**BILATERAL TECHNICAL ASSISTANCE AND THE TRIPS AGREEMENT:
THE UNITED STATES, JAPAN AND THE EUROPEAN COMMUNITIES IN
COMPARATIVE PERSPECTIVE**

**DUNCAN MATTHEWS AND VIVIANA MUNOZ-TELLEZ
QUEEN MARY INTELLECTUAL PROPERTY RESEARCH INSTITUTE
UNIVERSITY OF LONDON**

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Abstract

Article 67 of the TRIPS Agreement places an obligation on developed country WTO members to provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed WTO members. This article provides an analysis of technical assistance provided by the United States, Japan and the European Communities and its member states in accordance with Article 67. The article suggests that least-developed countries can learn lessons from a comparative analysis of the technical assistance that the United States, Japan and the EC have so far provided to developing country WTO members.

Keywords: TRIPS, technical assistance, United States, Japan, European Communities, developing countries, least-developed countries

Introduction

The Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) established new minimum standards of intellectual property (IP) protection and enforcement. In order to assist developing and least-developed country members of the World Trade Organisation (WTO) in meeting their IP protection and enforcement obligations under TRIPS, significant resources have been made available in the form of technical assistance and financial cooperation initiatives. These initiatives have been either bilateral (provided by one WTO member to another), provided via multilateral institutions such as the WTO, the World Intellectual Property Organisation (WIPO),¹ the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Development Programme (UNDP) or via non-traditional providers, such as industry groups and public interest Non-Governmental Organisations (NGOs).² However, despite a great deal of activity, technical and financial cooperation in relation to TRIPS remains relatively understudied within the global intellectual property system. This article seeks to contribute to the debate on IP-related technical assistance by providing an assessment of bilateral technical assistance provided to developing countries by the United States, Japan and the European Communities and its member states.

The legal basis for bilateral IP-related technical assistance can be found in Article 67 of the TRIPS Agreement, which explicitly places an obligation on developed country WTO members to provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed WTO members.³ According to the text of Article 67, the type of technical cooperation to be

provided includes assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights, as well as the prevention of their abuse, and support regarding the establishment or enforcement of domestic offices and agencies relevant to these matters, including the training of personnel.

In order to ensure that information on available assistance is readily accessible and to facilitate the monitoring of compliance with the obligation of Article 67, developed country members have agreed to present to the WTO descriptions of their relevant technical and financial cooperation programmes and to update this information annually.⁴

This article provides an analysis of technical assistance provided by the United States, Japan and the EC and its member states during the period 1996–2005, based on submissions to the TRIPS Council to facilitate the monitoring of compliance with Article 67 obligations. Thus far, almost all of the technical assistance provided has been directed towards developing country WTO members. However, with least-developed countries now entering a crucial period of change and adaptation ahead of full TRIPS implementation and enforcement when the revised TRIPS transitional period for this latter group of countries expires on 1 July 2013 (and on 1 January 2016 in respect to patents for pharmaceutical products), important decisions lie ahead in terms of what types of technical assistance these countries decide to request and also in terms of which potential providers of technical assistance they decide to approach.⁵ In this respect, this article suggests that least-developed countries can learn from a comparative analysis of the U.S., Japanese and EC technical assistance that has been provided to developing country WTO members.

A typology of technical assistance activities

The TRIPS Agreement itself provides no definition of technical assistance activities. However, some guidance on what IP-related technical assistance might involve was provided by the Council for Trade-Related Aspects of Intellectual Property Rights (the TRIPS Council) on 26 April 1996, when it summarised the information on technical cooperation activities presented by WTO members during the first year that the TRIPS Agreement was in force.⁶ The TRIPS Council categorised technical assistance as:

- (i) general assistance in the development of human resources;
- (ii) assisting in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse;
- (iii) support regarding the establishment or reinforcement of the relevant domestic offices and agencies; and
- (iv) other types of assistance, specifically the promotion of public awareness of intellectual property and the exploitation of intellectual property rights.

In a study of technical assistance produced for ICTSD in 2004, Tom Pengelly provides a similar typology of technical assistance activities in the TRIPS area.⁷

Pengelly categorises these activities as:

- (i) general and specialised training for human resource development;
- (ii) advice on IP policy/legal reforms and assistance with preparing draft laws;

- (iii) support for modernising IPR administration offices (including automation) and collective management systems; and
- (iv) international patent co-operation and information services (including search and examination) to facilitate IPR administration and promote local innovation and creativity.

These technical assistance activities are provided almost entirely by specialist IP personnel who are working on a short-term consultancy basis and are deployed in developing countries.⁸ The scope of each of Pengelly's four categories is summarised below.

