WIPO's revenue-generating, treaty-related services.
- Make more information on TA activities readily available to Member States. This would be done, *inter alia*, through the database described under development agenda recommendation 5. There is a danger, however, that a database that simply lists what is available, while potentially useful, could miss the point, be too passive, and merely reinforce the 'one size fits all'

approach. The purpose of the database must be to facilitate critical review of what is offered for relevance and effectiveness; to enable structured evaluation of the implementation of recommendation 1 on TA regarding development orientation; and to facilitate comparison by Member States, particularly potential recipients.

6.6 Code of Ethics and Conflicts of Interest

- Adopt a specific code of ethics for providers of WIPO's TA, whether staff or consultants, to complement WIPO's own staff rules and code of conduct, which apply to all WIPO staff.⁵⁶ Specific features of this code, which would be signed by all involved staff and consultants, should be provisions requiring disclosure of conflicts of interest.⁵⁷ According to WIPO Secretariat staff, an 'instruction' has now been issued to staff and consultants that 'advises' them of the importance of adhering to the Development Agenda principles. However, this is neither sufficiently clear nor comprehensive. In order for such instructions to be effective, they need to be binding on consultants, with clear metrics for monitoring and evaluation. Further, for staff, they must be linked to broader employment incentives and professional rewards. With respect to overseas consultants, the instruction merely provides a link in the contract cover letter to the fact that these principles and the organisation's code of conduct can be found on WIPO's website. It is also unclear whether and under what conditions a consultant's contract could be terminated for violations of the code of conduct. Furthermore, to properly mainstream development principles, attention to the Development Agenda principles needs to be integrated throughout WIPO's hiring process, including its recruitment advertisements.
- Apply the code of conduct and the WIPO Development Agenda principles to the process of selecting experts who participate as advisors in WIPO trainings and conferences

and call on such experts to review and sign the code of ethics, complete conflict of interest statements, and review the Development Agenda principles. These steps are important because there is a large group of technical consultants and providers of training and presentations in seminars, at the national and regional level, who are not contracted consultants and as such are not paid by WIPO (although WIPO usually pays costs, such as small honoraria). Further, a number of current and ex-employees of national IP offices (including one of the authors of this paper) take part in WIPO programmes in developing countries, either their own or in third countries. Again, they are not often consultants in the normal sense, receiving expenses and an honorarium rather than a fee. Even though, with no contractual arrangements, WIPO cannot oblige all experts to sign the code of conduct or disclose conflicts of interest, it can veto their participation if they fail to do so. Moreover, this process will serve as a mechanism to help staff within WIPO ensure balanced seminars, conferences, and trainings and may also sensitize the broader IP community to the notion that the kinds of considerations included in the code and the Development Agenda principles are significant and important.

- Enhance WIPO's new register of all TA consultants to include their CVs and explicit disclosure of potential conflicts of interest. All those wishing to take WIPO contracts must be required to join the register. WIPO partially put such a system into place in early 2009, when it published on-line its first public register of consultants. This register includes only those who reside outside Geneva and only those involved from 2005 forward. A review of the document reveals the prevalence of industry linked consultants over those linked to NGOs. Several NGO experts are known, however, to have submitted their information as potential providers of assistance. Many of those actively involved in providing WIPO's TA may indeed be Geneva-based.
- Adopt a process for selection of staff and external consultants most suitable for particular assignments, including greater attention to harnessing local and regional experts. WIPO should take a multi-disciplinary approach to the issues, utilizing professionals and experts from different backgrounds and disciplines, harnessing and building local expertise, and incorporating inputs from a variety of international sources.

6.7 Improve Evaluation and Performance-Based Management

- Three recommendations in the Development Agenda concern evaluation of TA (i.e. Recommendations 1, 35, 37) and WIPO more broadly (i.e. Recommendations 33, 38, 40, 41). The November 2009 CDIP looked at proposals for improving the evaluation framework.⁵⁸ In such discussions, WIPO Member States should ensure that WIPO undertakes continuous evaluations both internal and independent to ensure its effectiveness. They should employ a relevant and publicly available set of qualitative and quantitative indicators and development benchmarks, based on the principles and guidelines outlined above.⁵⁹
- The development of a standardized programme-design framework as set out, and including evaluation and governance, should be tackled as a matter of urgency if such programmes are to deliver real value to developing countries and value for money for all.

