

# Commission on Intellectual Property Rights

## Workshop 9: Institutional Issues for Developing Countries in Intellectual Property Policymaking, Administration and Enforcement

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**Summary:** The workshop focused on institutional issues regarding intellectual property policy making, administration and enforcement. Specifically, the following five sets of questions were addressed:

1. What levels of national and regional institutional capacity do developing countries currently have in IP policymaking, regulation and enforcement? What resources do developing countries currently allocate to IP protection and rule making via national and regional institutions? To what extent are developing countries able to participate effectively in international IP rule making and regulation?
2. What levels of national institutional capacity do developing countries currently have in other fields of economic regulatory policy relevant to IP policymaking, regulation and enforcement, such as competition policy and law; judicial and legal systems; and police and customs administration? How important is institutional capacity building in this area for maximising the benefits of IPRs and minimising abuse from restrictive business practices? What are the key constraints?
3. What are the key priorities for building capacity in IP policymaking, regulation and enforcement, and related areas of economic regulatory policy, within national and regional institutions in developing countries? What are the key constraints and resource costs? Could developing countries make greater use of regional organisations and international co-operation in IP regulation?
4. What are the likely financial costs of providing an IP system consistent with current international agreements? Who should meet these costs: developing countries or the international community? Should developing countries be asked to accept new undertakings in international IP rule making if they have inadequate levels of institutional capacity?

5. What technical and financial assistance programmes have been made available to developing countries in the last five years? How many countries have such programmes covered? How effective have such programmes been in building institutional capacity in IP regulation and enforcement? How could these programmes be improved in the future?

The Workshop concluded with a set of key issues and recommendations for the consideration of the Commission and policy makers.

## **Session 1: Overview of the issues**

### **Presentation by Tom Pengelly and Mart Leesti**

Mr Pengelly presented the key findings of a background paper prepared for the workshop, which examines the institutional capacities for intellectual property policy making, administration and enforcement which exist in poor countries and the recent technical co-operation which have sought to reinforce them. Mr Leesti presented an institutional model of an IPR system emphasising national tailor-made approaches based on best practice and reasonable functionality avoiding needless duplication of efforts.

### **Discussion**

The 1<sup>st</sup> Discussant focused his comments on the points of departure of the background paper (Chapter 2). Firstly, he underlined that an IP regime should strike a balance between national policy objectives and stakeholder interests. This balance is different in different environments, and as a consequence a tailor made approach in compliance with international agreements is needed.

Secondly, the 1<sup>st</sup> Discussant did not completely agree with the paper's assertion that developing countries generate low levels of IP. A distinction must be made between types of IPRs: it is true in the field of patents (even though IP statistics show levels of protection not innovation) but less so for trademarks and copyright, which are more widely used in developing countries. The problem is not only that protection levels are low, but also that IP rights are not sufficiently exercised and exploited. This may be particularly true for middle-income countries like India, Brazil and Mexico.

Thirdly, the 1<sup>st</sup> Discussant argued that a holistic approach to technical assistance is essential and that linkages exist between different components of an IP system. The 1<sup>st</sup> Discussant concluded by underscoring the importance of the IPR holders in keeping the financing burden on the state to a minimum.

The 2<sup>nd</sup> Discussant commended the paper's attempt to put IP in a broader context. He explained that a country's IPR regime is a part of the national development framework, and that they must be upgraded in conjunction. Modernising IPR legislation is a long-term resource intensive process, and not a "quick fix". The 2<sup>nd</sup> Discussant asked how lessons can be learned from best practices since situations vary between countries, and suggested comprehensive case studies of countries like India and Kenya. Regarding the delivery of technical assistance, he noted the

importance of country-based approaches linked to national processes. It is preferable to wait and develop a country's own drafting abilities than insisting on compliance. The 2<sup>nd</sup> Discussant also drew the group's attention to Article 67 of the TRIPS agreement and the need to make delivery of technical assistance binding and enforceable. Finally he agreed with the study's conclusion that the participation of developing countries in negotiations be strengthened.

The general discussion was opened by a reminder of the trend of co-operation and harmonisation going on mainly between the patent offices of Japan, Europe and US and the need to look ahead in the recommendations of the Commission. It was argued that the developing countries must be part of this global integration process. Several participants addressed the financing issue. IP is a low priority in developing countries. Governments struggle with a set of basic development issues and cannot be expected to put money into IP. The same argument applies to donors. As a consequence self-financing of IP offices become necessary. One solution is membership of a regional organisation, but the cost of membership deters many countries from joining, and the immediate benefits are hard to show.