General and specialised training for human resource development

The training programmes that are provided are usually through short-term training courses, seminars and workshops, run in individual developing countries, at regional locations, and in the home country of the respective IP technical assistance donor, for example hosted by the national IP offices in the U.S., Japan or EC member states.⁹

Advice on IP policy/legal reforms and assistance with preparing draft laws

As developing countries implement the TRIPS Agreement and prepare for new negotiations at the multilateral, regional and bilateral level, technical assistance in relation to legal and policy reform has become a major focus for providers, particularly in the form of:

- (i) issue-based guidance (e.g. on protection of geographical indications);
- (ii) workshops and seminars on technical topics and negotiating skills;
- (iii) production of handbooks for IP policymakers and negotiators; and
- (iv) country-specific policy analysis and legal advice (e.g. on how to incorporate provisions of the TRIPS Agreement into national law).¹⁰

Support for modernising IPR administration offices

A key area of activity has been development of the national IP institutional infrastructure, including technical assistance for institutional development, organisational reform, introduction of modern management systems and financial assistance for automation of IP administration, for example providing on-line services such as secure e-mail, exchange of IP data, hosting of national IP agency websites and internet connectivity.¹¹

Country-specific policy analysis and legal advice

In the case of patents in particular, most developing countries rely to some extent on the work of the United States Patent and Trademark Office (USPTO), the Japanese Patent Office (JPO) and the European Patent Office (EPO), which together undertake substantive examination of approximately 95 per cent of all applications worldwide, as a result of the Patent Cooperation Treaty (PCT) search and examination procedures for patent applications.¹²

Article 67 obligations

As noted above, developed country WTO members are obliged to provide technical and financial cooperation in the field of intellectual property rights in favour of developing and least developed countries, on request and on mutually agreed terms, as set out in Article 67 of the TRIPS Agreement.¹³ They must also submit annual updated information to the TRIPS Council of their technical cooperation activities.¹⁴ However, since there is no best-practice or internationally-shared guidelines in this regard, developed countries are free to decide which activities to prioritise financing for, and how best to design and deliver IP related technical assistance. The result can be the duplication of efforts or, at worst, conflicting advice.¹⁵

In part, deficiencies in the design and delivery of IP-related technical assistance to developing countries are the result of in-built limits to Article 67 that have important consequences for the quantity and quality of technical assistance provided. First, by requiring developing countries to request assistance from developed country WTO members, and by requiring the providers and recipients of technical assistance to mutually agree terms and conditions, there is a risk that Article 67 perpetuates a dependency culture. IP-related technical assistance may be subsequently provided by developed countries may be inappropriate for specific country conditions. Second, by making explicit reference to the fact that technical cooperation under Article 67 ‘shall include’ the provision of assistance associated with the protection and enforcement of intellectual rights,¹⁶ Article 67 fails to place an explicit obligation on developed nations to assist developing countries in utilising TRIPS flexibilities such as those in relation to compulsory licensing that could help to ensure access to medicines.

Neither does Article 67 place an obligation on developed country members to assist developing countries in respect to Articles 7 and 8 TRIPS. It will be recalled that Article 7 states that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligation. Under Article 8(1) members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of the TRIPS Agreement. Article 8(2) acknowledges that appropriate measures, provided that they are consistent with the provisions of the TRIPS Agreement, may be needed to prevent abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer or technology.

As a result, developed countries have largely limited their technical assistance activities to IP protection and enforcement initiatives.

To summarise, Article 67 TRIPS can be interpreted in two ways: first, as an obligation on developed country WTO members to assist developing countries to meet their obligations relating to IP protection and enforcement under the TRIPS Agreement; and, second, as an opportunity for developed country WTO members to

assist developing countries in utilising TRIPS flexibilities and fulfilment of the objectives set out in Articles 7 and 8.

The reality of IP-related technical assistance

But, at a bilateral level, the reality is that technical assistance tends to emphasise intellectual property protection and enforcement objectives that are priority areas for foreign rights holders operating in developing countries and, while developed countries are quick to provide assistance and to give examples of best practice on how to protect intellectual property rights, they rarely offer technical assistance on how best to put into practice the objectives and principles set out in Articles 7 and 8 TRIPS or how to incorporate TRIPS flexibilities.¹⁷ Emphasising protection and enforcement as priority areas has simply had the effect of downgrading the need for assistance designed to ensure that developing countries make appropriate use of TRIPS flexibilities.

The UK Commission on Intellectual Property Rights, after assessing the current programmes being provided by multiple sources of IP technical assistance, concluded that the design and delivery of IP related technical assistance to developing countries needs to be improved and to be better integrated with the overall national development strategy of individual countries.¹⁸

There are multiple flexibilities in the TRIPS Agreement that can be used by developing countries to implement the TRIPS Agreement in a manner that is coherent with their broader national developing strategies. These include flexibilities that can

enable developing countries to improve access to medicines, including: compulsory licensing; exceptions to the exclusive right conferred by a patent; the status of test data submitted for the purpose of obtaining regulatory approval; and parallel importation, whereby WTO members are free to import goods sold locally from cheaper overseas sources.¹⁹ Moreover, the TRIPS Agreement permits the exclusion of plant and animals from patentability. However, plant varieties have to be protected. This obligation is complemented by a flexibility, namely that plant variety protection can be either by patents or *a sui generis* system. This means that WTO members can freely decide on the kind of protection they want to provide, allowing them to implement their own models, without having to follow those of developed countries or international agreements such as the UPOV Convention.