6.8 Boost Independence of Technical Assistance

- WIPO should be open to collaboration and co-organisation of events, TA projects, and training with a broadened range of organisations, including NGOs, research centres, and business groups.
- Evaluate options for improving the independence of WIPO's TA function from the Secretariat's other functions, such as

through the creation of an independent unit within WIPO, managed by an Executive Board comprised equally of a sub-group of developed and developing countries, and a Managing Director appointed by that Executive Board with a budget approved bi-annually by the General Assembly.

- Promote positive competition among providers of IP-related TA so that governments can choose how to use available TA resources based on their own assessment of whose advice would most benefit them, or whether they would like to receive multiple or competing perspectives (e.g. they may prefer a mix of consultants from WIPO, academia, industry or NGOs). One proposal that warrants deeper consideration is the pooling of capacity building resources from a number of donors, including WIPO, into a central fund, managed by an executive director appointed by a board of internationally recognised experts, with which developing countries could negotiate packages of support.

6.9 Improve Development-orientation through Greater Collaboration with the UN Family and Development Agencies

- Improve the quality of WIPO's collaboration with the UN family, donors of bilateral IP assistance, and development cooperation agencies to help instil a stronger development orientation in its TA and training and to promote TA that better reflects broader development strategies. There are several potential avenues for this, including through participation and input into processes for the formulation of development cooperation (UN Country Development Assistance Frameworks and the World Bank's PRSPs) in which agencies have sought to develop a coherent

framework for development assistance from a range of donors.

A key challenge for WIPO will be to approach collaboration not from an IP-centric perspective but from a broader development perspective that focuses on overarching policy priorities, such as those related to innovation, science and technology, and the promotion of cultural industries.

Importantly, the point of collaboration need not be coordination around a uniform view of IP-related TA within the UN family. One risk, for instance, is that other UN agencies would defer to WIPO on IP issues on the grounds that they are 'technical' or that WIPO will seek to monopolise the provision of IP-related TA within the UN family and among bilateral donors. Even if WIPO does succeed in integrating a stronger development perspective, its independence will be constrained by its role as the guardian of multilateral IP treaties (just as the WTO Secretariat is the guardian of the TRIPS Agreement). From the beneficiary country perspective, the potential to choose from a range of TA providers representing a variety of perspectives may be desirable. That said, in cases where two organizations both advise the same country on the same issue with a similar perspective - sometimes giving rise to turf wars - there is clearly a case for stronger coordination.

- A broader challenge for WIPO, which faces development assistance in general concerns national ownership. Recent scholarship has affirmed that development assistance is most effective in contributing to long-term development when it is channelled through national budgeting processes, where it is subject to government and parliamentary oversight, rather than through a patchwork of individual projects, no matter how well conceived.⁶⁰

CONCLUSION

From the outset, a core objective of proponents of the WIPO Development Agenda has been to mainstream development issues into all WIPO processes. In light of the experience to date, it is doubtful that the CDIP is anywhere near able to identify the agreements and conditions that would enable the successful achievement of the Development Agenda or to avoid simply having created a structural “solution” in the form of a new, permanent WIPO committee. This paper has delineated a set of lessons for WIPO members, as well as specific proposals for the WIPO Secretariat and for governments, which aim to help translate the principles and aspirations of the WIPO Development Agenda into real development benefits on the ground and empower stakeholders, whether researchers, consumers, or business communities.

It is more than likely that political debates will continue - some simply ideological and others grappling with important questions about the

intersection of IP and development. However, there are specific actions that the WIPO Secretariat, WIPO Members and interested stakeholders can take to improve IP-related TA that would yield short- and medium-term benefits on the ground for developing countries. Developing countries would, for instance, be well advised to identify their own needs and interests, and to take advantage of WIPO’s new approach to developing national IP strategies to devise programmes that meet their needs, allowing them create the opportunities for local businesses, creativity, and research to grow and to adapt IP regimes to their specific situations. Simultaneously, this paper has emphasised the importance of broader governance issues at WIPO, particularly regarding how WIPO’s TA is financed and evaluated, its accountability to Member States, transparency, and insulating TA activities from the political dynamics associated with WIPO’s norm-setting.⁶¹

