

THE INTERNATIONAL ARCHITECTURE



INTRODUCTION

The implication of our analysis is that the interests of developing countries are best served by tailoring their intellectual property regimes to their particular economic and social circumstances. Just as developed countries currently exhibit significant variations in how they apply IPRs, and did so to an even greater extent in the past, so should developing countries be free to proceed accordingly. Indeed, it is perhaps more important for developing countries because costly errors of policy will be harder to bear. A crucial question, however, is how this objective can be accommodated within the complex international architecture of multilateral, regional and bilateral IP rules and standards which impose unprecedented limits on the freedom of countries to act as they see fit in this field. (See Box 8.1 for an overview).

This question arises not only in the context of the existing regulations but may also be asked of the future regulations currently under discussion. As we discuss in Chapter 6, the current debate about more comprehensive international harmonisation of patent systems in WIPO raises in acute form the issue of how developing countries' interests can appropriately be protected and furthered in the international system. More generally, our conclusions place a responsibility on the international community to assess whether the mechanisms in place for negotiating intellectual property standards, both multilaterally and bilaterally, take sufficient account of the interests of developing countries and poor people. We consider that the institutional framework is not optimally suited to this task and needs to display considerably greater sensitivity to these issues.

The central questions, which we address below, are as follows:

- Do the key international institutions, in particular WTO and WIPO, provide adequate advice and analysis based on an understanding of the particular needs of developing countries, and poor people?
- In their bilateral relations with developing countries, do developed countries take sufficient account of the impact of IPRs on developing countries and in particular poor people in them?
- Are developing countries themselves sufficiently aware of where their own interests lie, and do they have the capacity to secure those interests in bilateral and multilateral negotiations?

In order to answer these questions, it is necessary to gain some understanding of the international architecture for IP, how rules are formulated at that level and how the institutions help in embedding them into national law.

Box 8.1 The International IP Architecture: Multilateral, Regional and Bilateral Rules

The architecture of the global IPR regime has become increasingly complex, and includes a diversity of multilateral agreements, international organizations, regional conventions and bilateral arrangements.

Multilateral treaties

Most of these agreements are administered by WIPO, and are of three types:

- Standard setting treaties*, which define agreed basic standards of protection. These include the Paris Convention, the Berne Convention and the Rome Convention. Important non-WIPO treaties of this kind include the International Convention for the Protection of New Varieties of Plants (UPOV) and TRIPS.
- Global protection system treaties*, which facilitate filing or registering of IPRs in more than one country. These include the Patent Cooperation Treaty (PCT), and the Madrid Agreement Concerning the International Registration of Marks.
- Classification treaties*, which organise information concerning inventions, trademarks and industrial designs into indexed, manageable structures for ease of retrieval. One example is the Strasbourg Agreement Concerning the International Patent Classification.

Other international agreements with an IPR content include the International Treaty on Plant Genetic Resources for Food and Agriculture and the Convention on Biological Diversity.

Regional treaties or instruments

Examples of these kinds of agreement include the European Patent Convention, the Harare Protocol on Patent and Industrial Designs within the Framework of ARIPO, and the Andean Community Common Regime on Industrial Property.

Regional trade agreements

Regional trade agreements normally have sections governing IP standards. For example, the North American Free Trade Association, the proposed Free Trade Area of the Americas, the EU/ACP Cotonou Agreement.

Bilateral agreements

Specifically, these include those bilateral agreements that deal with IPRs as perhaps one of several issues covered. A recent example is the 2000 Free Trade Agreement between the US and Jordan, but there are many others (see Table 8.1).

Source: UNCTAD/ICTSD (2002).¹

INTERNATIONAL STANDARD SETTING: WIPO AND WTO

There are several international institutions involved in standard setting for intellectual property. WIPO is the principal international institution responsible for organising the negotiation of IP Treaties and their administration. With the inclusion of TRIPS in the Uruguay Round, intellectual property has also come under the aegis of the WTO, the successor to GATT, and some would argue that WIPO's influence has thereby diminished. A special Council for TRIPS was created within the WTO structure to administer the TRIPS Agreement.

The secretariats of both WIPO and WTO serve organisations which are governed by members. National governments determine policy and decide the outcome of negotiations. In reality, as in any bureaucracy where governance has a dispersed structure, the secretariat and its leadership play a greater or lesser role in defining the important issues, and determining the range of possible solutions. WIPO and the WTO also respond to a range of external influences, outside the formal structure of governance, including from member states, some of which have greater influence than others, and external pressure groups including industry, industry associations and NGOs.

Governments and others perceive that the WTO is particularly important as an institution for establishing trade rules which are binding. This is because of the generality of its scope and the fact that it has the power to impose sanctions that may significantly affect national policy. This is why the developed countries chose GATT/WTO, rather than WIPO, as the appropriate mechanism for the globalisation of IP protection through TRIPS. It is also why, for instance, so much attention was focused on the Doha Declaration on TRIPS and Public Health by industry, governments and NGOs. The importance of the WTO in the context of IP rule-making is not so much due to its particular competence in international standard setting for IP (although it has a high quality intellectual property division), but because its mechanism for dispute settlement is a potent tool, which members can use to enforce the TRIPS obligations of their trading partners, backed by the threat of trade sanctions. To date, there have been 24 cases of dispute settlement cases concerning TRIPS in the WTO, the vast majority having been brought by the US and the EU.²