It was pointed out that fee levels are important, but also how the fees are used. From an economic perspective the fee is a major incentive and even disincentive mechanism. The importance of strengthened human resources in developing countries both in the national patent offices and in Geneva was underscored.

## **Session 2: Institutional challenges for Developing countries**

The group noted the disconnect that often exists in developing countries between IPR and economic development policies, leading to low financial support for IPR institutions. In addition IPR is not mainstreamed into donor assistance programs, because they do not see how IPR can help poor people. In the Caribbean, for example, there is some political support for copyright but it is slow to develop for patents. In Jamaica a patent office has recently been set up, but human resources need to be built up. There is a need for short-term assistance since the IP law has to be administered immediately.

It was suggested that one problem is the absence of strong domestic pressure groups in least developed countries and elsewhere. On the other hand it was pointed out that the attorneys constitute a main lobby group in most countries. The role of the national IP office in policy-making was highlighted in order to overcome the separation between administration and policy-making. The need to look at the broader policy issues, including R&D and competition policies was also touched upon. The importance of participation in WIPO and WTO was emphasised, in particular the issue of representation in Geneva must be addressed, since existing assistance schemes are not sufficient.

The role of regional co-operation was acknowledged and that it would be possible to build on the framework of existing regional trade agreements. However it was cautioned that this could prove politically difficult. There is a sovereignty problem. Looking at regional co-operation in Africa, it was noted that there are historical reasons for the existence of national offices in ARIPO member countries and their absence in the French speaking OAPI countries. Where regional organisations do

exist, it was asserted that the reason why developing countries do not join them is the cost. Tangible results must be shown. ARIPO is establishing national focal offices to provide support on a country level. One participant observed that if ARIPO and OAPI were to merge the joint organisation would have more impact on international policy-making.

In addition, a point made by a number of participants is that local IP attorneys in developing countries are sometimes worried that they will lose business as a result of international co-operation, for example through the Madrid system for trademark registration. The participants were reminded of the WIPO Patent Agenda, a process of international consultations concerning the worldwide patent system launched by WIPO in Sept 2001. It was also noted that relying only on a national patent registration system might not be helpful for developing countries. Some duplication of patent examination is needed to build up national know-how. Regardless of the institutional setting it was argued that the job of handling IP applications is simply too big for national patent offices.

### **Session 3: Technical co-operation and capacity building**

The group took note of information presented about the relevant policies and activities of the OECD-DAC, WIPO, EPO, WTO and the World Bank. In the ensuing discussion the question was raised why developing countries do not make more use of the existing flexibilities of the TRIPS agreement? Is technical assistance provided without understanding of national development agendas? Is its delivery really unbiased? There might be cases when countries need alternative systems.

It was argued that the present system is insufficient and not as beneficial as it might be to developing countries: radical changes in the delivery of technical assistance were called for. New mechanisms must be found and a holistic approach is more appropriate than ad-hoc activities. It was emphasised that training is not effective without a national strategy. Competition policy is one important policy area that must complement IPR reforms. It was questioned whether this is done at present, in spite of art 67 of the TRIPS agreement.

It was suggested that there is an urgent need to define realistic concepts regarding the role and function of small IP offices, in particular in the patents field, in developing countries, instead of modeling the structure of developed countries. Regarding eg the issue of establishing examination capacities or not, the question of a threshold (size of country, economic level, human resources, etc), below which the feasibility of such a service could be seriously questioned, has to be put on the table. Such discussions are a missing element at present and are lowering the effectiveness of technical assistance. Further, instead of the North telling the South what it should do, a South-South approach may be interesting, based on regional success stories. This was countered by the argument that both WIPO and WTO are neutral and do not use standard models when giving advice.

It was clarified that implementation is more than just law and that the gap between what exists in developing countries and the requirements of WTO compliance has been underestimated. Small countries have taken quantum leap in legislation, and it was suggested that they have felt a pressure to implement new laws and that some

countries have relied on implementing model legislation. Regulations and procedures are lacking. It was also argued that governments in these countries also need to take a paternalistic approach and energise stakeholders, which is not the case in developed countries.

