

Intellectual Property and Sustainable Development Series



Maintaining Policy Space for Development



A Case Study on IP Technical Assistance in FTAs

By **Pedro Roffe and David Vivas with Gina Veá**
International Centre for Trade and Sustainable Development



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and Sustainable Development

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For more information about ICTSD's programme on intellectual property and sustainable development, visit our website: www.iprsonline.org.

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ABBREVIATIONS AND ACRONYMS

CAFTA-DR	DOMINICAN REPUBLIC-CENTRAL AMERICA FREE TRADE AGREEMENT
CIEL	CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW
EC	EUROPEAN COMMUNITIES
EFTA	EUROPEAN FREE TRADE ASSOCIATION
EU	EUROPEAN UNION
FTA	FREE TRADE AGREEMENT
GI	GEOGRAPHICAL INDICATION
ICTSD	INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT
IDDR	INSTITUTE FOR SUSTAINABLE DEVELOPMENT AND INTERNATIONAL RELATIONS
IDRC	INTERNATIONAL DEVELOPMENT RESEARCH CENTRE
IP	INTELLECTUAL PROPERTY
IPR	INTELLECTUAL PROPERTY RIGHT
IPTA	IP-RELATED TECHNICAL ASSISTANCE
IUCN	WORLD CONSERVATION UNION
NAFTA	NORTH AMERICAN FREE TRADE AGREEMENT
NGO	NON-GOVERNMENTAL ORGANISATION
QUONO	QUAKER UNITED NATIONS OFFICE
SECO	SWISS STATE SECRETARIAT FOR ECONOMIC AFFAIRS
SIDA	SWEDISH INTERNATIONAL DEVELOPMENT AGENCY
TA	TECHNICAL ASSISTANCE
TRIPS	AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS, WTO
UK	UNITED KINGDOM
UNCTAD	UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT
UPOV	INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
US	UNITED STATES
USAID	UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT
USPTO	UNITED STATES PATENT AND TRADEMARK OFFICE
WIPO	WORLD INTELLECTUAL PROPERTY ORGANIZATION
WSSD	WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT
WTO	WORLD TRADE ORGANIZATION

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FOREWORD

This study addresses the issue of how technical assistance is dealt with in the intellectual property (IP) chapters of Free Trade Agreements (FTAs). The study focuses on some of the technical assistance concerns raised by a new generation of IP obligations. It looks at the impact of such obligations and the challenges faced by developing countries with regard to their implementation, as well as human and institutional capacity building. It pays particular attention to FTAs between the US and a number of developing countries, especially those in Latin America. It centres its analysis on the needs and issues arising from the implementation phase of FTAs once the negotiation phase has ended.

This is the third ICTSD study on technical assistance in intellectual property. It demonstrates from a sustainable development perspective that this issue is one of the most strategically important – but also one of the most controversial – aspects for achieving a balanced IP system at the national level. The study concludes that the recent emergence of FTAs, many of which contain chapters on IP that go beyond the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), adds a new layer of complexity for countries in the implementation and enforcement of international IP rules and has important implications for policy coherence, institutional reforms and human resources. To this end, it argues that carefully crafted technical assistance is needed in order to make national IP systems effective tools for promoting innovation and technology transfer.

The premise of ICTSD's work in this field, together with its joint project with UNCTAD, is based on the understanding that intellectual property rights (IPRs) have never been more economically and politically important or controversial than they are today. Patents, copyrights, trademarks, industrial designs, integrated circuits and geographical indications are frequently mentioned in discussions and debates on issues as diverse as public health, food security, education, trade, industrial policy, traditional knowledge, biodiversity, biotechnology, the Internet, and the entertainment and media industries. In a knowledge-based economy, there is no doubt that a better understanding of IPRs is indispensable to informed policy making in all areas of development.

Empirical evidence remains inconclusive as to the role of intellectual property protection in promoting innovation and growth. Divergent views also persist on the impacts of IPRs on development prospects. Some point out that, in a modern economy, the minimum standards laid down in the TRIPS will bring benefits to developing countries by creating the incentive structure necessary for knowledge generation and diffusion, technology transfer and private investment flows. Others stress that intellectual property, especially some of its elements, such as the patent regime, will adversely affect the pursuit of sustainable development strategies by, for instance: raising the prices of essential drugs to levels that are too high for the poor to afford; limiting the availability of educational materials for developing country school and university students; legitimising the piracy of traditional knowledge; and undermining the self-reliance of resource-poor farmers.

It is crucial, therefore, to ask the question: How can developing countries use IP tools to advance their development strategy? What are the key concerns surrounding the issues of IPRs for developing countries in formulating their IP policy? What are the specific difficulties they face in intellectual property negotiations? Is IP directly relevant to sustainable development and to the achievement of agreed international development goals? How can we better facilitate technological flows between all countries? Do they have the capacity, especially the least developed among them, to formulate effective negotiating positions and become well-informed negotiating partners? These are essential questions that policy makers need to address in order to design and implement IP laws and policies that meet the needs of their people and negotiate effectively in future agreements.

To help address some of these questions, the ICTSD Programme on Intellectual Property and Sustainable Development was launched in July 2000. A central objective of the programme has been to facilitate the emergence of a critical mass of well-informed stakeholders in developing countries – including decision makers and negotiators, but also the private sector and civil society – who will be able to define their own sustainable human development objectives in the field of IPRs and effectively advance them at the national and international levels.

We hope you will find this study a useful contribution to the debate on intellectual property and sustainable development, and particularly on how technical assistance should best be devised to address the challenges of implementing the new generation of IP obligations in FTAs.

A handwritten signature in black ink, appearing to read 'R-M-O', with a horizontal line underneath.

Ricardo Meléndez-Ortiz

Chief Executive, ICTSD

EXECUTIVE SUMMARY

Free Trade Agreements (FTAs) are mushrooming at both regional and bilateral levels. According to the World Bank, the number of agreements in force has increased six-fold in just two decades.¹ These treaties are often one component of a larger political effort to deepen economic relations between selected countries. While the primary aim of FTAs is increased market access, these accords contain a number of trade-related regulations, including those on intellectual property rights (IPRs), investment, services, government procurement and, in some cases, the environment.²

The intellectual property (IP) obligations in these agreements are notable for expanding the minimum standards of protection and enforcement beyond those laid out in the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 1994.³ As these IP obligations are of recent vintage, it is difficult to assess their impact and relevance to technical assistance (TA). This paper seeks to generate knowledge and facilitate consensus around an action-oriented strategy for evolving and mainstreaming IPR technical assistance and capacity building. It deals specifically with IP technical assistance provisions in regional and bilateral trade agreements.

The paper thus focuses on some of the technical assistance concerns raised by FTAs, including the challenges to developing countries with regard to implementation and human and institutional capacity building. It pays particular attention to FTAs between the US and a number of developing countries, especially those in Latin America. It centres its analysis on the needs and issues arising out of the implementation of FTAs and does not deal with TA in the negotiating phase. With respect to the latter, a number of institutions, particularly non-traditional providers of TA, have been dealing with challenges related to negotiations.⁴

Against this backdrop, the paper begins with a broad consideration of the FTA phenomenon and what it represents in terms of challenges in the area of TA. It then reviews recent trends in TA, including a comparative analysis of TA in FTAs and related matters. Finally, the paper summarises the main findings and provides a set of preliminary recommendations for providers of technical assistance. The paper draws on the experience of the International Centre for Trade and Sustainable Development (ICTSD) in the implementation of its Programme on IPRs and Sustainable Development and in research, dialogues and workshops, sponsored by the programme, with a diversity of stakeholders.⁵

1. INTRODUCTION

INCREASING LEVELS AND SCOPE OF IP PROTECTION

The last several years have been characterised by an unprecedented increase in the coverage and level of IP protection and by attempts to harmonise IP standards throughout the world. The scope of protectable subject matter has been widened and new rights have been created. These developments have resulted in a significant shift in the balance of interests between private innovators and society-at-large, raising concerns over their impact on areas as diverse as food security, education, public health, biodiversity management, technology dissemination, and research and development.⁶

In this context, experts and policy-makers have challenged the so-called “one-size-fits-all” approach to IP, arguing in favour of a rebalancing of the global IP architecture. Thus far, attention has focused on preserving and enhancing flexibilities under the TRIPS Agreement – as evidenced particularly by the debate on access to medicines.⁷

A Development Agenda for IP

One expression of concern is the initiative by a group of developing countries that called upon the WIPO General Assembly in September 2004 to consider the integration of a Development Agenda into the work of the organisation. Its objective is to ensure that IP policy-making better takes into account development concerns, such as the need to promote access to technical knowledge, encourage technology transfer, maintain public interest flexibilities, and prevent anti-competitive practices.