In contrast, WIPO has a greater depth of expertise in the field of intellectual property. But it is a very different type of organisation for two reasons. First, about 90% of its funding comes not from member governments (as in WTO or other UN agencies) but from the private sector by way of fees paid by patent applicants under the PCT - effectively from the community of patentees.³ Secondly WIPO is, by its founding charter, solely concerned with the promotion of IPRs. Its objectives and functions do not include a development objective.⁴

As might be expected from WIPO's interpretation of its mission (see Box 8.2), the organisation is a firm advocate of stronger IP protection in developing countries. Indeed, the analyses in WIPO's various published policy documents pay little attention to the possible adverse consequences of such protection. IP rights are, in the main, presented as unequivocally beneficial. For instance, a publication on WIPO's website entitled "*Intellectual Property – Power Tool for Economic Growth*" states that ideas that:

"...patents are not relevant to developing nations, or that they are incompatible with the economic objectives of the developing nations - are pernicious myths. The reason why these notions are pernicious is because they give the impression that it is possible to simply opt {out} of the international patent system, and yet still achieve economic development. This is an error as patents are an essential component of economic strategy, regardless of whether the country is developed or in the process of economic development."⁵

We do not read too much into any individual statement such as this but it is, we believe, indicative of a particular perspective which prevails at WIPO. As is evident from this report, it is beyond question that there is a rather more complex link between intellectual property protection and development than such statements suggest. We recognise that WIPO has a role to play in promoting IPRs. However, we believe that it needs to do so in a much more nuanced way that is fully consistent with the economic and social goals to which the UN, and the international community are committed. A more balanced approach to the analysis of IPRs, and, in consequence WIPO programmes, would be beneficial to both the organisation and the developing world, which forms the majority of its membership.

WIPO should give more explicit recognition to the fact that IP protection has both benefits and costs, and give greater emphasis to the need for IP regimes to be appropriately tailored to the individual circumstances of developing countries. This would, we believe, certainly involve greater

Box 8.2 The World Intellectual Property Organisation (WIPO)

WIPO began life in 1893 as BIRPI (the French acronym for the United International Bureaux for the Protection of Industrial Property). This was a body established principally to administer service the Paris and Berne Conventions on industrial property and copyright. It was only restructured and reconstituted as a UN agency as recently as 1974.

WIPO's objectives, as set out in the Convention establishing it, are to "promote the protection of intellectual property throughout the world". In the light of that objective, its first function is to "promote the development of measures designed to facilitate the efficient protection of intellectual property throughout the world and to harmonize national legislation in this field."⁶ It is "convinced of the need to ensure that developing countries...are fully integrated into the international intellectual property system." It believes that "harmonization of national policies on the establishment of intellectual property rights should be sought, with the aim of protection at the global level."⁷ This is the perspective in which it manages its cooperation and technical assistance activities with developing countries.

Today, the main functions of WIPO are to serve as a forum for negotiation of international IP treaties; to administer such treaties and operate the systems of global protection such as the Patent Cooperation Treaty (PCT) and the Madrid system; and to provide technical assistance and training to developing countries and countries in transition.

The PCT aims to simplify and reduce the cost of obtaining international patent protection. By filing one international patent application under the PCT, an applicant can simultaneously seek protection for an invention in over one hundred countries. Recent PCT applications are published in the PCT Gazette to facilitate public access to technical information.

WIPONET is a global digital information network, providing network infrastructure and services for improved information exchange, to enable the integration of IP information resources, processes and systems of the worldwide IP communities, particularly the IP offices of member States. WIPONET will also provide a portal for other WIPO-provided systems, such as the Intellectual Property Digital Libraries (IPDLs), and eventually to on-line filing under the PCT.

The Internet Corporation for Assigned Names and Numbers (ICANN) administers a system for resolving domain name disputes involving trademarks, and a system of best practices for domain name registration authorities, designed to avoid such conflicts.

The WIPO Worldwide Academy is an institution which provides teaching, training, advisory, and research services in intellectual property.

Source: <http://www.wipo.int>

sensitivity in providing assistance to developing countries in implementing TRIPS and appropriate other measures to ensure that IP rights operate in the public interest.

As a means to this end, we also believe that WIPO would benefit from drawing a wider group of constituencies with an interest in the IP system into its policy-making process, such as consumer organisations. WIPO has always been responsive to the needs of the industrial sectors which make intensive use of IP. We are less persuaded that it is as responsive to the interests of consumers or users of IP-protected products. It is of crucial importance in this respect that WIPO is not perceived as being receptive primarily to those organisations which have an interest in stronger IP protection.⁸

Quite recently, WIPO set up two advisory bodies: a Policy Advisory Commission (PAC) and an Industry Advisory Commission (IAC). We welcome the establishment of these groups whose role is to provide expert advice to WIPO. We also welcome the recognition, noted below, of the need for a wider range of views to be represented in policy making. But we think that the membership of these bodies should reflect more systematically those diverse interests in society that have an interest in IP, both as producers of it or users. Thus representatives from industry, scientists, consumer groups and other civil society organisations, as well as IP experts and government representatives would enable WIPO to play a more effective role in facilitating dialogue with its broad constituency of stakeholders. This greater involvement with a wider representation of users and interest groups could usefully be complemented by closer co-operation with other relevant international organisations, such as the WHO (particularly for implementing the Doha Declaration), FAO, UNCTAD and the World Bank.⁹

WIPO should act to integrate development objectives into its approach to the promotion of IP protection in developing countries. It should give explicit recognition to both the benefits and costs of IP protection and the corresponding need to adjust domestic regimes in developing countries to ensure that the costs do not outweigh the benefits. It is for WIPO to determine what substantive steps are necessary to achieve this aim but it should as a minimum ensure that its advisory committees include representatives from a wide range of constituencies and, in addition, seek closer cooperation with other relevant international organisations.