So, IP-related technical assistance can be designed to identify all options available to developing countries when complying with their TRIPS obligations, particularly when the TRIPS Agreement contains flexibilities that will enable developing countries to do this in a way that can be tailored to their local conditions and developmental needs. This is often not the case with the type of assistance provided by the U.S., Japan and the EC and its member states, though there are important differences and nuances between the approaches taken.²⁰

IP-related technical assistance provided by the U.S., Japan and the European Communities and its member states

The next section of this article reviews the IP-related technical assistance initiatives undertaken by the U.S., Japan and the European Communities and its member states

during the period 1996–2005, analysing their annual reports to the TRIPS Council on activities undertaken in accordance with the terms of reference set out in Article 67 TRIPS.

The United States, Japan and the European Communities and its member states provide and fund technical assistance in the field of intellectual property rights through a web of multilateral, regional and national agencies.

This article suggests that there are subtle, but important, differences in the approaches of the U.S., Japan and the European Communities and its member states in the design and delivery of IP-related technical assistance. Although they share the common objective of seeking strong protection and enforcement of intellectual property rights in developing countries, and the view that IP-related technical assistance is a means to achieve this goal, they have a different understanding on how to best design and deliver IP-related technical assistance to meet the needs and demands of developing and least developing countries in this area.

IP-related technical assistance provided by the United States

U.S. IP policy objectives

The U.S. is a strong advocate of high standards of IP protection in developing countries. The policy objectives of IP-related technical assistance provided by the U.S. are linked to a broader agenda of trade liberalization, particularly to secure greater market access worldwide for U.S. products.

These objectives include accelerated implementation of the TRIPS Agreement, effective implementation of laws that strengthen IP standards and securing fair, equitable, and non-discriminatory market access opportunities for US persons that rely on IP protection.²¹

The strengthening of IP protection in developing countries benefits U.S. IP-dependent industries, such the pharmaceutical industry and copyright industries and acts as a driver for domestic economic growth in the United States.²² Since 9/11, the U.S. administration has also linked IP protection to national security, maintaining that organised terrorist networks are benefiting financially from their involvement in the counterfeiting and piracy of IP protected products.²³ The U.S. also maintains that increased IP protection in developing countries is conducive to those countries' own economic development, acting as a stimulus for innovation and promoting foreign direct investment and private sector growth.

Types of technical assistance provided by the U.S.

The U.S. provides different types of IP-related technical assistance to developing countries. This assistance is targeted at addressing issues considered obstacles to IP protection and enforcement in developing countries including: poor awareness of intellectual property rights; inadequate IP legislation; and ineffective enforcement mechanisms. Addressing counterfeiting and piracy in developing countries has in

recent years become a central focus of U.S. IP-related technical assistance to developing countries, largely in response to industry concerns.

U.S. technical assistance initiatives undertaken have included: the provision of advice to assist developing countries in the preparation of laws and regulations on IP protection and enforcement in accordance to the TRIPS Agreement and other bilateral and international agreements; assistance in the establishment, modernisation and administration of domestic offices related to intellectual property, such as patent offices; and activities to promote awareness in the private sector and general public in developing countries about the positive relationship between IP and economic growth and against piracy and counterfeiting.

Our analysis of the submissions referred by the U.S. to the TRIPS Council regarding its technical assistance activities indicates that most activities undertaken have been in the form of training and information programmes focused on public awareness and out-reach activities aimed at increasing IP protection and enforcement. These include courses, seminars, workshops and study visits for staff of domestic IP offices, legislators and government officials, students, as well as specialised training for judges, prosecutors, customs and other officials involved in IP enforcement. These activities generally are one-off events, although there are some regular training programmes, such as the USPTO Visitor Scholar programme. Table 2 provides examples of U.S. technical cooperation activities as reported in the submission covering the period from 1 October 2004 to 30 September 2005.²⁴

Government agency involvement IP technical assistance provided by the U.S.

The U.S. has a robust, multi-agency system for the provision of IP-related technical assistance to developing countries. Eight U.S. government agencies fund and or provide technical cooperation, each focusing on different types of assistance but joined by the common aim of implementing U.S. IP policy objectives.²⁵

The government agencies involved include: the U.S. Department of Justice which focuses technical cooperation activities on providing strong IP enforcement; the U.S. Library of Congress Copyright Office, that provides technical assistance to help developing countries to develop and improve their copyright laws and enforcement mechanisms to address copyright infringements; the USPTO, which carries out reviews and provides comments and advice on developing countries' draft IP laws, provides extensive training and funds IP technical assistance; the Department of Homeland security divisions of Customs and Border Protection, that provides assistance on custom law and border enforcement; and the United States Agency for International Development (USAID) which funds and implements IP technical assistance generally as part of broader trade capacity-building programmes at the country level.