One important component of the Development Agenda initiative relates to technical

International policy deliberations continue to be focused in the WTO and the World Intellectual Property Organization (WIPO). Negotiations in WIPO have intensified in the last few years. Since the TRIPS Agreement entered into force, new multilateral treaties have been signed⁸ and new initiatives are underway that aim to expand patent and copyright protection. These activities, again, move towards increasing the harmonisation of IP standards. This process of deepening harmonisation is further reinforced through international and bilateral technical cooperation designed not simply to make national legislation more uniform, but to make the highest IP standards the least common denominator for all countries.⁹ This, in turn, has spurred concerns that current trends fail to take into account both the development needs of member countries and the flexibilities under TRIPS.

assistance. In the view of its proponents, TA should: a) have a development orientation; b) be mutually supportive and coherent with relevant international instruments and national development policies; c) adopt an integrated approach, expanding its coverage to include matters related to competition policy and related regulatory regimes; d) be neutral, of an advisory nature and non-discriminatory among recipients or issues to be addressed; e) ensure that IP laws and regulations are tailor-made and demand-driven; and f) be independent and subject to continuous evaluation and transparent.¹⁰

FTAs and ‘TRIPS-Plus’

Parallel to these developments, FTAs are rapidly increasing at the regional and bilateral level. The principle driving force behind this trend has been the United States (US), which has negotiated numerous new accords, leading to the emergence of a new generation of FTAs.

These include comprehensive chapters on IP that go well beyond the TRIPS agreement (“TRIPS-plus”). Furthermore, the European Union (EU) and the European Free Trade Association (EFTA) have also negotiated trade agreements with a particular emphasis on certain areas

of IP, such as geographical indications (GIs), trademarks, copyright, plant variety protection and enforcement. It is expected that these groups of countries might become more ambitious in pursuing FTAs, especially given the current stagnation of trade negotiations at the multilateral level. The FTAs subscribed by these major trading partners encompass a large number of countries at different stages of development. The relevance and pervasiveness of FTAs are illustrated in Annex A, which provides a list of agreements negotiated or under negotiation.

While most developing countries are still struggling to implement the minimum standards of the TRIPS Agreement, FTAs pose new challenges. Even though they consolidate

important market access opportunities in developed countries, experts and civil society groups have expressed concern that the TRIPS-plus provisions in these agreements raise many implementation challenges in terms of policy coherence and ultimately reduce opportunities to use the flexibilities built into the TRIPS. TRIPS-plus provisions are a legitimate derivation of the minimum standards and alone should not have negative implications. However, the problem lies in their potential to reduce the scope of policies and instruments and the freedom to determine the appropriate method of implementation, which is legitimately recognised by the TRIPS Agreement. Table 1 provides examples of the type of obligations contained in FTAs that go beyond the minimum standards of the TRIPS Agreement.

Table 1: FTA provisions that go beyond the TRIPS minimum standards

TRIPS-plus provisions	Jordan- US	Chile-US	CAFTA-US	Morocco-US	EFTA-Korea
Extension of the duration of patents beyond 20 years in cases of administrative delays in granting patents or in the commercialisation of products.	✓	✓	✓	✓	
Exclusive minimum protection of five years for data on safety and efficacy of products.	✓	✓	✓	✓	✓
Linkage between patent protection and the commercialisation of products.	✓	✓	✓	✓	
Conditional use of compulsory licensing.	✓			✓	
Limitations on the use of parallel imports (exhaustion of intellectual property rights (IPRs)).	✓			✓	
Protection of plants through International Union for the Protection of New Varieties of Plants (UPOV)/patents.	✓	✓	✓	✓	✓
Copyright protection extended to a minimum of 70 years	✓	✓	✓	✓	
Technological measures to protect digital products.	✓	✓	✓	✓	
Stricter enforcement measures	✓	✓	✓	✓	✓
Inclusion of non-violation complaints in the settlement of disputes.	✓	✓	✓	✓	

2. IMPLEMENTATION CHALLENGES POSED BY FTAS

Developing countries negotiate FTAs because of the perceived benefits of such agreements, particularly when they involve a major trading partner. For example, developing countries may consider FTAs advantageous in enhancing market access, foreign direct investment (FDI), political stability, national security and “lock-in reforms.”¹¹ Developing countries, as in the case of TRIPS negotiations, are not *demandeurs* in the area of IP as their interests have been rather defensive.

For many parties to FTAs, the process of negotiations does not end with the signing of the agreement. The implementation process is a complex and tedious one.¹² In addition, once the implementation phase has been concluded, a subsequent and difficult phase commences with on-going monitoring activities.¹³

Flexibilities in the TRIPS Agreement

FTAs have limited, to a certain extent, some of the flexibilities inbuilt in the TRIPS Agreement. Table 2 compares some of the flexibilities in the TRIPS Agreement with standard provisions

in current FTAs. Nevertheless, it is important to note that FTAs build on the existing international architecture, which currently provides space for countries to design IP regimes according to their

Table 2: Flexibilities in TRIPS and FTAs

Flexibilities in TRIPS	FTAs
Freedom to define patentability criteria, such as ‘novelty’ or ‘inventive step’ and ‘industrial application.’	Limited in certain cases, i.e. industrial application has been defined as a specific, substantial and credible utility (i.e. the Central American Free Trade Agreement (CAFTA)).
Authorisation to exclude certain subject matters from patentability.	Limited in certain cases, such as “best efforts clauses” or direct obligations to make available patents to plants or animals.
Choice to protect ‘new use’ patents.	Limited – patents available to ‘new uses’ or “methods” in certain cases (i.e. US-Morocco).
The determination of the substantive grounds for the issuance of a compulsory license.	Limited to certain grounds, such as in cases of national emergencies, anti-trust remedies and public non-commercial use (i.e. US-Jordan).
The determination of an IPR exhaustion regime that best suits domestic conditions (national, regional and international).	Parties may limit parallel imports to cases where the patent owner has placed restrictions on importation by contract or other means (i.e. US-Morocco).
The opportunity to define the nature of protection of pharmaceutical and agro-chemical test data submitted for regulatory authorities for marketing approval.	Limited, countries are obliged to provide for test data protection (i.e. US-CAFTA).
The authorisation to control IPR abuses through competition laws.	Similar as in TRIPS.
Obligation to implement border measures against counterfeiting and piracy only in the case of imports.	Expand obligation to also cover exports (i.e. US-Peru and US-Colombia).

Source: Vivas, D. and von Braun, J. (2006).

respective needs. As a result, a sophisticated implementation strategy is needed to maintain and use such flexibilities at the national level, as well as to facilitate targeted and demand-driven technical assistance.

Moreover, there is generally freedom in FTAs for countries to craft many of their own IP policies, such as in the cases of compulsory licensing and parallel importation. With respect to compulsory licensing, FTAs, with some exceptions,¹⁴ do not preclude the use of patented subject matter

Policy Space in FTAs

Even if FTAs adopt stricter standards of protection and, in some cases, reduce the space for defining the patentability criteria,¹⁷ each country is generally free to determine what constitutes an invention and to request a declaration of origin for inventions using national genetic resources. This is also true with respect to the use of exceptions and limitations, particularly in the case of patents. Copyright exceptions in digital expressions are treated in some FTAs in more restrictive terms.

Alternative Innovation Models

Within the IP system there are a number of other instruments that could be better utilised in the implementation process with a view to promoting innovative capacities at the local level. If, for example, foreign right holders normally use patents, innovations of an incremental character, such as those produced by and large in developing countries, they might

Pharmaceutical and Agrochemical Products

One of the most sensitive areas of FTAs concerns measures dealing with “regulated products”. These relate to new standards for securing marketing approval of new pharmaceutical or chemical agricultural products, particularly with regard to the submission of undisclosed data on safety and efficacy. FTAs contain detailed provisions prohibiting the use of support data necessary for obtaining marketing approval of pharmaceutical or agrochemical

without the authorisation of the right holder. Additionally, the Doha Ministerial Declaration on the TRIPS Agreement and Public Health (2001)¹⁵ affirms the freedom of Members to decide at which point IPRs are “exhausted,” thus leaving countries to devise their own domestic approach to parallel importation.¹⁶ Existing FTAs do not generally deal with exhaustion of IPRs, with the exceptions of the FTAs between the US and Morocco, as well as those with Australia and Singapore, respectively.

However, in general, the exercise of exceptions in the case of patents, such as for teaching and research, commercial experimentation and prior use,¹⁸ needs to be explored further and used effectively by those countries implementing FTAs. The same applies to exceptions and limitations in the case of copyrights that are commonly used in developed countries (for example, personal/fair use, criticism, quotation and educational purposes).¹⁹

be protected by simpler systems such as utility models, or by non-proprietary regimes, such as compensatory liability regimes and open source models.²⁰ Many of these non-proprietary regimes have proven to be successful in practice and appealing to certain communities that are driven by non-profit goals in both developed and developing countries.

products, without the consent or acquiescence of the first applicant for at least five years in the case of pharmaceuticals and 10 years for agrochemicals. Many civil society actors have expressed concern over the effects of such provisions on the entry of generic versions of the product in question into the market and the impact on public health.