If WIPO adopts the approach we suggest, a question arises as to whether its current articles will permit it to do so legitimately. The objectives laid down for many international organisations are broad and multi-faceted, and allow for considerable flexibility in interpretation if member states wish to change the activities of the organisation in response to changing circumstances. Unlike many of these organisations, WIPO has a very specific mandate in its constitution - to promote the protection of intellectual property throughout the world, including the harmonisation of national legislation. We are not sure that this mandate can be interpreted to allow WIPO to adjust its approach in developing countries to reflect the economic need to balance the benefits and costs of IP protection.

Unless they are clearly able to integrate the required balance into their operations by means of appropriate reinterpretation of their articles, WIPO member states should revise the WIPO articles to allow them to do so.

THE TRIPS AGREEMENT

There has been much debate about whether the subject matter of the TRIPS agreement belongs in WTO. Some commentators have taken the view that the WTO is essentially a free trade organisation and the global enforcement of IP standards, among nations at very different levels of social and economic development, should not fall within its terms of reference. They argue that intellectual property is not a matter concerned with trade, and further, that as TRIPS will principally benefit the developed countries, the credibility of the WTO as an instrument to promote free trade in the interests of all countries is weakened. A leading exponent of this view is Jagdish Bhagwati:

"TRIPS does not involve mutual gain; rather, it positions the WTO primarily as a collector of intellectual property-related rents on behalf of multinational corporations (MNCs). This is a bad image for the WTO and in the view of many, especially the non-governmental organizations, reflects the "capture" of the WTO by the MNCs."¹⁰

Others counter this argument by stating that IP protection has always been integral to trade and commercial diplomacy. On this view, TRIPS was produced as a result of bargaining between sovereign states as part of a larger package of trade-offs in which there were supposed to be gains for all. Whilst not all developing countries participated in the TRIPS negotiations, they were free to do so and leading developing countries, most notably India and Brazil, did participate actively.

It appears to us that, despite the history of the Uruguay Round negotiations and the asymmetries in negotiating capacity and power between the developed and developing countries, TRIPS is likely to remain an integral part of the WTO framework. While we have reservations about the extension of TRIPS standards to all developing countries, we recognise that it is most unlikely that any WTO members would be keen to renegotiate the agreement. Many members fear that in seeking particular amendments they would be obliged to compromise elsewhere in ways that may not bring a net benefit to them. The TRIPS Agreement, like others in the WTO, is subject to periodic review and genuine proposals for improving TRIPS provisions to benefit developing countries must be given proper consideration. But beyond these general points, we wish to draw two other specific conclusions from the evidence and our consultations about TRIPS.

Assisting Developing Countries to Implement TRIPS

First, it is of prime importance that WTO members complete their work in clarifying the flexibilities within TRIPS regarding public health and that developing countries are enabled to utilise these and other flexibilities in the Agreement. Much new IP legislation has been introduced in developing countries since 1995 and some commentators¹¹ have expressed concern that the flexibilities available under TRIPS have not been fully utilised to reflect local needs. Our investigations of the current or draft IP laws of about around 70 developing countries and LDCs found, for example, that only around a quarter of these countries specifically excluded plants and animals from patent protection, less than half provided for international exhaustion of patent rights and less than a fifth specifically provided a so-called "Bolar" exception to patent rights.¹² Of course, there may be good reasons why a developing country might not wish to make use of these flexibilities, having made an informed decision not to do so. Their freedom to manoeuvre may also be constrained by other commitments, such as bilateral agreements.

But it might also be because those in charge of the legislative process are unaware of the options available, or the full implications of these options. As we note in Chapter 7, developing countries receive technical assistance in the IP field from a wide range of national and international institutions, such as the EPO, the USPTO, and the IP authorities of developed countries. But WIPO, as the international institution responsible for the promotion of IP, has a pivotal role in the setting of standards in this area, through its model laws and the nature of the technical assistance it provides. Our comments on this subject are therefore appropriately directed at WIPO, but they apply as well to all the other bodies involved in advising developing countries on IP matters.

We found that while some, particularly in developing country IP offices, highly value WIPO's technical assistance, substantial concerns have been raised by a number of individuals and organisations, about whether the assistance provided by WIPO has always been appropriately tailored to the circumstances of the developing country concerned.¹³ Hitherto, the confidential nature of the consultations between WIPO officials and a developing country, together with the absence of a formal WIPO policy statement on the nature of its technical assistance made it difficult to assess whether there was substance to in these concerns. In addition, WIPO did not publicise its model IP laws and annotations which would have indicated the extent to which it was providing

advice consistent with all the flexibilities under TRIPS. There is also evidence that, in cases where WIPO's assistance has been acknowledged, the result has not incorporated all TRIPS flexibilities. For instance, the revised Bangui Agreement for the OAPI countries, where WIPO's assistance is acknowledged, has been criticised in various quarters for going further than TRIPS. It obliges LDC members (the majority of OAPI members) who ratify it to apply TRIPS in advance of need; it restricts the issuance of compulsory licences to a greater extent than required by TRIPS; it does not explicitly allow parallel imports; it incorporates the elements of UPOV 1991 in the agreement and it provides for a copyright term of 70 years after the death of the author.