ENDNOTES

- * Tom Pengelly. *Technical Assistance for the Formulation and Implementation of Intellectual Property Policy in Developing countries and Transition Economies*. Issue Paper, No. 11, ICTSD Programme on IPRs and Sustainable Development, 2005; Michael Kostecky. *Intellectual Property and Economic Development: What Technical Assistance to Redress the Balance in Favour of Developing Nations*, Issue Paper No. 14, ICTSD Programme on IPRs and Sustainable Development, 2006 and Pedro Roffe and David Vivas with Gina Veal, *Maintaining Policy Space for Development: A Case Study on IP Technical Assistance in FTAs*, Issue Paper No. 19, ICTSD Programme on IPRs and Sustainable Development, 2007.
- 1 WIPO (2004).
 - 2 WIPO (2007).
 - 3 Such as recommendations concerning increased support for countries to make use of IP, to protect their own domestic innovations, to assist small and medium-size businesses, scientists and cultural industries to benefit from the IP system, and those calling for greater attention to IP-related anti-competitive practices.
 - 4 Further discussions of these issues are included in Li (2009), Gold and Morin (2009) and Paranagua (2009).
 - 5 Bogsh (1992), Halbert (2007).
 - 6 Idris (2003).
 - 7 For details of WIPO's activities see, for instance, WIPO (1999) and WIPO (2001).
 - 8 For examples of this cooperation, see WIPO (1999).
 - 9 Deere (2008a).
 - 10 See WIPO's 2010-11 Program and Budget documents.
 - 11 ICTSD, 2005.
 - 12 Roffe *et al* (2007), Matthew and Tellez-Munoz (2006), Kostecky (2005), Deere (2008).
 - 13 Deere, 2009.
 - 14 CIPR (2002), Saana Consulting (2004), Bellmann and Vivas-Eugui (2004).
 - 15 Matthews and Munoz-Tellez, 2006.
 - 16 Deere (2008).
 - 17 Bellmann and Vivas-Eugui, 2004; MSF (2003).
 - 18 See Saana Consulting (2004) and ICTSD/Saana Consulting (2007). Also see <http://www.iprtaforum.org>.
 - 19 See, for instance, Matthews and Tellez-Munoz (2006), Kostecky (2005), Bellmann and Vivas-Eugui, 2004. Pengelly (2005), MSF (2003), Musungu (2003), Saana Consulting (2004), Villanueva (2005), CIPR (2001), Kuanpoth (2005), Matthews (2005).
 - 20 Marchant and Musungu (2007).
 - 21 CIPR (2002). These were then broadly accepted by the UK government. See UK Government, 2002.
 - 22 CIPR (2002: 162).
 - 23 ICTSD (2003).
 - 24 See Kostecky (2005).
 - 25 ICTSD (2005).

- 26 UN Joint Inspection Unit (2005).
- 27 ICTSD (2005).
- 28 Idris (2003).
- 29 Among these, the core treaties are the Patent Cooperation Treaty, the Madrid Agreement Concerning the International Registration of Marks and the Hague Agreement for the International Deposit of Industrial Designs.
- 30 Musungu and Dutfield (2003).
- 31 Musungu and Dutfield (2003).
- 32 Boyle (2004).
- 33 Deere (2008), Leesti and Pengelly (2002).
- 34 Abdel Latif (2005).
- 35 Deere (2008a; 2008b; 2009).
- 36 May (2007), Musungu (2003; 2005).
- 37 Fukuda-Parr et al (2002), Fukuda-Parr and Berg (1993).
- 38 See WIPO document: WO/GA/36/4 Rev.
- 39 WIPO (2008).
- 40 See for instance, WIPO's 2010-11 Program and Budget documents.
- 41 See WIPO (2009).
- 42 See WIPO documents, CDIP/3/INF/1, 2, CDIP/3/1 PROV.2, CDIP/3/2, 3, 4, 5, 6, 7, 8, available at <http://www.wipo.int/meetings>.
- 43 These projects include several relevant to technical assistance and capacity-building as set out in Development Agenda recommendations 2, 5, 8, 9, and 10.
- 44 Thus the CDIP agreed to treat cluster some recommendations (16 and 20) into a theme on "Intellectual Property and the Public Domain; other recommendations (7, 23 and 32) as a theme on "Intellectual Property and Competition Policy; and recommendations 19, 24 and 27 as a theme on "Intellectual Property, Information and Communications Technologies, the Digital Divide and Access to Knowledge. Discussions on each of these themes are likely to have some bearing on what is needed by way of technical assistance.
- 45 See WIPO Document CDIP/4/9 and CDIP/4/10.
- 46 The structure and desired outcomes of these projects were also presented at WIPO's "Open-ended Forum on Proposed Development Agenda Projects" held in October 2009.
- 47 Mara (2009).
- 48 Some of the lessons and recommendations below draw from Correa and Deere (2005).
- 49 OECD (2003).
- 50 Available at: http://www.oecd.org/document/18/0,3343,en_2649_3236398_35401554_1_1_1,00.html.
- 51 See www.ictsd.org and www.iprta.org.
- 52 See, the principles and guidelines for the provision and evaluation of technical assistance submitted in a proposal by the Group of Friends of Development at the First Session of WIPO's Inter-sessional Intergovernmental Meeting (IIM). See Document IIM/1/4, page 21. Also see Correa and Deere, 2005.