FTAs also provide for a kind of linkage between the marketing approval and the patent. They specify that a Party shall not provide marketing approval to any third party prior to the expiration of the patent term, unless by “consent or acquiescence” of the patent owner. This relatively new form of IP protects investment in clinical trials for the marketing approval of pharmaceuticals and agrochemicals, rather than in a particular form of innovation of creation. Therefore, it pushes the limits of traditional intellectual property to the pure protection of commercial assets.

Provisions that tend to expand the protection of pharmaceutical products are enhanced by parallel obligations dealing with compensatory extensions of the duration of the patent in cases

of undue delays in the administrative granting of patents or in the marketing approval of products. FTAs generally do not contain parameters for defining these compensatory extensions. This matter is regulated domestically. For example, in the case of the US, where these provisions generally derive, the restoration period is limited to five years in the case of administrative delays in the granting of the patent. While extensions may help to mitigate unreasonable curtailment of the patent term as a result of the marketing approval process, in the US there is a limitation on cumulative patent terms “where the effective patent term including the restoration period may not exceed 14 years.”²¹

Opportunity for Broader Reform

Implementation of FTAs should ultimately be used as an opportunity for reform and modernisation, involving investment in appropriate institutions and human resources. One area that calls for reform relates to competition laws and policies that, in the case of developed countries, have taken years to develop to ensure that the market operates under competitive conditions.

In addition to competition policy, a well-structured IP system needs to interact coherently with the national innovation system and with the structures and institutions that support such a system. This aspect, as discussed below, is taken into account in recent FTAs negotiated by the US with Peru and Colombia, respectively.

3. RECENT TRENDS IN TECHNICAL ASSISTANCE

Since the adoption of TRIPS, technical assistance has become an important subject of debate.²² As mentioned previously, the Development Agenda, under discussion in WIPO, pays particular attention to this matter. The obligations of developed country Members under TRIPS to provide technical and financial cooperation for developing and least-developed country Members have been the subject of close examination, in particular through the

information provided by major donor countries to the Council for TRIPS. A recent comprehensive study by Duncan Matthews and Viviana Munoz-Tellez analyses and compares bilateral TA in accordance with article 67 of TRIPS, provided by the US, Japan and the European Communities (EC). The authors reached a number of important conclusions regarding the type of assistance provided by each of these countries. Box 1 summarises these findings.

Box 1

Bilateral Technical Assistance and TRIPS: The United States, Japan and the European Communities in Comparative Perspective

US policy objectives in providing TA, linked to a broader agenda of trade liberalisation, include the accelerated implementation of TRIPS, the implementation of laws that aim to strengthen IP standards and secure market access for US industries that rely on IP protection. As a result, the types of assistance provided are steered towards issues that are considered to impede IP protection and enforcement in developing countries. Thus assistance can be grouped into: activities that provide advice to assist governments in the preparation of laws and regulations on IP protection and enforcement, including legal obligations stemming from multilateral and bilateral agreements; support for the establishment, modernisation and administration of domestic IP offices; and activities targeted at the domestic private sector and the overall public to educate people on intellectual property and economic growth, counterfeits and piracy. Furthermore, a key element of US Trade Agreements, provided by a range of US government institutions, is the dominant role that the private sector plays within it. Finally, most of US activities are one shot events, rather than medium or longer-term projects.

Japan's technical assistance is guided by its identification that adequate IP protection is key in promoting foreign investment and technology transfer to developing countries while also boosting national industrial development. Therefore, technical assistance focuses on improving developing country intellectual property protection and the domestic IP operation systems, most of which is directed towards the Asia Pacific Region. It is being implemented through the development of human resources, the modernisation of domestic IP offices and their administrative obligations. Unlike the US most of Japan's programmes last for a period of three to five years and include the work of international organisations such as WIPO and UPOV.

The EC and its member states provide similar TA as Japan and the US, in terms of training activities, legal technical advice, awareness raising and overall support for the IP infrastructure in developing countries. Similar to Japan, its activities tend to last for a longer time frame than the US. Overall, however, the EC's TA seems to be more targeted towards addressing the needs of developing countries. While this could be expanded to include further important components, such as the use of TRIPS flexibilities, the EC and individual member states also provide assistance by supporting public interest non-governmental organisations (NGOs) in providing TA, most of whose work has been linked to IP and development-related concerns.

Source: Matthews, D. and Munoz-Tellez, V. (2006).

The cumulative experience of ICTSD in providing and facilitating dialogues and *ad hoc* technical assistance²³ suggests that TA should aim to address the challenges posed by TRIPS and TRIPS-plus obligations (See Annex C for a list of dialogues sponsored by ICTSD). In view of the importance of TA activities, in July 2005, ICTSD organised a Dialogue on Technical Cooperation for IP in Developing Countries.²⁴ The aim was to evaluate the current state of play and take stock of existing proposals in order to ensure that technical assistance better enhances the capacities of developing countries to adopt appropriate, coherent and effective policies. The meeting provided an opportunity to increase understanding of trends and prospects for TA. As part of the background material for the meeting, three case studies were commissioned in Peru, the Philippines and Thailand. These shed light on how TA is perceived by stakeholders in the respective countries, as well as the diversity of TA providers, which in most cases do not fall under the category of “traditional providers”. Annex B provides an overview of the main findings of each of the case studies. These studies generated similar conclusions to those of Matthews and Munoz-Tellez (2006) but examine both the recipient and provider sides, especially in relation to harmonisation, enforcement and administrative support.

The case studies and preliminary research undertaken for the preparation of this paper,

for example, reveal that the United States Agency for International Development (USAID) programmes tend to include IP technical assistance as part of more comprehensive trade capacity building packages. Some of these packages are oriented towards improving government or private entities’ capacities to implement bilateral or multilateral trade commitments. In the case of the US Patent and Trademark Office (USPTO), most of the programmes are designed to assist IP offices, customs officials and the judiciary in the drafting of local regulation, and enforcement and institutional building activities. Most of the data available on the websites of these institutions is presented in an aggregated manner and usually mentions the country, recipients, description of the project, amount of assistance, and year of implementation of TA projects. Such information renders the TA programme more transparent. However, it does not provide a clear idea of the needs being addressed, the specific objectives of the projects, the scope, the activities and the impact generated for such assistance.

In the case of Canada (i.e. the Canadian International Development Agency (CIDA) and the International Development Research Centre (IDRC)), the case studies also show that TA is often delivered by non-traditional providers in areas related to intellectual property and, more specifically, to competition policy, genetic resources and traditional knowledge.

Dialogue on Technical Cooperation for IP Policy in Developing Countries

Drawing on the discussions and exposure to TA, participants at the ICTSD Dialogue on Technical Cooperation for Intellectual Property Policy in Developing Countries (2005) made a number of recommendations to bilateral and multilateral technical assistance including:

- Consulting with a broad range of stakeholders within and outside of government on the design and implementation of TA;
- Increasing the scale of resources available for IP-related Technical Assistance (IPTA);
- Tailoring advice and assistance to the different levels of development and for a more demand-driven, long term and less *ad hoc* approach;
- Improving the quality of TA, including guidelines on recruitment of providers and training of providers in conducting professional TA, feedback and evaluation;
- Improving indicators and benchmarks for the evaluation and audit of IPTA and stronger commitment to conducting evaluations and incorporating feedback;

- Increasing transparency, information-sharing and monitoring of TA;
- Shifting the focus of enforcement away from a preoccupation with legal measures and towards a positive, business-oriented approach to understanding how best to use the IP system;
- Elaborating a manual of best practices in IPTA and case studies.

Principles and Guidelines for IP Technical Assistance and Elements for a Code of Ethics

As a follow-up to these recommendations, ICTSD commissioned the preparation of a set of Principles and Guidelines for the delivery of IPTA and Elements for a Code of Ethics for providers of TA.²⁵ These could be employed to improve the current delivery of such assistance by both bilateral and multilateral donors. The main principles suggested in those guidelines are:

- *Development Focused Technical Cooperation:* The provision of TA should have as its objective the fulfilment of the development goals of recipient countries and broader development goals, such as the United Nations Millennium Development Goals (MDGs);
- *Comprehensive and Coherent Assistance Programmes:* Technical cooperation should assist countries in devising coherent national IP policies that are linked to broader development and public policy objectives. The existence of such policies should be recognised as a necessary part of developing a coherent approach to the implementation of international IP-related commitments;
- *Integrated Approach:* In designing technical assistance programmes, there is a need to expand coverage to include matters related to the use of competition law and policy to address abuses of intellectual property and practices that unduly restrain trade and the transfer and dissemination of technology;
- *Neutral, Unbiased and Non-Discriminatory:* The provision of technical assistance 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.

In the light of these recommendations and guidelines for improving TA, to what extent have FTAs used TA as a means of responding to the new challenges faced by developing countries implementing TRIPS and TRIPS-plus obligations? The following section describes how TA has been dealt with in recent FTAs.