However, very recently WIPO has introduced a page on its website which describes the legislative assistance it provides in relation to TRIPS and the Doha Declaration. This serves to allay some of these concerns. In addition to making available the model IP laws it uses, WIPO also notes that:

"WIPO's advice takes into account all the flexibilities that are open to members under the TRIPS Agreement including those confirmed in the Doha Ministerial Declaration on the TRIPS Agreement and Public Health ("the Doha Ministerial Declaration"). WIPO's advice takes into account the unique situation of each country, given that Member States have different legal systems and different political and cultural structures. WIPO follows up its written legal advice with an interactive process between the Organization and major stakeholders in the Member State concerned. To strengthen the TRIPS implementation process during the last four years, WIPO has promoted the interaction among stakeholders at the national level to include, for example, officials of Law Reform Commissions, Chambers of Commerce and Federation of Industries, Research and Development institutions, Parliamentarians, high-level officials of Ministries of Trade, Agriculture, Health, Science and Technology, Culture, Justice, Environment, among others."¹⁴

We welcome this statement of WIPO's commitment to provide advice to developing countries which takes account of the flexibilities in TRIPS, and the particular circumstances of each country. In addition we attach importance, as we note in the previous chapter, to a wide-ranging consultative process in the development and evolution of each country's IP legislation. Such consultation is essential if IP laws are to be devised in line with development objectives in agriculture, health and industry. Nevertheless, we think that this is the beginning of the process required to make WIPO truly responsive to the specific needs of developing countries. For example, WIPO's current model law on patents requires further work in our view if it is to provide the best guidance on how developing countries can utilise the flexibilities in TRIPS.¹⁵ Other organisational and procedural changes may also be necessary to embed these new policies operationally. Other providers of IP technical assistance need also to consider their policies in the same light.

WIPO should take action to make effective its stated policy of being more responsive to the need to adapt its IP advice to the specific circumstances of the particular developing country it is assisting. We also recommend that it, and the government concerned, involve a wider range of stakeholders in the preparation of IP laws both within government and outside, and both potential producers and users of IP. Other providers of technical assistance to developing countries should take equivalent steps.

Timetable for Implementing TRIPS

Our second conclusion regarding TRIPS is that, consistent with the overall analysis of this report, we are not persuaded by the arguments that developing countries at very different stages of development should be required to adopt a specific date (January 2000 for developing countries, January 2006 for LDCs) when they will provide the TRIPS standards of protection within their domestic IP regimes, regardless of their progress in creating a viable technological base. On the contrary, we believe there are strong arguments for greater flexibility in setting an optimum time to strengthen IP protection, taking into account the nation's level of economic, social and technological development.

In TRIPS there are provisions made for the extension of the transitional period for LDCs by the TRIPS Council, although the logic of our argument applies to a wider range of low income developing countries.¹⁶ We think that TRIPS would be improved by utilising these provisions to take greater account of the special needs of LDCs. These countries need longer to devise appropriate IP regimes and to establish the necessary administrative and institutional infrastructure, as well as the required regulatory frameworks, including complementary legislation such as competition law. The challenges are formidable and developing countries will incur significant costs if they rush to establish an IP regime that is inappropriate to their level of development. And, quite obviously, the governments of many LDCs, particularly in sub-Saharan Africa are facing much more immediate demands in critically important areas such as health, education and food security.

We do not think that granting LDCs the option of a longer transition period for TRIPS will materially damage the interests of developed nations. The Doha Declaration began this process by agreeing on the extension of the transition period for LDCs to provide patent protection to pharmaceuticals to at least 2016. It seems logical that the extension of that transition period should now be broadened to cover the implementation of TRIPS as a whole. It could be readily implemented by the TRIPS Council in complete conformity with the existing provisions of Article 66.1 of the Agreement. Furthermore, we think the TRIPS Council should also consider introducing criteria to decide the basis on which LDCs should enforce TRIPS obligations after 2016. These criteria could include indicators of economic development and scientific and technological capability, related to the criterion specified in the Article of “the need for flexibility to create a viable technological base.”¹⁷

LDCs should be granted an extended transition period for implementation of TRIPS until at least 2016. The TRIPS Council should consider introducing criteria based on indicators of economic and technological development for deciding the basis of further extensions after this deadline. LDCs that have already adopted TRIPS standards of IP protection should be free to amend their legislation if they so desire within this extended transition period.

IP IN BILATERAL AND REGIONAL AGREEMENTS

Developed countries, the US and the EU in particular, have sought to encourage developing countries to comply with international IP treaties, or to adopt higher standards of IP protection. In the past, trade concessions have been withheld and trade sanctions implemented against certain developing countries whose IP regimes have not met the expectations of their trading partners in the developed world.¹⁸ More recently, there has been a trend for developed countries to seek commitments on IP standards from an increasing number of developing countries in bilateral or regional trade and investment agreements that go beyond TRIPS.¹⁹ Table 8.1 below, provides some examples.²⁰

We accept that to a degree, developed countries have a legitimate interest in the IP standards of their trading partners. In our judgement, regional and bilateral agreements are much less preferable to the setting of multilateral standards, where the negotiating capabilities of developed and developing countries although remaining asymmetrical, are counterbalanced by numerical advantage and the ability to build alliances. Moreover, there is a risk that regional/bilateral agreements could undermine the multilateral system by limiting more generally the use by developing countries of the flexibilities and exceptions in TRIPS. In particular the Most Favoured Nation Principle means that terms agreed bilaterally or regionally must be offered to all other WTO members on the same basis.