Table 1: Examples of U.S. IP-related technical assistance activities 2004 - 2005

Training Date	Title	Beneficiary Countries	Sponsor	Description
1-31 December 2004	IPR Crime Law Enforcement Training	South Africa	DOS	Location: South Africa Training Recipient: Prosecutors US government team of prosecutors and investigators sent to South Africa to present seminars on combating IPR crime to selected law enforcement officials. The USG team in planning and delivering the seminars have been encouraged to closely coordinate with private industry groups supportive of strong IPR enforcement.
30 August-2 September 2005	IP Enforcement Seminar	Armenia	USAID	Location: Yerevan, Armenia Training Recipient: Police A 4-day IP enforcement seminar for police, including a special IP enforcement unit.
13-15 September 2005	Counterfeit Medicines in Sub-Saharan Africa	Botswana Congo (Dem. Rep. of the; Kinshasa) Cote d'Ivoire Ethiopia Ghana Guinea Kenya Madagascar Mauritius Nigeria Senegal Seychelles South Africa Uganda Zambia	USPTO	Location: Johannesburg Training Recipient: Trademark officials, Police, Customs officials, Revenue (Tax) officials, Prosecutors, Judges - civil/administrative courts, Judges - criminal courts, Ministry of Public Health officials Programme to explore the problem of counterfeit medicines in sub-Saharan Africa and identify ways to combat it.

Private sector involvement in IP-related technical assistance provided by the U.S.

One of the defining characteristics of the U.S. approach to IP-related technical assistance is the level of involvement of U.S.-based IP private industries in both its design and delivery.

A closer examination of the United States IPR Training Coordination Group, which provides a mechanism through which the U.S. aims to fulfil its technical assistance obligations under Article 67 TRIPS, illustrates this point. The IPR Training Coordination Group, comprising government agencies and industry associations representing rights holders,²⁶ aims to provide information, training and technical assistance to foreign officials and policy-makers.

The U.S. IPR Training Coordination Group is composed of U.S. private sector organisations that represent U.S.-based IP industries and multiple U.S. government agencies that work closely to protect IP on a global level. The industry associations that are involved in the IPR Training Coordination Group are: the Coalition for Intellectual Property Rights (CIPR); the Interactive Digital Software Association (IDSA); the International Anti-Counterfeit Coalition (IACC); the International Intellectual Property Alliance (IIPA); the International Intellectual Property Institute (IIPI); and the Pharmaceutical Research and Manufacturers of America (PhRMA). The U.S. IPR Training Coordination Group, as its name suggests, is intended to operate as a coordinating mechanism that seeks to facilitate the provision of technical assistance to developing countries by bringing together the different providers.

Founded in 1998, the stated aim of the IPR Training Coordination Group is to assist participants in matching training and technical assistance needs with available resources and avoiding duplication of efforts. As such, the U.S. IPR Training Coordination Group has two characteristics. The first is a focus on activities designed to enhance implementation and enforcement procedures in developing countries, with little attention paid to wider issues of how best developing countries can utilise TRIPS flexibilities. The second is a high profile for private sector organisations, representing rights holders, with a vested interest in ensuring high standards of IP protection and are consequently likely to emphasise a narrow focus on enforcement of TRIPS obligations rather than engaging with the wider agenda of utilising TRIPS flexibilities in developing countries.

Public interest NGOs and academics with the knowledge and expertise to redress the balance by highlighting the scope for TRIPS flexibilities alongside issues of IP protection and enforcement do not participate in the U.S. IPR Training Coordination Group and, even though the UK Commission on Intellectual Property Rights has cautioned against policy decisions on intellectual property in developing countries being influenced principally by domestic industrial and commercial interest groups in the developed world,²⁷ this appears to be exactly what has happened in the case of the U.S. context.²⁸

To summarise, the presence of strong private sector involvement in close coordination with U.S. government agencies indicates that advice being provided to developing countries is closely linked to U.S. private business interests. This carries with it the risk that U.S. IP-related technical assistance activities do not present developing countries with all available options when implementing the TRIPS Agreement and other IP obligations. As suggested earlier in this article, TRIPS flexibilities are available, but our concern is that these are not emphasised within U.S. IP-related technical assistance programmes.