4. TECHNICAL ASSISTANCE AND RELATED PROVISIONS IN FTAS: THE CASE OF THE LATIN AMERICAN AGREEMENTS

Technical assistance has been dealt with under different modalities in FTAs signed by the US, including in the four major recent agreements it signed respectively with Chile, CAFTA-DR, Colombia and Peru. In these FTAs, the treatment of technical assistance has not been identical, suggesting that this issue might be subject, to a certain extent, to the interest and negotiation among parties. These four agreements represent what we have characterised in this paper as the new generation of FTAs, incorporating far-reaching chapters on intellectual property that go beyond the minimum standards of protection and enforcement of the TRIPS Agreement.

The FTA with Chile entered into force on 1 January 2004 and is the first major agreement signed by the US with a Latin American country after the North American Free Trade Agreement (NAFTA). The FTA with Chile is peculiar in many respects.²⁶ For example, it contains a special Preamble to the IP Chapter where an explicit

reference is made to the Declaration on the TRIPS Agreement on Public Health of 2001. Also, it states that, “the protection and enforcement of intellectual property rights is a fundamental principle of this Chapter that helps promote technological innovation as well as the transfer and dissemination of technology to the mutual advantage of technology producers and users, and that encourages the development of social and economic well-being.”

Technical assistance in the FTA with Chile does resemble the general provision in Article 67 of TRIPS. This issue was raised and discussed only in the final phases of the negotiations of the agreement. The Parties felt that it was important to increase technical cooperation due to the asymmetrical economic and development conditions of the Parties. The FTA refers to a mutual obligation to cooperate on TA²⁷ as reproduced in Box 2.

Box 2:

FTA between Chile and the US (Article 17.1.14)

Both Parties should, “cooperate on mutually agreed terms and subject to the availability of appropriate funds, to strength the development and protection of intellectual property, and implementing the obligations contained in the Chapter, by means of:

- educational and dissemination projects on the use of intellectual property as a research and innovation tools as well on the enforcement of intellectual property;
- appropriate coordinating, training, specialisation courses, and exchange of information between the intellectual property offices of the Parties; and
- enhancing the knowledge development, and implementation of the electronic systems used for the managing of intellectual property.”

Subsequently, the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) FTA with the US was a major agreement with a group of Central American countries to which the Dominican Republic joined later. As has been reported elsewhere,²⁸ these agreements normally build on the latest agreement signed by the US. With regard to TA, the CAFTA-DR

FTA resembles that with Chile, but with more specificity on the obligations of the parties. The CAFTA-DR Agreement practically reproduces the provision in the Chilean FTA (see Box 2) but links the commitment to trade capacity building, as reflected in the establishment of the Committee on Trade Capacity Building under Article 19.4 (Committee on Trade Capacity Building) and the

importance of trade capacity building activities in the context of the Central American Free Trade Agreement (CAFTA). There is a stronger commitment to capacity building compared to the FTA with Chile, particularly through the establishment of a mechanism to monitor and provide priorities to trade capacity building

projects. It is interesting to note that the same model adopted in CAFTA-DR is reproduced in the subsequent agreements signed by the US with Colombia and Peru. Box 3 refers to the functions and tasks of the Committee on Trade Capacity Building.

Box 3

CAFTA-DR: The Committee on Trade Capacity Building

(Article 19.4, Chapter on Administration and Trade Capacity Building)

1. Recognising that trade capacity building assistance is a catalyst for the reforms and investments necessary to foster trade-driven economic growth, poverty reduction, and adjustment to liberalised trade, the Parties hereby establish a Committee on Trade Capacity Building, comprising representatives of each Party.
2. In furtherance of the Parties' ongoing trade capacity building efforts and in order to assist each Central American Party and the Dominican Republic to implement this Agreement and adjust to liberalised trade, each such Party should periodically update and provide to the Committee its national trade capacity building strategy.
3. The Committee shall:
 - (a) seek the prioritisation of trade capacity building projects at the national or regional level, or both;
 - (b) invite appropriate international donor institutions, private sector entities, and nongovernmental organisations to assist in the development and implementation of trade capacity building projects in accordance with the priorities set out in each national trade capacity building strategy;
 - (c) work with other committees or working groups established under this Agreement, including through joint meetings, in support of the development and implementation of trade capacity building projects in accordance with the priorities set out in each national trade capacity building strategy;
 - (d) monitor and assess progress in implementing trade capacity building projects; and
 - (e) provide a report annually to the Commission describing the Committee's activities, unless the Committee otherwise decides.
4. During the transition period, the Committee shall meet at least twice a year, unless the Committee otherwise decides.
5. The Committee may establish terms of reference for the conduct of its work.
6. The Committee may establish ad hoc working groups, which may comprise government or non-government representatives, or both.
7. All decisions of the Committee shall be taken by consensus, unless the Committee otherwise decides.
8. The Parties hereby establish an initial working group on customs administration and trade facilitation, which shall work under and report to the Committee.

As indicated, subsequent FTAs signed by the US with South American countries, namely with Colombia and Peru, provide also for the establishment of a Committee on Trade Capacity Building.²⁹ The only difference with CAFTA-DR is that the latest agreements (Colombia and Peru), do not contain a provision similar to the one included in the FTA with Chile (see Box 2), which was later reproduced in CAFTA-DR with specific reference to the Committee on Trade Capacity Building. However, the FTAs with Colombia and Peru contain an interesting feature. They refer specifically to the need, within the IP chapter, to promote innovation and technological development. In this respect, the Parties agree to encourage opportunities

for science and technology cooperation and identify areas for such cooperation and engage in collaborative scientific research projects. In this context, the Parties should give priority to collaboration that advances common goals in science, technology and innovation, and support partnerships between public and private research institutions and industry. It also emphasises that any such collaborative activities or transfer of technology shall be based on mutually agreed terms.

This aspect of the FTA is identical in both agreements signed by the US with Colombia and Peru. Box 4 reproduces the provision of the FTA with Colombia.

Box 4

FTA- US Colombia: Promotion of Innovation and Technological Development

16.12.1. The Parties recognise the importance of promoting technological innovation, disseminating technological information, and building technological capacity, including, as appropriate, through collaborative scientific research projects between or among the Parties. Accordingly, the Parties will seek and encourage opportunities for science and technology cooperation and identify areas for such cooperation and, as appropriate, engage in collaborative scientific research projects.

2. The Parties shall give priority to collaborations that advance common goals in science, technology, and innovation and support partnerships between public and private research institutions and industry. Any such collaborative activities or transfer of technology shall be based on mutually agreed terms.

3. Each Party shall designate a contact point to facilitate the development of collaborative projects from the following offices responsible for science and technology cooperation, which shall review periodically the state of collaboration through mutually agreed means of communication:

(a) in the case of Colombia, the Instituto Colombiano para el Desarrollo de la Ciencia y la Tecnología “Francisco Jose de Caldas” (COLCIENCIAS);

(b) in the case of Peru, el Consejo Nacional de Ciencia, Tecnología e Innovación Tecnológica (CONCYTEC); and

(c) in the case of the United States, Office of Science and Technology Cooperation, Bureau of Oceans, and International Environmental and Scientific Affairs, U.S. Department of State; or their successors.

As noted previously, one of the peculiarities of the FTA with Chile was a Preamble in the IP Chapter. This Preamble refers also to similar objectives – as in Colombia and Peru – regarding the “importance of efforts to encourage private and public investment for

research, development, and innovation” and the recognition “that the business community of each Party should be encouraged to participate in programs and initiatives for research, development, innovation, and the transfer of technology implemented by the other Party.”

While this kind of commitment has a best endeavour nature and follows similar provisions used in cooperation agreements on science and technology, it provides a framework for addressing one of the biggest limitations by developing countries in benefiting from intellectual property: the lack of technological and scientific capacities. It is too early to evaluate

how these commitments will be implemented in the bilateral context. Nevertheless, it is an interesting precedent to follow and further develop in other FTA negotiations and in the implementation phase. Finding ways and means to take advantage of these provisions could be an issue to further explore.

5. FINDINGS AND RECOMMENDATIONS

The evolution of IP in recent years, particularly the emergence of the new generation of trade agreements with stronger IP obligations, raises a number of questions on the implementation of commitments and the corresponding institutional and human resources implications. These new agreements build on the TRIPS Agreement, which established minimum standards of protection and enforcement in all fields of technology.

The implementation of the TRIPS obligations is still a work in progress in many countries, particularly in least developed countries. Intellectual property provisions in FTAs go beyond those minimum standards. We have noted in this paper that countries sign FTAs for a number of reasons and that different actors perceive the benefits of the agreements differently. In any case, these agreements should be objectively examined as a whole and not be restricted to the implications of a particular chapter, such as IP provisions. However, at the same time, it is evident that the primary and immediate beneficiaries of the implementation of the TRIPS and TRIPS-plus obligations are likely to be technology and information investors and developers in industrialised countries. Indeed, the more rapidly and comprehensively these obligations are put in place, the greater those benefits will be.³⁰ On the other hand, some of the costs are usually borne by the less fortunate consumers, especially in the case of medicines, seeds and educational materials. It is, therefore, not unreasonable to suggest that it is in the interest of the immediate beneficiaries to assist developing countries in their efforts to implement TRIPS and TRIPS-plus arrangements through technical and financial support.