It is unrealistic to think that IP standard setting will disappear altogether from bilateral and regional commercial diplomacy. The imperative, then, is for developed countries to ensure that their policy objectives for IP standards in regional/bilateral trade agreements are demonstrably consistent with their broader objectives for promoting international development and poverty

reduction. To that end we would encourage developed countries, rather like developing countries (see Chapter 7), to incorporate a wider range of stakeholders, within government and without, in their policymaking on IP. IP policy too must integrate development considerations and that should be done as much by developed countries as by developing. Developing countries should not have to accept IP rights imposed by the developed world, outside their existing commitments to international agreements. Negotiators for developed countries need to take account of the costs to developing countries of higher IP standards, as well as the benefits to their own industries.

Table 8.1. Examples of Bilateral Agreements Requiring TRIPS-plus Standards²⁰

Agreement	Date	Examples of TRIPS-plus provisions
US-Jordan Free Trade Agreement	2000	Each party must give effect to selected provisions of the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty and the UPOV (1991) Convention. Parties may not exclude plants and animals from patent protection and must provide patent term extension to compensate for unreasonable regulatory approval delay.
US-Cambodia Agreement on Trade Relations and IPRs	1996	Each party must accede to the UPOV Convention, must extend term of copyright protection in certain cases to 75 yrs from publication or 100 yrs from making (TRIPS requires only a minimum of 50 years in both cases), and Parties may not allow others to rely upon data submitted for pharmaceutical regulatory purposes for a reasonable period which shall generally be not less than 5 years.
US-Vietnam Agreement on Trade Relations	2000	Parties may not exclude from patent protection inventions that encompass more than one variety of animal or plant.

To the extent that development objectives have been given a higher priority in the policy framework of developed countries (as seemed to be demonstrated at Doha and Monterrey), then it would be unwise to let IP policy be influenced principally by domestic industrial and commercial interest groups in developed countries, whose view of what is appropriate for developing countries is very much coloured by their perception of their own interest. Governments from developed countries need to form their own view, in the light of all the evidence, as to how the interests of development in developing countries and their own commercial interests can best be reconciled. Ultimately, this should not be a zero sum game. In our view, most developed countries take insufficient account of development objectives when formulating their policies on IP internationally. More specifically, we believe that developed countries should discontinue the practice of using regional/bilateral agreements as a means of creating TRIPS-plus IP regimes in developing countries as a matter of course.²¹ Developing countries should be free to choose, within the confines of TRIPS, where to pitch their IP regimes.

Though developing countries have the right to opt for accelerated compliance with or the adoption of standards beyond TRIPS, if they think it is in their interests to do so, developed countries should review their policies in regional/bilateral commercial diplomacy with developing countries so as to ensure that they do not impose on developing countries standards or timetables beyond TRIPS.

PARTICIPATION BY DEVELOPING COUNTRIES

Active participation by developing countries is essential to ensure the legitimacy of standard setting and its appropriateness and relevance to nations at very different levels of development. The achievement of the Doha declaration, in part, reflected the fact that developing countries were able to present carefully developed, specific proposals that could be accommodated in WTO rulemaking. One clear implication of this, and a theme which emerged from much of our fieldwork, is that developing countries need the capacity to participate much more effectively in international IP negotiations, and on a regular rather than an exceptional basis.

To participate effectively, developing countries require a combination of four factors. These are permanent representation in Geneva; appropriately staffed expert delegations able to attend meetings and negotiations; adequate technical support for policy analysis; and functional mechanisms for policy co-ordination and discussion in capitals. In Chapter 7, we dealt with the issue of the need for more “joined-up” policymaking in developing countries, and the crucial requirement to develop expertise in policymaking in IP in their national institutions. We deal here with the other two issues.

Permanent Representation in Geneva

Permanent representation in Geneva is important for ensuring good information flows back to capitals; participation in informal consultations and negotiations; alliance building with like-minded countries; eligibility for chairing meetings; and to enable better access to the services and assistance available from the secretariats. A recent study commissioned by the Commonwealth Secretariat²² found that there are 36 developing countries, either WTO members or in the process of accession, who do not have any permanent representation in Geneva because they cannot afford the high costs of setting up and running a mission.²³ Our own analysis shows that 20 of the 45 LDCs who are members of either WIPO or WTO, or are in the process of WTO accession, are currently without permanent representation in Geneva. Where developing countries do have permanent representation, they are on average only half the size of those of developed countries.²⁴ There is a duality amongst developing countries in their capacity to participate. Some 30-35 developing countries, including Brazil, Egypt, India and some LDCs like Bangladesh, are effective and active participants at WTO and WIPO and accordingly exert an influence on the rule-making processes in these organisations. The rest of the developing countries, including many of the LDCs, are currently little more than spectators in WTO and WIPO, if they are present at all.

Expert Delegations

Developing countries should ideally send expert delegations from their capitals to attend international negotiations and meetings on different IP subjects. For most developing countries, a fundamental constraint is the lack of financial resources for travel costs, notwithstanding the schemes for financial assistance available from WIPO.²⁵ Even when delegations from the capitals do attend, their expertise may be limited to IPR administration as opposed to knowledge of IP as a tool of development policy. It would be helpful, we believe, if more developing countries were able to include expertise in economics, health, environment and agriculture in their delegations at relevant IP meetings and negotiations.