Some of the participants indicated that transition periods may be too short and that sufficient transitional periods are essential for ownership. In response it was pointed out that the transition period for least developed countries for patent protection for pharmaceuticals has been extended to 2016. In addition, it is unlikely that there will be disputes against least developed countries that are not in full compliance. On the other hand, this does depend on the political climate and that there is no guarantee that it will be the case. It was added that the conditions for countries newly acceding to the WTO (regarding implementation of the TRIPS Agreement) are more stringent, since they have less bargaining power.

#### **Session 4: Conclusions and key issues**

There was discussion of the recommendations of the background paper, which were thought to be generally interesting and well argued. However, participants were not asked to give a full endorsement of each and every one of the recommendations and a number of specific questions were raised concerning the validity of certain individual recommendations. Further, some participants suggested additional recommendations that could be made by the Commission which were not covered in the paper. The main points raised during the tour de table include:

- Countries need to think about the service levels that their national IPR administration offices need to deliver and the performance standards to which they will be measured. This should inform decisions on the design of the national regime and use of international/regional co-operation systems. There may be a need to think about minimum standards to deliver priorities for an IPR regime. The whole spectrum may not be necessary.
- Developing countries may need assistance in making an assessment analysis before making formal requests for financial assistance. One way of doing this could be to support a national policy process that generates a national action plan with priorities.
- The overall bureaucratic culture and practice in developing countries will influence a re-designing of IPR systems.
- Best/worst practices and guidelines could be developed, based on case studies and the experiences of donors. More resources should be devoted to document experiences of actual uses of IPRs to show to what extent they can be beneficial.
- A single IP office may have negative effects in terms of disconnect between the area of IPR and the wider area of public policy (e.g. PVP under Ministry of Agriculture). On the other hand, there are real scale economies from centralizing IPR administration in small or very poor countries – and mechanisms can be found to avoid losing synergies for inter-ministerial collaboration.

- The need for short-term technical assistance to developing countries could be met by secondment of expatriate staff. This would allow immediate workloads to be processed and capacity to be built over the longer term.
- Small states have special requirements for technical and financial assistance similar to LDCs due to small market size and small volumes of IPR applications, leading to problems with the financial sustainability of IPR institutions. Small economies may also need long-term secondment of expatriate staff.
- Improving the quality of technical assistance should be emphasized rather than just the quantity: this suggests a requirement for independent impact evaluation and lesson learning.
- It is important to consider the wider policy framework (e.g. R&D policy, Science & Technology policy, competition policy) when establishing IPR regimes in developing countries.
- Capacity building in IPR policymaking/administration should also cover developing countries' desire to establish protection and benefits sharing arrangements for traditional knowledge, folklore and bio-diversity.
- Regarding the issues related to patent examination versus registration systems, there is a concern about concentration of global patent examination in very few (developed country) offices. Enhancement of regional IPR administration search and examination centres could be a way of addressing this. In addition, developing countries could establish patent administration expertise in strategic industries of national significance (would help in dissemination of patent information services).
- There should be more donor support for regional organizations, for example to establish on-site training institutions to provide training activities to staff from member states. Also, staff in regional offices can be given long-term training assignments in national offices.
- A new mechanism is needed for facilitating dialogue between donors and developing countries on strategies and information sharing for IP-related capacity building. Existing practices are not adequate. Opportunities for this under the Integrated Framework and through the OECD-DAC could be explored as first steps.
- Development banks may wish to support more research on the impact, benefits and use of IPR system in developing countries (e.g. addressing questions such as commercialisation of research).
- Donor agencies may be interested in working together in particular countries on programs to integrate IPR regime with the R&D and competition policy regimes.
- Larger participation by developing countries in the PCT and the Madrid systems of international co-operation would be recommendable.

- Within semi-autonomous IP institutions, cross-subsidization across different functions and services can be considered once adequate revenues come on stream.
- A key issue for developing countries is the institutional capacity for commercialisation of research and knowledge. Related to this, a new area for technical/financial assistance could be subsidizing acquisition/maintenance of IPRs by developing countries in developed countries, where costs can be very high.
- There is a case for expanded ODA to finance the modernisation of IP regimes in developing countries, but this is problematic under shrinking or stable ODA levels. An additional specific levy on PCT and Madrid fees could be an alternative.