This assistance should help developing countries achieve proper adaptation, implementation and general application of these new obligations. In order for this to work in practice, technical assistance should not be perceived as a mere exercise to translate the new intellectual

property obligations into law, but a serious undertaking combining various levels of intervention. An often-expressed concern has been that the TA offered by some multilateral institutions is not appropriate to the needs of the countries but rather tilted in favour of increasing IP protection and enforcement.

From the vantage point of ICTSD, which has been working with a variety of IP stakeholders since 2000, the endeavour to strengthen standards and IP enforcement – while it has some potential for expanding access to trade, foreign direct investment and technology – it is likely to be of small value for developing countries, without a coherent framework of broader domestic policies. Hence, intellectual property rights should be implemented in a way that promotes dynamic competition through the acquisition and local development of technology in an environment that is conducive to growth. In such an environment, stronger IPRs should spur additional growth, rather than higher prices and limited growth.³¹ Technical assistance providers should bear this in mind, as they target different levels of intervention.

During the last 10 years, providers of TA have placed substantial emphasis on the implementation of the TRIPS Agreement and, to some extent, to the negotiating phase of a new generation of FTAs. The same level of attention is now needed for the implementation process of FTAs. The potential impact of the implementation process should not be underestimated. In many cases, implementation is as important as the actual negotiations. Badly-designed implementation processes may lead to the adoption of standards that are higher than those negotiated and ultimately negatively impact national developmental prospects and access to technology-intensive goods. Therefore, carefully crafted TA is needed in order to make the IP system an effective tool for development.

Main findings

This paper has reviewed, on the basis of existing material and drawing on the experience of various providers and ICTSD experience, the importance of recent developments and the relevance and pervasiveness of FTAs in the world of IP. The paper has outlined the approaches on TA by traditional donors, as well as TA provisions in FTAs. On the basis of the preceding analysis, the following main findings emerge:

- The importance of TA continues to be a major issue for developing countries and least developed countries. The recent emergence of FTAs adds new complexity to the implementation and proper enforcement of these agreements and has important implications for policy coherence, institutional reforms and human resources;
- TA provisions in FTAs are in most cases part of the overall trade TA. Recent cases show more focus and attention to IPTA;
- TA projects in the context of the new generation of FTAs are very recent. Most of them are just being designed and their implementation is incipient;
- The monitoring and evaluation of bilateral TA provided under FTAs will be difficult to undertake compared to the TRIPS and WIPO related-TA where a multilateral more transparent notification and review system exist;
- TA must not become a vehicle for promoting “FTA-plus” implementation. Current obligations are already burdensome for developing country partners to these agreements. To promote too high or over-protective standards might be counterproductive;
- Traditional providers tend to focus on increased protection and enforcement of IP provisions in FTAs. In some cases, especially in the assistance provided by European countries and Canada, non-traditional providers have fulfilled an important role;
- TA should assist countries to understand the potential options, costs, opportunities and challenges arising from new IP obligations in FTAs;
- Non-traditional TA actors are playing an active role in raising awareness on the issues at stake in the negotiations of FTAs and in the implementation challenges faced by developing countries, particularly with respect to the impact of new obligations concerning patents and regulated products on access to health;
- Developing country partners in FTAs are becoming more active and sophisticated in the incorporation of IPTA provision in FTAs. Innovation, access to knowledge and technology transfer are at the centre of their demands;
- Some recent FTAs offer opportunities to explore new areas such as innovation, technological development and transfer of technology. While most of the provisions in these area are general and of a “best endeavour nature,” follow-up and creativity will be needed on the recipient side to make them operational.

Recommendations

The IP scenario reflects the on-going tension between those promoting more protection and those emphasising additional flexibilities and emphasis on dissemination and diffusion of knowledge. This calls for innovative ways

of delivering TA,³² particularly with respect to new obligations arising from FTAs in terms of meeting the needs of countries. In each of the following areas, TA should promote:

A. Analysis

- The implications of TRIPS-plus obligations, particularly with respect to health, nutrition and technological upgrading;
- Economic impacts of new IP obligations through assessments, audits or studies examining the effects of minimum standards on development needs, health, nutrition and competition;
- The implications of patent and regulated products including protection of test data, particularly on access to health;
- The impacts of new developments in copyright in the digital environment in terms of access to knowledge and educational material.

B. Policy Formulation

- Policy coherence with other trade related issues (market access, foreign direct investment, competition, trade in services) as well as social (public health, farmers' rights) and environmental issues (genetic resources and traditional knowledge);
- Identification of policy space available in FTAs as well as a best modes of implementation;
- Preservation of the balance between public and private interests (e.g. on one side, the use of exceptions and limitations in patents and copyright and on the other, the adequate enforcement of IPRs);
- Maintain the correct balance between protection, enforcement with competition policy and law.

C. Negotiation

- Coordination between national ministries in the preparation for and participation in IP deliberations;
- Strengthen the negotiating capacities of entrepreneurs and government officials regarding contract negotiations and other conditions or clauses for the transfer of technology, either as providers or as receivers;

- Involvement of small and medium enterprises and civil society actors.

D. Legal and regulatory reform

- The translation of data exclusivity obligations into effective regulations that preserve flexibilities, encourage affordability of medicines and sustain a competitive environment;
- The use and exercise of the flexibilities of the IP system, such as the appropriate use of compulsory licensing in the context of the 30 August 2003 solution and the recent TRIPS Amendment to Article 31 f).

E. Administration and enforcement

- Neutral assessments of the economic and social implications of piracy, counterfeiting;
- Strengthen and develop institutional capacities of national competition authorities.

F. Strengthening national innovation system

- Innovation and commercialisation of research and development;
- Fiscal incentives to encourage enterprises to employ scientific and engineering and management graduates from developing countries partners;
- Provide fiscal incentives to firms transferring technologies to developing countries;
- Grant programmes to support partnerships between public research centres in areas of common interests (e.g. neglected diseases, food products and sustainable energy);
- Explore modalities to promote local creativity and innovation by assisting countries with strong traditions in certain sectors (e.g. artistic and literary works, designs, crafts).

ANNEXES

Annex A: Selected recent trade-related agreements*

Country		Negotiated	Under Negotiation
US with	1992	NAFTA	Free Trade Agreement of the Americas (FTAA), Ecuador, Panama; Southern African Customs Union (SACU)**; Malaysia, Republic of Korea, Thailand; Middle East Free Trade Area Initiative (MEFTA), United Arab Emirates.
	2000	Jordan	
	2001	2001: Vietnam	
	2003	Chile; Lao People's Democratic Republic, Singapore	
	2004	Australia, Bahrain, Morocco	
	2005	US-Central America and Dominican Republic (CAFTA-DR)	
	2006	Colombia, Oman, Peru	
EU with	1994	Australia (Wine Agreement), Moldova, Russia, Ukraine	Andean Community (CAN), Brazil, Canada (Trade and Investment Enhancement Agreement), Mercosur****; Regional bilateral economic partnership negotiations built on Cotonou Agreement: Countries of the Caribbean Forum of African, Caribbean and Pacific States (CARIFORUM); Communauté Economique des Etats de l'Afrique de l'Ouest (CEDEAO) (Western Africa and Mauritania); Communauté Economique et Monétaire de l'Afrique Centrale (CEMAC) and Sao Tome and Principe (Central Africa); Countries of Southern African Development Community (SADC); Common Market for Eastern and Southern Africa (COMESA); Turkey (as part of EU enlargement); Euro-Mediterranean Free Trade Area, Gulf Cooperation Council***, Iran, Syria; Australia, New Zealand (Wine Agreement).
	1995	Belarus, Israel, Kazakhstan, Kyrgyzstan, Mongolia, Tunisia, Turkey (Customs Union)	
	1996	Armenia, Azerbaijan, Georgia, Morocco, Turkmenistan, Uzbekistan	
	1997	Jordan, Mexico, Palestinian Authority	
	1999	South Africa	
	2000	Africa, the Caribbean and Pacific (ACP) countries – Cotonou Agreement	
	2001	Croatia (Stabilization and Ass. Agreement), Egypt, India (Science and Technology), Macedonia (Stabilization and Ass. Agreement)	
	2002	Algeria; Chile; Lebanon; South Africa (Wines and Spirits)	
	2003	Canada (Wines and Spirits)	
	2005	India (Strategic Partnership)	
2006	Albania (Stabilization and Ass. Agreement)		

Country		Negotiated	Under Negotiation
EFTA with *****		- Turkey	- Egypt
	1992	- Israel, Romania	- Canada
	1993	- Bulgaria	- Gulf Cooperation Council
	1997	- Morocco	- Thailand
	1998	- Palestinian Authority	
	2000	- Macedonia, Mexico	
	2001:	- Croatia, Jordan	
	2002:	- Singapore	
	2003:	- Chile	
	2004:	- Lebanon, Tunisia	
	2005:	- Republic of Korea	
	2006:	- Southern Africa Customs Union (SACU)	

* Dates refer in general to the year of signing of the respect agreement.