The IP-related technical assistance activities provided by the different members of the IPR Training Group are documented in the Training Program Data Base, administered by the U.S. State Department.²⁹ Our analysis of the data contained indicates that the training programmes have focused on improving levels of IP protection and enforcement. We would suggest that such training programmes are insufficient in supporting developing countries to formulate IP policy that helps them meet their development objectives and that is tailored to their domestic circumstances. Table 2

offers some examples of the type of training activities that are included in the Training Program Data Base.

Table 2: Examples of U.S. IPR Training Group technical assistance activities included in the Training Program Data Base

Training Date	Title	Beneficiary Countries	Sponsor	Description
September 19 2005	Cable Piracy	Namibia	IFPI	Location: Walis Bay Training Recipient: Copyright Officials, Police, Customs officials. One day training seminar.
September 13 2005	IP Enforcement	Philippines	Time Warner	Location: Manila Training Recipient: Copyright Officials Workshop on IP enforcement organised by the US embassy
May 25 2005	IPACT training	South Africa	BSA	Location: New York, NY Training Recipient: Judges – civil/administrative courts. Time Warner hosted a group of middle eastern judges or a discussion on IP issues and a tour of CNN to demonstrate the significant effort that goes into producing tv programming.
March 14 2005	Anti-counterfeiting seminar	Kenya	IFPI	Location: Nairobi Training Recipient: Copyright officials, Police, Customs officials. Administrative officials. Seminar sponsored by Microsoft to train 60 members of the Kenyan Police force in piracy investigation.
February 28 2005	Data exclusivity seminar	China	RDPAC	Location: Beijing, China Training Recipient: Judges – civil/administrative/criminal courts, commerce officials, legal professionals, other. Seminar to discuss the data exclusivity provisions of the TRIPS Agreement and how the US and China fulfil those obligations. Sponsored by Research and Development Based Pharmaceutical Association Committee (RDPAC).

IP-related technical assistance provided by Japan

Japan's IP policy objectives

In policy terms, IP protection is an issue of increasing importance to Japan, presented as both enhancing the international competitiveness of Japanese industries and revitalizing the economy. In Japan, IP policy coordination is the responsibility of the Strategic Council on Intellectual Property.³⁰ The Intellectual Property Strategic Program 2004 defines the main objectives of Japan's IP policy and its strategy for achieving them.³¹ The 2004 Strategic Program notes that Japan seeks to promote the international protection of and cooperation on IP and to actively encourage developing countries to develop their IP systems and ensure the efficient IP enforcement through bilateral and multilateral agreements so as to achieve IP protection beyond the level provided in the TRIPS Agreement.

The JPO has identified adequate IP protection as a key to promoting foreign investment and technology transfer to developing countries, as well as for a means to boost national industrial development in those countries. Accordingly, the emphasis of Japan's IP technical assistance is on improving developing country IP protection systems and their operation systems.³²

The emphasis that Japan has given IP enforcement was emphasised on 15 November 2005, when Japan proposed a new international treaty to combat worldwide counterfeiting and piracy, complementing the TRIPS Agreement. The proposed new Treaty on Non-Proliferation of Counterfeits and Pirated Goods, would focus on the

import, export and transshipment of illegal goods, according to Hisamitsu Arai, Secretary General of the Intellectual Property Strategy Headquarters Cabinet Secretariat in Tokyo.³³

Type of technical assistance provided by Japan

Japan provides IP-related technical assistance mainly to countries of the Asia-Pacific region in areas such as development of human resources and modernizing, computerization and information processing at IP offices, as well as in supporting the examination and search processes in patent and design applications in developing countries, including the provision of examination results.³⁴ The human resource development aspect of Japan's IP-related technical assistance includes the dispatch of Japanese IP expert officials, usually from the Japanese Patent Office (JPO) to developing countries to provide advice on issues such as modernizing IP offices usually for short periods of time and receiving trainees such as officials from IP offices from developing countries. Japan also provides IP technical cooperation in the field of plant variety protection systems.

Generally, IP-related technical assistance takes the form of country level projects that seek to transfer knowledge and provide systematic support over a period of three to five years. Table 3 presents some examples of the type of country-level technical assistance that Japan provides to developing countries in the Asia-Pacific region.

Table 3: Examples of Japan IP-related technical cooperation activities 2004 - 2005

Activity Type	Activity Date	Title	Countries	Sponsor	Description
Training Course	2004	The Enforcement of IPR	ESCAP region	WIPO Funds-in-Trust/Japan	Two-week course for senior officials engaged in the enforcement of IPR in enforcement-related government agencies
Expert Missions	Two week periods 2004	The Enforcement of IPR	ESCAP region	WIPO Funds-in-Trust/Japan and JICA	The dispatched experts mainly provide on-site instruction regarding examination practices, computerization and so forth.
Computerization and Information Processing	May 1999 – May 2003	WIPO Asia and the Pacific Regional Workshop	Philippines	WIPO Funds-in-Trust/Japan	Technology transfer and human resource development for modernization of industrial property right administrative procedures of the IP Office
Assistance in Search and Examination	On-going	WIPO/State-of-the-Art-Searches for Developing Countries	Developing countries	WIPO Funds-in-Trust/Japan	The JPO provides search reports for which prior art search was requested by IP offices or research institutes of developing countries through the WIPO