We believe that this is an important issue, which may have undesirable consequences and needs to be addressed. Some donors are supporting important, project-based initiatives.²⁶ And a number of developing countries are making important progress (for example, Botswana opened a mission in Geneva in 2001 and now regularly attends TRIPS Council meetings). But more needs to be done before we are likely to see any major improvement for a significant number of developing countries.

We offer two recommendations below aimed at significantly increasing participation by developing countries in international IP standard setting. The first recommendation is aimed at ensuring that the poorer developing countries, particularly LDCs, have the opportunity of sending representatives from capitals to the important meetings in WIPO and the WTO TRIPS Council. We propose that this could be achieved, with relative ease and without excessive cost, by an expansion of the existing subsidy scheme operated by WIPO for certain meetings. The new scheme should be mainly targeted at LDCs, as they are the least well represented in Geneva and face the most severe financial constraints in sending delegations to international IP negotiations and meetings. But it should also be open to all low income developing countries.

WIPO should expand its existing schemes for financing representatives from developing countries so that developing countries can be effectively represented at all important WIPO and WTO meetings which affect their interests. It would be for WIPO and its member states to consider how this might most effectively be done and financed from WIPO's own budgetary resources.

The second recommendation we make aims at ways to improve the quality of participation by developing countries whose representatives may lack expertise and experience in international IP standard setting and in the examination of the relationship between IP and national interests, and who may be unfamiliar with some of the technical subjects being discussed in WIPO and the TRIPS Council. To address this issue, we propose that two full time posts for IP Advisers (one for industrial property, the other for copyright, traditional knowledge and other IP subjects) are established at UNCTAD in Geneva. After careful consideration, we conclude that UNCTAD is best placed to fulfil this role because it has a broad mandate to undertake technical assistance and research not just on IP but across the spectrum of trade and development issues. Importantly, it also appears to us that UNCTAD has the confidence of the developing countries that are likely to be the main clients for such a service. Indeed, there is a clear precedent for this measure as UNCTAD recently established a similar post to developing countries on the WTO Trade in Services negotiations, with funding from DFID.

UNCTAD should establish two new posts for Intellectual Property Advisers to provide advice to developing countries in international IP negotiations. DFID should consider the initial funding of these posts as a follow-up to its current TRIPS-related project funding to UNCTAD.

We emphasize that these measures are in no way intended to substitute for the strengthening of IP-related administrative and analytical capacities within national institutions in developing countries. In fact, it is our intention that these recommendations should support those made in Chapter 7.

THE ROLE OF CIVIL SOCIETY

We have been struck by the recent extent and influence of NGOs' activity in IP. We believe that NGOs have made, and can continue to make in the future, a positive contribution to the promotion of the concerns of developing countries. Campaigns to raise awareness by development and health NGOs were important factors in the supporting developing countries in the negotiations of the Ministerial Declaration at Doha. In the fields of agriculture, genetic resources and traditional knowledge, certain NGO groups play an important role in highlighting and analysing issues of concern to developing countries.

Of course, there is a very wide diversity within the NGO community in terms of the interests they represent, the balance of activities between advocacy and research, and how vocal they are in representing their interests. Legitimate questions have been asked about whom exactly NGOs represent and to whom they are accountable. On occasion, we believe that a more reflective approach to some of the issues is called for. But the fact is that NGOs have helped to raise the profile of IP issues, and that some have access to more expertise in this field than many officials in developing countries. The crucial issues are to ensure that the role played by NGOs is constructive in relation to a proper appreciation of the interests of developing country interests, and that they are accorded an appropriate role in relation to international dialogue on these issues.

There is also concern about the perceived problem of certain NGOs acting as “proxy representatives” for the governments of developing country governments in international dialogue. But others point out that developing countries are, or should be, selective in seeking assistance from NGOs. Whatever forms such support may take, it is important that developing countries are enabled and assisted to identify and put forward their own interests. We think that developing countries will be best served by having a diversity of resources on which they can draw to assist them in making IP policy and participating in negotiations.

NGOs are certainly one source of such assistance, but the role they currently fulfil reflects the fact that they are to some extent filling a gap. We consider, as noted above, that it is imperative that other sources of such assistance, particularly the concerned international institutions, such as WHO or FAO, recognise how they might make their policy advice and technical assistance more attuned to the needs of developing countries in the IP area. But at the same time, a more constructive role for NGOs, along with other civil society groups, might be achieved by giving them greater opportunities to participate in proceedings.

WTO and WIPO should increase the opportunities for civil society organisations to play their legitimate roles as constructively as possible. For instance, this could be done by inviting NGOs and other concerned civil society groups to sit on, or observe, appropriate advisory committees and by organising regular public dialogues on current topics in which NGOs could participate.

DEEPENING UNDERSTANDING ABOUT IP AND DEVELOPMENT

International rules on IP are developing very rapidly. As we note in Chapter 5, a year or so after TRIPS was agreed, WIPO completed two new international treaties concerning copyright and the Internet. The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is dealing with these complex issues at WIPO. And, more recently, WIPO members have started to focus on the future of the patent system at the international level. As the rules evolve, it is important that their actual and potential impact be properly understood if policymaking is to be more firmly based on evidence, and less on preconceptions of the value or otherwise of these rules to developing countries.