** Botswana, Lesotho, Namibia and Swaziland.

*** Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates.

**** Argentina, Brazil, Paraguay, Uruguay and Venezuela.

***** Iceland, Lichtenstein, Norway and Switzerland.

Source: Roffe, P., CIEL (2007).

Annex B: Summary of case studies

Appendix B1: IP-Related Technical Assistance, Cooperation and Capacity-Building: The Thai Experience

In a study aimed at increasing understanding on IP-related TA in Thailand, individuals from four agencies involved in IP-related activities in Thailand were interviewed. They included the Department of Intellectual Property (DIP) in the Ministry of Commerce, which is responsible for implementing IP law and the administration of the patent office; the Central Intellectual Property and International Trade Court, the special court specifically established to deal with IP cases; the Office of Plant Variety Protection in the Ministry of Agriculture, which is responsible for implementation of the PVP Act and the registration of plant varieties in Thailand; and FTA Watch, a group of non-governmental organisations and academics monitoring FTA negotiations between Thailand and other countries, with a particular emphasis on IP. The main findings of the study are summarised below.

The Department of Intellectual Property

The DIP is in great need of TA and has set up a Division to deal exclusively with International Cooperation. In addition to communicating with international agencies, the Division also conducts TA needs assessments based on past experience and current trends. The DIP has engaged in technical cooperation with foreign agencies at three levels:

- Multilateral cooperation, primarily from WIPO and WTO;
- Regional cooperation, particularly among APEC countries;
- Bilateral cooperation with Australia, China, EU, Japan, Korea, member countries of APEC and the US.

Most TA directed to the DIP has been focusing on harmonisation and enforcement. Activities include academic and educational TA on different IP-related issues; technical assistance in drafting and amending laws; TA for the development of the national IP infrastructure (primarily provided by the EU and Japan); training in the patent application process (provided by the EU, Japan and the US); and enforcement training of border and custom officials, judges and the police. Many of its own TA demands have so far not been addressed, such as further training on the commercialisation and management of IP.

Independent of whether or not the TA offered overlaps with the identified need, the DIP does not turn away TA once offered in the hope that something new can be learnt.

The Central Intellectual Property and International Trade Court

In general, the Court does not express any demand for TA. Nevertheless, in the past it has received TA from a range of donors, including from the British Council, the French Embassy, the US Embassy, and the Max Planck Institute in Germany.

The following observations were made in the interviews:

- As assistance is primarily donor or provider driven, rather than based on requests from the Court, a large majority of the TA received does not match with the priorities of the Court;
- Since IP laws and legal systems differ by country, the TA received can sometimes not be translated to the Thai context. Further adjustments are needed to meet the local contexts;

- Assistance can be inefficient due to logistical and budgetary constraints such as the lack of translators and transport to and from the seminars. Among the donor agencies, Japan is considered the most useful as the Thai judges are able to understand the Japanese system, concept and culture.

Similar to the DIP the Court does not turn away TA once it is offered, even if it does not address its priority areas.

The Plant Variety Protection Division

The Division has received several forms of assistance, including training, seminars and meetings to share experiences with other countries, as well as trips to study the plant registration system in other countries. A substantial amount of it was provided by UPOV, including training, technical assistance, and support in developing guidelines in registration of new plant varieties, and the Japan International Cooperation Agency (JICA), including training on the development of a PV database.

In principle, many of the core needs of the PVP Division have been addressed through TA albeit being very donor driven. More tailored and demand driven TA is needed, however, to match Thai priorities or the country's specific domestic context. Much of the TA has consisted of a mere copy of other country's legislation independent of whether it would be appropriate in the Thai context. The adjustment of the knowledge and information supplied by the donors to local conditions is not always easy. Furthermore, more TA is needed with respect to legal clarifications, practical training for staff in implementing the law, and developing guidelines for plant registration. The Division also requires further assistance for capacity building and human resource development.

FTA Watch

FTA Watch is a group of NGOs and academics that aim to monitor FTA negotiations. The group takes a fairly critical stance towards FTAs and has issued warnings to the government on the possible negative repercussions of TRIPS-plus standards. The group has at the time of the undertaking of this study not received any technical assistance apart from the UNCTAD-ICTSD Project on IPRs and Sustainable Development, comprising a joint seminar. Possible future work with Oxfam US is anticipated. The group hopes for further assistance from foreign donors as well as increased cooperation with counterparts from those countries that already have negotiated bilateral FTA with the US.

Source: Kunanpoth, J. (2005) "IP-Related Technical Assistance, Cooperation and Capacity-Building: the Thai Experience". Presented at ICTSD Dialogue on Technical Cooperation for IP in Developing Countries, Geneva, 11 July 2005. Obtained from: www.iprsonline.org/.

Appendix B2: IP-related TA: The Philippines' Experience

TA in the Philippines has been designed to enable the national IP office to comply with international IP standards and enforcement. No TA was provided to other institutions that deal with IP, such as the Department of Science and Technology. TA providers included: JICA, the USAID, EC (through their regional partnership agreement with the Association of Southeast Asian Nations (ASEAN)), as well as the Japanese Patent Office, USPTO, European Patent Office, WIPO and the Korean Patent Office. Non-traditional providers have never provided TA to the Philippines Patent Office.

The TA provided came as a response to the needs identified by the country's IP office, namely:

- To provide strong protection of intellectual property rights of stakeholders;
- Expediently settle disputes that may prevent a conducive business environment;
- Register technology transfer agreements to ensure their enforceability; and
- To pro-actively promote IP as a tool for economic, technological and cultural development.

The mechanisms to achieve these goals were identified as improvements in human resources, financial capabilities, computerisation, and institutional capacity building for the overall smooth functioning of the domestic IP administration according to international standards.

Source: Villanueva, S. "IP-related TA: The Philippines' Experience." Prepared for the ICTSD Dialogue on Technical Cooperation for IP Policy in Developing Countries. Geneva, 11-12 July 2005. Obtained from: www.iprsonline.org.

*Appendix B3: IP-related technical cooperation, assistance and capacity building:
The Peruvian experience*

In Peru, the principle agency determining the needs and priorities with respect to IP technical co-operation is the National Institute for the Defence of Competition and Intellectual Property (INDECOPI).

INDECOPI identifies TA needs into the following categories:

- Technological needs: Full computerisation and related smooth functioning of all three IP offices – copyright, inventions and new technologies, trademarks; IP infrastructure; and capacity building of IP examiners;
- Awareness raising on IP and its role for economic development: Strengthening the competitiveness of small enterprises as well as strengthening the capacities of collecting societies;
- Issue-related capacity building: direct training for IP officials on GIs, collective marks, enforcement and border measures, traditional knowledge and genetic resources.

Most of the technical assistance provided has been responding to specific aspects of the above needs.

Traditional donor and provider agencies include the Asia Pacific Economic Cooperation (APEC), JICA, the Korean Office for International Co-operation and Assistance, SECO, UPOV, USAID and WIPO.

Examples of TA provided by those donors and providers include activities, such as seminars on border measures, the development of an Andean Patent Manual, the development of an Andean Trademark Manual, as well as workshops on Access to Genetic Resources, Traditional Knowledge and Folklore. Some of these activities have been directed towards the Andean Community (CAN), rather than individual member states of CAN.

Furthermore, Peru has also received TA from some non-traditional donors and providers such as NGOs or universities. These included the Sociedad Peruana de Derecho Ambiental (SPDA) and the Peruvian Catholic University, and was funded primarily by the Andean Development Corporation (CAF), the Inter-America Development Bank (IADB) and IDRC. Non-traditional TA has focused on IP-related issues, such as on the protection of traditional knowledge and genetic resource.

Source: Ruiz, M. "IP-related technical cooperation, assistance and capacity building: the Peruvian experience". ICTSD Dialogue on Technical Cooperation for IP Policy in Developing Countries, Geneva, 11-12 July 2005. Obtained from: www.iprsonline.org.

Annex C: Dialogues sponsored by ICTSD on IPRs and Sustainable Development

August 2001 – December 2006

2006

6 December

Recent International Developments in Access and Benefit Sharing Regulatory Framework.

A side event at the WIPO IGC on IP, Traditional Knowledge and Folklore being organised by ICTSD and CIEL, Geneva, Switzerland.

7 November

Consultation on Developing a Methodology to Facilitate Trade-Related Policy Coherence for Sustainable Access to Medicines.