Japan provides most of its IP-related technical assistance through a small number of government agencies and, in cooperation with intergovernmental organisations, through trust funds. The main government agencies involved are the Japan International Cooperation Agency (JICA), the Association for Overseas Technical Scholarship (AOTS), the Japanese Institute of Invention and Innovation and the Japan Patent Office (JPO). Moreover, a large part of the IP-related technical assistance is channelled through the WIPO Funds-in-Trust/Japan and to a lesser extent, the UPOV Trust fund which provides funding for activities related to strengthening plant variety protection systems in Asia-Pacific countries.

Government provides funding through JICA and the WIPO Funds-in-Trust/Japan which are used annually to finance trainees, dispatch JPO officials to developing countries in the Asia-Pacific region and to support the automation and modernization of IP offices.

IP-related technical assistance provided by the European Communities and its member states

The EC and its member states' IP policy objectives

The European Communities and its member states provide IP-related technical assistance to developing countries through the activities of the European Commission and through national government bodies. In a similar way to the U.S. and Japan, the strengthened protection and enforcement of IP rights is considered a central objective of EC trade policy and an important tool to support developing countries achieve higher levels of economic growth.³⁵ Moreover, the EC seeks to increase trade relations with developing countries by way of economic partnership and other cooperation agreements that cover IP protection and enforcement and IP-related technical assistance. An example of the importance that the EC attaches to IP in developing countries is the strategy to enforce intellectual property rights in third countries.³⁶ The EC is also a strong proponent of increasing discussion of IP enforcement in the TRIPS Council.³⁷

However, the EC has also adopted progressive positions with respect to IP protection in developing countries and developing countries' defensive interests in IP related

issues, which indicates that there are actors involved in the design and delivery of EC technical assistance that are more receptive to developing country interests than is the case in the U.S. and Japan. For example, the EC has supported a requirement for patent applicants to disclose, under certain conditions, the origin and or source of genetic resources and traditional knowledge on which inventions are based³⁸. This is a mid-way position between that of the U.S. and Japan, on the one hand, that has strongly opposed the inclusion of disclosure requirements in patent applications as regards to genetic resources and traditional knowledge, and the position of developing countries rich in biodiversity and traditional knowledge, on the other, that have sought legally binding obligations at the multilateral level.

Broadly speaking, the EC policy objectives for its IP-related technical assistance include: providing developing countries with help in implementing TRIPS-compliant laws and regulations supportive of local public health, innovation and technology transfer objectives; providing expertise on organising and modernizing administrative offices and collecting societies; providing training for administrative and judicial officers; and increasing awareness amongst potential right-holders.³⁹

Types of technical assistance provided by the EC and its member states

The activities undertaken by the EC and its member states fall into all of the categories of IP-related technical assistance discussed earlier in this article, including legislative advice, training activities, awareness raising activities, and support for IP infrastructure in developing countries. Some IP-related technical assistance activities are carried out at the level of the European Commission, while others are undertaken

at the national level by individual EC member states. IP-related technical assistance is also carried out independently by the EPO though this assistance is outside the scope of the current article.

The IP-related technical assistance activities provided by the European Commission are generally organised through large programmes of several years duration that are targeted at a specific country or regions and cover several types of capacity building and technical assistance. Some of the past and or current programmes include the EC–ASEAN IPR Co-operation Programme (ECAP and ECAP II from 1993 to date), PHARE (Co-operation Programme for Central and East European countries that concluded in 1998), and several country level programmes such the EC–TACIS and EC–China IPR Co-operation Programmes. In broad terms the programmes seek to strengthen IP protection systems at the domestic level through training, legislative and institutional reform and awareness raising and thus cover several fields of IP- and enforcement–related activities.

The ECAP II programme, for example, has the overall objectives of fostering trade, investment and technology exchanges between Europe and the ASEAN region and to foster intra-ASEAN trade and investment.⁴⁰ To meet these objectives, ECAP II activities focus on updating the legal framework to make IP laws TRIPS compliant, improving the IP administration and enforcement and raising awareness of the importance of IP and economic development. ECAP II and other large programmes are financed by the EC, but implemented through the EPO and the Office for the Harmonization of the International Market (OHIM) in cooperation with national agencies.

While this comprehensive regional and country level approach to the provision of IP-related technical assistance can be considered more advantageous in targeting developing country needs than one-off events, there is little evidence that EC programmes are incorporating TRIPS flexibilities, presenting policy alternatives or focusing on capacity building to enable developing countries to negotiate proactively on intellectual property issues. However, an evaluation of the EC trade-related assistance, including IP-related technical assistance, has concluded that the EC approach is highly sensitive to partners' requests and priorities, but that the EC has possibly been too reactive resulting in an ad hoc approach. The evaluation report recommended that the EC should move from a reactive approach to partners' demands towards a more strategic identification and implementation of technical related assistance.⁴¹ Even if this were the case, EC IP-related technical assistance would still appear to lack important components concerning advice on the use of TRIPS flexibilities in developing countries.