This challenge has two aspects. First, as we have noted, there is a need for more evidence on the effect of introducing stronger IP protection in developing countries, particularly those with low incomes, which lack a viable technological base. Secondly, the range of emerging issues where the relationship between IP protection and development needs to be analysed and understood is very broad. For instance, a sample list of just some of subjects on the future agenda over the coming five to ten years might include:

- The consequences of full implementation of TRIPS on the developing world, including the provisions relating to enforcement.
- The implications of the movement towards harmonisation and integration of patent systems at the international level.

- Impacts of patents and other IPRs in new or rapidly advancing fields of technology, such as biotechnology and software.
- The impact on access to information crucial for development on the Internet, including technological protection by publishers and other content providers, and of anti-circumvention legislation. In addition, there will be issues of how to respond when nations attempt to take legal jurisdiction over foreign servers in order to affect the way these servers distribute information over the Internet.
- Alternative models of IPR protection suitable for developing countries.
- How best to build capacity for IP policymaking, administration and enforcement in developing countries – and how donors can provide support more effectively.

Currently, research work on IP is sponsored and undertaken by a variety of public and private sector organisations – universities, NGOs, industry associations, IP institutes, and development agencies. WIPO does commission studies on particular topics (for example, it has completed a very useful programme of case studies in the field of traditional knowledge) and occasional research papers, but we are surprised that it does not support a more substantial and extensive research programme directed at the emerging issues in its field. The WIPO Worldwide Academy currently focuses principally on training, but research is a part of its mandate. We see value in WIPO building up the research work of the Academy as a means of better informing itself, and its members, about the impact of IP on developing countries at different stages of development. As we have already noted, too little research work is focused on low income developing countries; even less is undertaken by developing country organisations themselves as part of national level programmes.

We believe that the system will only improve from a development perspective if we can develop a deeper understanding of the relationships between IP and development. It is important, therefore, for the community of research sponsors and practitioners around the world to meet this challenge. More research and collation of country case studies are certainly needed on subjects such as those we have listed above. But this is by no means a definitive list. Beyond these questions of resources and research priorities, however, we believe there would also be benefits from greater collaboration and co-ordination in this field between research sponsors and practitioners in developed and developing countries.

We have in mind an international network and partnership initiative which would bring together development agencies, developing country governments, IP researchers and NGOs. The aims would be to identify priorities and promote co-ordination of research programmes; improve knowledge sharing amongst partners; and facilitate wider dissemination of findings through sponsorship of publications, conferences and Internet-based resources. A steering committee could oversee the initiative's operations and working groups could be formed on particular subjects. The initiative would probably require a small secretariat to be most effective, but ideally it would be housed within one of the partner organisations.

Research sponsors, including WIPO, should provide funds to support additional research on the relationships between IP and development in the subject areas we have identified in our report. The establishment of an international network and an initiative for partnership amongst research sponsors, developing country governments, development agencies and academic organisations in the IP field could help by identifying and co-ordinating research priorities, sharing knowledge and facilitating wider dissemination of findings. In the first instance we recommend that DFID, in collaboration with others, take forward the definition of such an initiative.

¹ UNCTAD/ICTSD (2001), *“Intellectual Property Rights and Development”*, UNCTAD, Geneva, pp.57-62.

Source: <http://www.ictsd.org/unctad-ictsd/outputs/policypaper.htm>

² See Box O.1 in Overview on TRIPS.

³ WIPO (2001) *“Revised Draft Program and Budget 2002-2003”*, WIPO, Geneva.

Source: http://www.wipo.org/eng/document/govbody/budget/2002_03/rev/pdf/introduction.pdf

⁴ Convention Establishing the World Intellectual Property Organization, as amended in 1979, Articles 3 and 4.

Source: <http://www.wipo.int/clea/docs/en/wo/wo029en.htm>

⁵ At WIPO website. Source: http://www.wipo.int/about-wipo/en/dgo/abstract_ip_pub.htm

⁶ See Article 4 of Convention.

⁷ Quotations from World Intellectual Property Declaration, WIPO (2000).

Source: <http://www.wipo.int/about-wipo/en/>

⁸ For instance, international NGO Observers at the WIPO Assemblies are mainly industry groups. See WIPO Document No. A/36/INF/3 (October 3, 2001).

Source: http://www.wipo.int/news/en/index.html?wipo_content_frame=/news/en/conferences.html

⁹ This is also the view of WHO and the EU, who issued a joint statement following a meeting in Brussels on 6 June 2002 saying: “WHO will also seek to co-operate closely, where appropriate, with WTO and WIPO on technical assistance to developing countries implementing the TRIPS Agreement along the lines of the Doha Declaration”. Source: <http://www.who.int/inf/en/pr-2002-45.html>

¹⁰ Bhagwati, J. (2000) *“What It Will Take to Get Developing Countries into a New Round of Multilateral Trade Negotiations”*, Columbia University, New York, p.21.

Source: <http://www.dfait-maeci.gc.ca/eet/02-e.pdf>

¹¹ For example, Correa, C. (2000) *“Intellectual Property Rights, the WTO and Developing Countries: the TRIPS Agreement and Policy Options”*, Zed Books, New York & Third World Network, Penang.

¹² See Thorpe, P. (2002) *“The Implementation of the TRIPS Agreement by Developing Countries”*, Commission on Intellectual Property Rights Background Paper 7, Commission on Intellectual Property Rights, London.

Source: <http://www.iprcommission.org>

¹³ Conference organised by MSF, CPTech, HAI and Oxfam, *“Implementation of the Doha Declaration on the TRIPS Agreement and Public Health: Technical Assistance – How to get it right”*, 28 March 2002, Geneva.