Geneva, Switzerland.

6 October

Recent Multilateral and Bilateral Trends in IP Policy Making: Lessons and Challenges for Africa.

Organised by CIEL, TRALAC and ICTSD.

Cape Town, South Africa.

14 September

Technical Consultation on the review of draft guidelines for the examination of pharmaceutical patents.

Organised by WHO, UNCTAD and ICTSD.

Geneva, Switzerland.

23 August

Derechos de propiedad intelectual y acuerdos comerciales: negociando la salud y la biodiversidad.

Organized by InBio, CINPE and ICTSD.

Heredia, Costa Rica.

21-22 August

Taller Regional Para El Desarrollo de Una Normativa Modelo de Datos de Prueba de Productos Farmaceuticos y Agroquimicos.

Organized by UNCTAD, CINPE and ICTSD.

Heredia, Costa Rica.

31 July- 1 August

Developing a Methodology to Assess the Impact of TRIPS-Plus Provisions Affecting Drug Prices.

Organized by WHO, World Bank Institute and ICTSD.

Geneva, Switzerland.

6 July

Making Intellectual Property a Tool for Sustainable Development: A Dialogue with Intellectual Property Teachers.

Organized by ICTSD and QUNO.

Geneva, Switzerland.

16 May

Dialogo Nacional sobre Propiedad Intelectual, Innovación y Desarrollo Sostenible.

Organizado por el proyecto UNCTAD-ICTSD en cooperación con el Instituto del Banco Mundial, CEPAL y ASIES.

Ciudad de Guatemala, Guatemala.

10-12 Mayo

Diálogo Regional sobre Propiedad Intelectual, Innovación y Desarrollo Sostenible.

Organizado por UNCTAD-ICTSD en cooperación con el Instituto del Banco Mundial, CEPAL y CINPE. Costa Rica.

3 May

IP Commitments in FTAs: Implementation Challenges for Developing Countries.

Dinner Roundtable, Geneva, Switzerland.

26 April

Protection of Traditional Knowledge and Folklore: Perspectives on WIPO Draft Provisions.

Roundtable Co-organised by CIEL, ICTSD, IDDRI, IUCN and QUNO, Geneva, Switzerland.

28 March

Disclosure Requirements in Patent Applications: A tool against misappropriation or an obstacle to innovation?

ICTSD Side event, Curitiba, Brazil.

3 March

Stimulating Innovation in Developing Countries: The role of Utility Models.

UNCTAD/ICTSD Roundtable, Geneva, Switzerland.

2005

15 December

ICTSD Trade and Development Session: Recovering Multilateralism in IP Policy Making: Can the WTO Deliver?

Sixth World Trade Organization Ministerial Conference, Trade and Development Symposium, 13-17 December, Hong Kong, SAR, People's Republic of China.

14 December

ICTSD Environment and Natural Resources Session: Disclosure of Origin – A Deal Maker in the Doha Round?

Sixth World Trade Organization Ministerial Conference, Trade and Development Symposium, 13-17 December, Hong Kong, SAR, People's Republic of China.

21-22 November

Technical Workshop: The Use of Geographical Indications, Appellations of Origin, Collective Marks to Promote Sustainable Development and Biotrade.

CAN, ICTSD, SPDA, and UNCTAD BioTrade, Lima, Peru.

24-28 October

Fifth Bellagio Series on IPRs and Development – Intellectual Property and Sustainable Development: Revisiting the Agenda in a New Context.

ICTSD-UNCTAD Dialogue, Bellagio, Italy.

27 September

The Future Work of the IGC: Towards an Effective Protection of Traditional Knowledge and Folklore.

ICTSD Consultation, Geneva, Switzerland.

23 September

The International Copyright System: Limitations, Exceptions and Public Interest

Considerations for Developing Countries in the Digital Environment.

ICTSD Roundtable, Geneva, Switzerland.

11-12 July

Technical Cooperation for Intellectual Property Policy in Developing Countries.

ICTSD Dialogue, Geneva, Switzerland.

29 June

Egypt National Dialogue – Current Trends in IP Policy and Public Health.

Cairo, Egypt.

26-28 June

Arab Regional Dialogue – Intellectual Property Rights, Innovation and Sustainable Development.

Bibliotheca Alexandrina, Alexandria, Egypt.

21 April

Implementing Intellectual Property Rights from a Development Perspective: ICTSD-UNCTAD – a Reception to launch the *Resource Book on TRIPS and Development*.

WMO, Geneva, Switzerland.

21 April

Disclosure Requirements: Incorporating the CBD Principles in the TRIPS Agreement. On the Road to Hong Kong.

WTO Public Symposium, Geneva, Switzerland.

19 April

Trade, Agriculture and IP: Issues in the Lead-Up to Hong Kong.

Multi-Stakeholder Dialogue, Finnish Parliament, Helsinki, Finland.

7 April

Roundtable Presentation of the UNCTAD-ICTSD Resource Book on TRIPS and Development.

ICTSD-UNCTAD, WMO, Geneva, Switzerland.

17 January

Trade in Cultural Goods, Traditional Knowledge and Intellectual Property.

Third Global Forum on Human Development, Paris, France.

2004

29 November-3 December

UNCTAD-ICTSD – Moving the pro-development IP agenda forward: Preserving Public Goods in health, education and learning.

The Fourth Bellagio Series of Dialogues on Development and Intellectual Property.

Rockefeller Foundation's Bellagio Study and Conference Center, Bellagio, Italy.

12 November

UNCTAD-ICTSD-FTA Watch – National Dialogue on “Intellectual Property Rights and FTAs.”

Chulabhorn Research Institute, Bangkok, Thailand.

8-10 November

UNCTAD-ICTSD-University of Hong Kong – IDRC Regional Dialogue on Intellectual Property Rights (IPRs), Innovation and Sustainable Development.

Hong Kong, SAR, People's Republic of China.

12-16 October

UNCTAD-ICTSD – Policy Options for Assuring Affordable Access to Essential Medicines. The

Bellagio Series on Development and Intellectual Property Policy.

Rockefeller Foundation's Bellagio Study and Conference Center, Bellagio, Italy.

6 October

ICTSD – Roundtable on Technical Assistance for the Formulation and Implementation of Intellectual Property Policy in Developing Countries and Transition Economies.

Geneva, Switzerland.

24 September

ICTSD – SIDA Policy Dialogue on Intellectual Property Rights in the International Trading System 10 Years After Marrakech.

Stockholm, Sweden.

22 September

ICTSD Roundtable on The Challenge of Incorporating a Development Agenda in WIPO.

WMO, Geneva, Switzerland.

21-22 July

ICTSD - Fundación Agenda Colombia - Compensar - El Tiempo: Globalización, Derechos de Propiedad Intelectual y Equidad Social: Retos y Oportunidades de los Acuerdos de Libre Comercio.

Sala Brahms de Compensar, Bogotá, Colombia.

29 June-1 July

ICTSD - UNCTAD - TIPS Regional Dialogue: Innovation, Intellectual Property Rights and Sustainable Development in Eastern and Southern Africa.

Cape Town, South Africa.

17 June

UNCTAD XI: IPRs – Challenges for Development.

Sao Paulo, Brazil.

16 June

ICTSD - UNAIDS - DST AIDS SP: Intellectual Property and Health – Civil Society Meeting in Sao Paulo, Brazil.

Centro de Referência e Treinamento em AIDS de São Paulo, Sao Paulo, Brazil.

17 May

UNCTAD - ICTSD Policy Dialogue on Intellectual Property Rights and Development 10 Years after Marrakech: Where are we? Where are we heading?

WMO, Geneva, Switzerland.

24 March

Diálogo Nacional “Elevación de los Estándares de propiedad intelectual en los acuerdos regionales de comercio”, organizado por el Proyecto ICTSD - UNCTAD sobre Propiedad Intelectual y Desarrollo Sostenible, el Centro de Estudios Interdisciplinarios de Derecho Industrial y Económico (CEIDIE) de la Universidad de Buenos Aires, y la Sociedad Peruana de Derecho Ambiental (SPDA).

Facultad de Derecho - UBA - Salon Rojo, Buenos Aires, Argentina.

22-23 March

Diálogo Regional Sudamericano sobre Propiedad Intelectual y Desarrollo Sostenible, organizado por el Proyecto ICTSD - UNCTAD sobre Propiedad Intelectual y Desarrollo Sostenible, el Centro de Estudios Interdisciplinarios de Derecho Industrial y Económico (CEIDIE) de la Universidad de Buenos Aires, y la Sociedad Peruana de Derecho Ambiental (SPDA).

Buenos Aires, Argentina.

19 March

ICTSD-UNCTAD Dialogue on Exploring the environmental and developmental dimensions of geographical indications, co-organised in collaboration with the Institut du développement durable et des relations internationales (IDDRI).

WIPO, Geneva, Switzerland.