Individual EC member states also provide IP-related technical assistance alongside that provided at supranational level under the auspices of the European Commission. In this respect, our review of the submissions of the EC to the TRIPS Council regarding Article 67 activities undertaken by EC member states suggests that there are different approaches to the provision of IP-related technical assistance.⁴² Most EC member states provide technical assistance through their national patent offices, for example the Austrian Patent Office, the Danish Patent and Trademark Office, the National Board of Patents and Registration of Finland, the German Patent and Trademark Office (GPTO), the Swedish Patent and Registration Office and the United

Kingdom Patent Office (UKPO). This IP-related technical assistance undertaken by the national IP offices of individual EC member states is often carried out in cooperation with the EPO or WIPO (for example, collaborative initiatives of this type have been undertaken by Austria, Finland and Sweden).

The IP-related technical assistance provided generally takes the form of training, study visits, seminars, workshops and advice on the elaboration of legislation to comply with IP obligations. The activities tend to be one-off events. Table 4 provides some examples of the common types of technical assistance provided by EC member states.

Table 4: Examples of EC IP-related technical assistance activities 2004 - 2005

Country	Activity	Beneficiary Countries	Sponsor	Description
Finland	State-of-the art search reports	Chile, Egypt	National Board of Patents and Registration of Finland	Provide state-of-the art search reports free of charge within the framework of development cooperation with WIPO.
France	Development of geographical indications	OAPI (16 countries of French speaking Africa)	Various ministries, National Institute of Appellations of Origin (INAO), WIPO	Technical assistance in introducing harmonized domestic regulations in the area of geographical indications (GI), assistance in the formulation of GI policy.
Germany	Seminar on "Enforcing the Protection of Patents and Trademarks in Germany"	Viet Nam	German Patent and Trademark Office (GPTO)	The 20 participants visited different respective institutions in the framework of the project "Viet Nam's WTO Accession: Preparing to Compete in a new environment".
Spain	Regional seminar for Judges and Prosecutors	Latin America	Spanish Patent and Trademarks Office (OEPM), WIPO, European Patent Office (EPO), Spanish International Cooperation Agency (AECI)	Industrial property seminar to study Spanish and European legislation on patents, trademarks, industrial designs, utility models and copyright.
United Kingdom	Visit of a delegation from various organisations	China	United Kingdom Patent Office (UKPO)	An overview of the UK patent process involving seven visitors from Technology Bureau's Electrical institutes and the Patent Office.

Some of EC member states' international development agencies are also involved in the provision of IP-related technical assistance (e.g. the Swedish International Development Cooperation Agency (SIDA) and the UK Department of International Development (DFID)). The review of Article 67 submissions shows that where these agencies are involved, the IP-related technical assistance activities tend to be more development-oriented. The activities focus on addressing developing country capacity constraints and the use of TRIPS flexibilities. Table 5 provides examples of these activities.

Table 5: Examples of IP-related technical assistance activities: SIDA and DFID

Country	Activity	Beneficiary Countries	Organising Agency	Description
United Kingdom	Willingness and ability to use TRIPS flexibilities – July 2004	Developing Countries	DFID	Study looking at developing countries' technical capacity, understanding and readiness to use TRIPS flexibilities in relation to increasing access to medicines.
United Kingdom	Willingness and ability to use TRIPS flexibilities case studies July 2004	Kenya Malawi	DFID	Country level case studies forming part of the wider study looking at developing countries' technical capacity, understanding and readiness to use TRIPS flexibilities in relation to increasing access to medicines.
United Kingdom	Resource book on TRIPS and development project 2002 – 2004.	Developing Countries and countries in transition	DFID/ UNCTAD/ International Centre for Trade and Sustainable Development (ICTSD)	Preparation of a resource book on TRIPS and development that gives independent assessment and guidance on the implications of specific issues and on the options available. The book is written and compiled by groups of international experts on the TRIPS Agreement.
United Kingdom	Strategic dialogue on coherence between multilateral, regional and bilateral processes on IP, November 2003	Argentina, Brazil, Chile, Dominican Republic, Mexico, Panama, Peru, Venezuela	DFID/ UNCTAD/ International Centre for Trade and Sustainable Development (ICTSD)	Dialogue to discuss latest developments on IP at the multilateral, regional and bilateral levels.
Sweden	The biodiversity and bio safety programme. January 2000 – June 2003.	Developing countries	SIDA/Third World Network (TWN)	Support to TWN for seminars, workshops, training and capacity building activities. The objective is to strengthen developing countries knowledge in the areas of bio safety, biotechnology and biological multitude. It involves building of research and negotiating capacity of developing countries to bring forward their case and concrete proposals in various relevant international fora.
Sweden	WIPO/WTO: redefining rights of biodiversity	Developing countries	SIDA/ Genetic Resources Action International (GRAIN)	Support to Genetic Resources Action International (GRAIN)
Sweden	Capacity building of bio safety and bio policy January 1999 – March 2005	Ethiopia, Kenya, Tanzania and Uganda	BIOEARN/SIDA	Courses and seminars within bio safety and bio policy, including IPRs. Objective of the project is to strengthen national and regional capacity within biotechnology, bio safety and biotechnology policy development.