Source: <http://www.haiweb.org/campaign/access/ReportPostDoha.pdf>

¹⁴ Source: <http://www.wipo.int/cfdiplaw/en/trips/index.htm>

¹⁵ The updated model law, whilst certainly an improvement on the previous version we saw, still does not specifically address in either the text or the accompanying commentary certain key issues. These include the patentability of computer programmes, or biological material such as genes or other material pre-existing in nature. We would suggest, for example, that the law should highlight, at least in the accompanying commentary, the different positions taken also on other issues such as farmer’s rights, rights in respect of the progeny of patented material and other exceptions to patent rights such as for educational uses. The various grounds on which some countries provide for compulsory licences could also be discussed, subject of course to any necessary qualification regarding possible incompatibility with international agreements. Other issues that could also be more openly addressed would include the possible interpretations of novelty, inventive step and industrial applicability (see chapter 6) and the disclosure of the origin of biological material (chapter 4).

¹⁶ Article 66.1 of TRIPS.

¹⁷ See Lall, S. & Albaladejo, M. (2001) *“Indicators of the Relative Importance of IPRs in Developing Countries”*, UNCTAD/ICTSD, Geneva. Source: <http://www.ictsd.org/unctad-ictsd/docs/Lall2001.pdf>.

This report sets out various measures of scientific and technical capacity in developing countries.

¹⁸ Drahos, P. (2001) *“Developing Countries and International Intellectual Property Standard-Setting”*, Commission on Intellectual Property Rights Background Paper 8, Commission on Intellectual Property Rights, London. Source: <http://www.iprcommission.org>

¹⁹ The Trade Act of 2002 (fast-track authority), HR3009, states: “The principal negotiating objectives of the United States regarding trade-related intellectual property are:

(A) to further promote adequate and effective protection of intellectual property rights, including through

(i) (I) ensuring accelerated and full implementation of the Agreement on Trade-Related Aspects of Intellectual Property Rights referred to in section 101(d)(15) of the Uruguay Round Agreements Act (19 U.S.C. 11 3511(d)(15)), particularly with respect to meeting enforcement obligations under that agreement; and

(ii) ensuring that the provisions of any multilateral or bilateral trade agreement governing intellectual property rights that is entered into by the United States reflect a standard of protection similar to that found in United States law;

- (ii) providing strong protection for new and emerging technologies and new methods of transmitting and distributing products embodying intellectual property;
 - (iii) preventing or eliminating discrimination with respect to matters affecting the availability, acquisition, scope, maintenance, use, and enforcement of intellectual property rights;
 - (iv) ensuring that standards of protection and enforcement keep pace with technological developments, and in particular ensuring that rightholders have the legal and technological means to control the use of their works through the Internet and other global communication media, and to prevent the unauthorized use of their works; and
 - (v) providing strong enforcement of intellectual property rights, including through accessible, expeditious, and effective civil administrative, and criminal enforcement mechanisms;
- (B) to secure fair, equitable, and non-discriminatory market access opportunities for United States persons that rely upon intellectual property protection; and
- (C) to respect the Declaration on the TRIPS Agreement and Public Health, adopted by the World Trade Organization at the Fourth Ministerial Conference at Doha, Qatar on November 14, 2001.

Source: <http://waysandmeans.house.gov/>

- ²⁰ Agreement Between The United States Of America And The Kingdom Of Cambodia On Trade Relations And Intellectual Property Rights Protection (Source: http://199.88.185.106/tcc/data/commerce_html/tcc_documents/cambodiatrade.html); US-Jordan Free Trade Agreement (Source: <http://www.ustr.gov/regions/eu-med/middleeast/textagr.pdf>); US-Vietnam Agreement on Trade Relations (Source: <http://www.ustr.gov/regions/asia-pacific/text.pdf>).
- ²¹ This is the current policy of the US Trade Representative, as reflected in the 2002 Trade Act.
- ²² Weekes, J. et al (2001) *"A Study on Assistance and Representation of the Developing Countries without WTO Permanent Representation in Geneva"*, Commonwealth Secretariat, London.
- ²³ The Commonwealth Secretariat study estimated the total cost of setting up and running a 3 to 4 person mission in Geneva to be approximately \$340,000 per year.
- ²⁴ Michalopoulos, C. (2001) *"Developing countries in the WTO"*, Palgrave, London.
- ²⁵ The Assemblies of the Unions established under the PCT and the Madrid Agreement, two WIPO-administered treaties, have agreed to finance the travel and subsistence expenses of one government official from each Member State to their meetings in ordinary or extraordinary session. In addition, following a decision by the Assemblies of WIPO Member States in 1999, WIPO sponsors the participation of 26 government officials from different developing countries and transition countries (five each from Africa, Asia, Latin America and the Caribbean, the Arab countries, certain countries in Asia and Europe plus one from China) in meetings of a selected number of committees (dealing with patents, trademarks, copyright and traditional knowledge). See Leesti, M. & Pengelly, T. (2002) *"Institutional Issues for Developing Countries in Intellectual Property Policymaking, Administration and Enforcement"*, Commission on Intellectual Property Rights Background Paper 9, Commission on Intellectual Property Rights, London, footnote 17. Source: <http://www.iprcommission.org>
- ²⁶ For example, UNCTAD, in collaboration with the International Centre for Trade and Sustainable Development, is currently implementing a project to provide developing countries with a handbook on implementation of TRIPS and on the upcoming reviews of the Agreement. The project is financed by the UK Department for International Development.