17 March

ICTSD-UNCTAD Dialogue on WIPO's new IGC Mandate: Implications for intellectual property, biodiversity and traditional knowledge, co-organised in collaboration with the World Conservation Union (IUCN).

WIPO, Geneva, Switzerland.

16 March

ICTSD-UNCTAD Dialogue on Development in the information age: Intellectual property, computer software and e-commerce, with Ruth Okediji, University of Minnesota, and William Drake, ICTSD Senior Associate.

WIPO, Geneva, Switzerland.

2003

20 November

Strategic Dialogue on Coherence between Multilateral, Regional and Bilateral Processes on Intellectual Property.

University of Miami, Florida, USA.

17-18 November

Americas Trade and Sustainable Development Forum (ATSDF). Thematic Tent on Trade, Knowledge and Intellectual Property Rights.

Courtyard Marriott Miami Downtown, Miami, Florida, USA.

18-21 September

Towards Development-Oriented IP Policy: Advancing the Reform Agenda. The Bellagio Series on Development and Intellectual Property Policy.

Rockefeller Foundation's Bellagio Study and Conference Center, Bellagio, Italy.

12 July

ICTSD Informal Roundtable: "Cases and views on the relationship between IPRs, genetic resources and traditional knowledge."

WIPO, Geneva, Switzerland.

11 July

Open Dialogue: "International Processes on Genetic Resources and Traditional Knowledge: Which Way Forward?" Presented by ICTSD, IUCN and SPDA.

WIPO, Geneva, Switzerland.

11 April

Policy Dialogue on a Proposal for an International Science and Technology Treaty. Science and Technology Diplomacy Initiative and the ICTSD-UNCTAD Project on IPRs and Sustainable Development.

Palais des Nations, Geneva, Switzerland.

2002

30 October-2 November

Towards Development-Oriented IP Policy: Setting An Agenda For The Next Five Years. The Bellagio Series on Development and Intellectual Property Policy.

Rockefeller Foundation's Bellagio Study and Conference Center, Bellagio, Italy.

29-30 October

Intellectual Property and Biodiversity Workshop. Organised in collaboration with Centro Ecuatoriano de Derecho Ambiental (CEDA), Sociedad Peruana de Derecho Ambiental (SDPA) and the Center for International Environmental Law (CIEL) in the context of the Forum “Towards Civil Society Participation in the Americas.”

Quito, Ecuador.

14-15 October

Expert Workshop on Trade, Intellectual Property and Sustainable Development. Organised in collaboration with Ecologic in the context of the UNCTAD-ICTSD Capacity Building Project on IPRs.

Domain de Penthes, Geneva, Switzerland.

26 August

Globalisation with Equity. A series of dialogues organised jointly with IUCN-The World Conservation Union and IUCN’s Commission on Environmental, Economic and Social Policy (CEESP) in conjunction with the World Summit on Sustainable Development.

Johannesburg, South Africa.

25 August

One-Day Workshop and Dialogue on Trade and Intellectual Property for Delegates to the WSSD and other Stakeholders Concerning Outstanding Issues In the Plan of Implementation.

Johannesburg, South Africa.

30-31 July

Dialogue Régional sur le Commerce, la Propriété Intellectuelle et les Ressources Biologiques en Afrique Centrale et Occidentale.

Hôtel Ngor Diarama, Dakar, Senegal.

24 July

Café & Croissants Meeting on TRIPs And Health – Finding Common Ground On Paragraph 6 Of The Doha Declaration.

Speakers: Ambassador Boniface Guwa Chidyausiku, Permanent Mission of Zimbabwe; Chumpichai Svasti-Xuto, Permanent Mission of Thailand.

Geneva, Switzerland.

11 June

Café & Croissants Meeting on TRIPs in the Post Doha Context.

Speakers: Ambassador Eduardo Perez Motta, Permanent Mission of Mexico, Chair of the TRIPs Council.

Geneva, Switzerland.

17 May

Geographical Indications: A Review of Proposals before the Council for TRIPs. Organised as part of the UNCTAD-ICTSD Capacity Building Project on IPRs. Speaker: Dwijen Rangnekar, School of Public Policy, University College London.

Geneva, Switzerland.

19-21 April

Regional Multi-Stakeholder Dialogue on Trade, Intellectual Property and Biological Resources in Asia.

Rajendrapur, Bangladesh.

ENDNOTES

- 1 See World Bank (2004).
- 2 For the sake of convenience, all such bilateral agreements will be referred to as Free Trade Agreements (FTAs).
- 3 See Resource Book (2005).
- 4 For definition of non-traditional providers, see Tansey, G. (2005).
- 5 See under general www.iprsonline.org. Annex C to this document lists the Dialogues sponsored by ICTSD since 2001.
- 6 See CIPR report (2002); ICTSD-UNCTAD Policy Paper (2003).
- 7 See ICTSD, *Negotiating Health*, (2006).
- 8 These include for example the WIPO Performances and Phonograms Treaty and the WIPO Copyright Treaty (2006), the Patent Law Treaty (2000) and the Trademark Law Treaty (2005).
- 9 See. Kostecki, M. (2006).
- 10 See WIPO document PCDA/2/2 of June 23, 2006.
- 11 The term “Lock-in reforms” refers to consolidating domestic economic reform through international commitments.
- 12 See Vivas, D. and von Braun, J. (2006).
- 13 See Roffe, P. (2007), CIEL.
- 14 The FTA with Jordan only allows the use of compulsory licensing in cases such as to remedy a practice considered to be anti-competitive, in cases of non-commercial use or national emergencies and on the grounds of failure to meet working requirements (Article 4.20 of the FTA).
- 15 See ICTSD (2006), *Negotiating Health: Intellectual Property and Access to Medicines*.
- 16 Parallel importation refers to the import of goods under a license (with the authorisation of the title holder) from a third country. In cases where the price of production of a good under license in a particular country is higher, it makes sense to import such goods from another legitimate/authorised producer in a third country. Countries can choose, in light of Article 6 of the TRIPS Agreement, their own exhaustion regime whether international, regional or national, which determines whether they allow parallel importation. For an authoritative analysis of the issue of exhaustion and parallel importation, see: UNCTAD/ICTSD (2005). *The Resource Book on TRIPS and Development*. Cambridge University Press.
- 17 See, for example, the FTA between the US and Peru that provides that each Party shall provide that a claimed invention is industrially applicable if it has a specific, substantial and credible utility.
- 18 See Garrison, C. (2006).
- 19 See Okediji, R. (2006).
- 20 See, for example, Suthersanen, U. (2006).
- 21 Roffe, P. (2004).
- 22 See Pengelly, T. (2005); Kostecki, M. (2006); Vivas, D. and Bellmann (2004).
- 23 More information on dialogues and meetings organised by ICTSD is available at www.iprsonline.org.
- 24 ICTSD (2006). *Technical Cooperation for Intellectual Property Policy in Developing Countries: Dialogue on Sustainable Development and Intellectual Property*. Further information including the Meeting Report and related documents obtained from www.iprsonline.org.
- 25 Correa, C. and Deere, C. (2005).

- 26 See Roffe, P. (2004).
- 27 Roffe, P. (2004).
- 28 Roffe, P. and Santa Cruz, M. (2006).
- 29 See Article 20.4 of the FTAs signed by Colombia and Peru, respectively, with the US.
- 30 See UNCTAD (1997).
- 31 Ibid.
- 32 In an earlier paper, we identified six areas of possible delivery by TA providers namely: 1) Analysis (understanding the concepts, issues and options and costs and benefits associated with IP protection); 2) Policy formulation (formal and informal processes for the identification of national interest and the definition of an IP strategy); 3) Negotiation (ensuring the active participation in international rule making and standard setting bodies at the bilateral, regional and multilateral levels); 4) Legal and regulatory reform (assistance in the implementation of international commitments, use of flexibilities and legal reform); 5) IPR administration, enforcement (staffing and human resources issues, registrar services, operating procedures and automation models); 5) National innovation systems (create and promote national innovation systems, learning processes, improvement of technological absorptive capacities and the commercialisation of the results of research and development). See Vivas, D. and Bellmann, C. (2004).

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The International Centre for Trade and Sustainable Development (ICTSD) has been active in the field of intellectual property since 1997, amongst others, through its Programme on Intellectual Property Rights (IPRs) and Sustainable Development. One central objective of the Programme has been to facilitate the emergence of a critical mass of well informed stakeholders in developing countries including decision makers, negotiators as also the private sector and civil society who will be able to define their own sustainable human development objectives in the field of IPRs and effectively advance them at the national and international levels.

The Programme has generated an Issue Paper Series on Intellectual Property Rights and Sustainable Development with the intention of offering a clear, jargon-free synthesis of the main issues to help policy makers, stakeholders and the public in developing and developed countries to understand the varying perspectives surrounding different IPRs, their known or possible impact on sustainable livelihoods and development, and different policy positions over the TRIPS Agreement and other relevant international intellectual property arrangements.

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