- 53 In addition to the ICTSD/Saana Consulting Needs Assessment Toolkit (2007), WIPO has also developed its own methodology for conducting IP ‘audits’ to help discern what countries needs and has also developed an African strategy tool kit.
- 54 Saana (2004).
- 55 Correa and Deere, 2005.
- 56 Deere, 2005.
- 57 WHO, for instance, requires all consultants to sign a specific declaration of potential conflicts of interests, including disclosure of full affiliations.
- 58 See WIPO Documents: CDIP/4//9 and CDIP/4/10.
- 59 Musungu (2003); Li (2009).
- 60 See, for instance, Woods (2008).
- 61 Deere (2009).

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ANNEX 1. RECOMMENDATIONS ON TECHNICAL ASSISTANCE AND CAPACITY-BUILDING APPROVED BY WIPO MEMBER STATES IN 2007 ADDRESSED IN THIS PAPER

1. WIPO technical assistance shall be, *inter alia*, development-oriented, demand-driven and transparent, taking into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of Member States and activities should include time frames for completion. In this regard, design, delivery mechanisms and evaluation processes of technical assistance programs should be country specific.
2. Provide additional assistance to WIPO through donor funding, and establish Trust-Funds or other voluntary funds within WIPO specifically for LDCs, while continuing to accord high priority to finance activities in Africa through budgetary and extra-budgetary resources, to promote, *inter alia*, the legal, commercial, cultural, and economic exploitation of intellectual property in these countries.
- * 3 Increase human and financial allocation for technical assistance programs in WIPO for promoting, *inter alia*, development-oriented intellectual property culture, with an emphasis on introducing intellectual property at different academic levels and on generating greater public awareness on intellectual property.
5. WIPO shall display general information on all technical assistance activities on its website, and shall provide, on request from Member States, details of specific activities, with the consent of the Member State(s) and other recipients concerned, for which the activity was implemented.
- * 6. WIPO's technical assistance staff and consultants shall continue to be neutral and accountable, by paying particular attention to the existing Code of Ethics, and by avoiding potential conflicts of interest. WIPO shall draw up and make widely known to the Member States a roster of consultants for technical assistance available with WIPO.
9. Request WIPO to create, in coordination with Member States, a database to match specific intellectual property-related development needs with available resources, thereby expanding the scope of its technical assistance programs, aimed at bridging the digital divide.
- *12. To further mainstream development considerations into WIPO's substantive and technical assistance activities and debates, in accordance with its mandate.
- *13. WIPO's legislative assistance shall be, *inter alia*, development-oriented and demand-driven, taking into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of Member States and activities should include time frames for completion.
- *14. Within the framework of the agreement between WIPO and the WTO, WIPO shall make available advice to developing countries and LDCs, on the implementation and operation of the rights and obligations and the understanding and use of flexibilities contained in the TRIPS Agreement.

Note: Recommendations preceded by a * were selected by member states for immediate implementation.

ANNEX 2. EXAMPLES OF OTHER MEMBER-STATE APPROVED WIPO DEVELOPMENT AGENDA RECOMMENDATIONS RELEVANT TO TECHNICAL ASSISTANCE

Assessment, Evaluation and Impact Studies

33. To request WIPO to develop an effective yearly review and evaluation mechanism for the assessment of all its development-oriented activities, including those related to technical assistance, establishing for that purpose specific indicators and benchmarks, where appropriate.
38. To strengthen WIPO's capacity to perform objective assessments of the impact of the organisation's activities on development.

Institutional Matters including Mandate and Governance

40. To request WIPO to intensify its cooperation on IP related issues with United Nations agencies, according to Member States' orientation, in particular UNCTAD, UNEP, WHO, UNIDO, UNESCO and other relevant international organisations, especially the WTO in order to strengthen the coordination for maximum efficiency in undertaking development programmes.
41. To conduct a review of current WIPO technical assistance activities in the area of cooperation and development

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