Public interest NGO involvement in IP-related technical assistance activities provided by the EC and its member states

A characteristic of the IP-related technical assistance provided by the EC and its member states, which marks it out from initiatives undertaken by the United States and Japan, is the engagement of public interest NGOs. However, where public interest NGOs have participated in IP-related technical assistance programmes, this has been as a result of individual EC member state initiatives. There is little evidence of public interest NGO involvement in IP-related technical assistance activities carried out in relation to initiatives taken by the European Commission at an institutional level.

Sweden and the United Kingdom, for instance, have provided IP-related technical assistance to developing countries through public interest NGOs that differs in important respects from the type of assistance that is provided through other agencies, such as national and regional patent offices. The emphasis of public interest NGO assistance has been on linking IP to development related concerns such as fostering local innovation, protecting public health and farmer's rights. The bulk of public interest NGO involvement has been in terms of policy research aimed at strengthening the understanding of, and capacity of developing countries to comply with, TRIPS obligations in a manner that is consistent with their broader national development strategies. This is in contrast with the majority of the assistance provided by the national patent offices of EC member states and other agencies, where public interest NGOs have not been involved has generally focused on improving the administration of developing countries' national IP systems and other activities related to the increased protection and enforcement of IP.

One example of the type of technical assistance that has been provided by public interest NGOs with the involvement of EC member states is the “UNCTAD-ICTSD Capacity Building project on Intellectual Property Rights (IPRs) and Sustainable Development”, a joint initiative of UNCTAD and the International Centre for Sustainable Development (ICTSD). ICTSD is an independent non-profit and non-governmental organisation that seeks to facilitate interaction between policy-makers and those outside the system to help trade policy become more supportive of sustainable development⁴³. The UNCTAD–ICTSD project is partly funded by the UK Department of International Development (DFID), the UK government department responsible for promoting development and the reduction of poverty. The project is geared towards improving the understanding of the development implications of the TRIPS Agreement and strengthening the analytical and negotiating capacity of developing countries so that they are better able to participate in IPR-related negotiations in an informed fashion in furtherance of their sustainable development objectives.⁴⁴ The main results of the project have been a series of publications and workshops targeted at developing country policy makers emphasising that developing country governments need to pursue IP policies that best accommodate their respective levels of development, not a “one size fits all” approach that focuses on IP protection and enforcement.

Comparisons between the United States, Japan and the European Communities

Since the TRIPS Agreement came into force in 1995, a great deal of attention has been devoted to implementation and enforcement issues, with developed country

WTO members obliged, under Article 67 of TRIPS, to provide, on request, technical and financial cooperation in favour of developing and least-developed WTO members. In meeting their obligations under Article 67 TRIPS, industry experts have played a prominent role in IP-related technical assistance initiatives undertaken by the United States. The initiatives undertaken by the U.S. have emphasised IP protection and enforcement issues. NGOs representing public interest civil society have not participated in these programmes.

In the case of Japan and the European Communities, the role of industry has been less pronounced. Japan has focused on the provision of IP-related technical assistance to countries of the Asia-Pacific region and has given prominence to relatively uncontroversial issues such as the development of human resources and the modernizing, computerization and upgrading of information processing capabilities at IP offices, as well as supporting the examination and search procedures in patent and design applications in developing countries. This cooperation has been channelled through a few government agencies and often delivered in cooperation with intergovernmental organisations such as WIPO, financed through trust funds. In Japan, industry groups and public interest NGOs have been relatively absent from the process of providing IP-related technical assistance.

In the case of the European Communities and its member states, IP-related technical assistance initiatives have been more varied, both in terms of the range of providers engaged in delivery, which have included public interest NGOs as well as industry and government experts, and in terms of the issues engaged with, which have included some initiatives to emphasise TRIPS flexibilities as well as IP protection and

enforcement issues. In this respect, this EC approach differs markedly from IP-related technical assistance initiatives undertaken by the U.S and Japan.

On the basis of the analysis of submissions made by the U.S., Japan and the EC to the TRIPS Council in relation to Article 67 undertaken in this article, it therefore appears that subtly divergent strategies towards IP-related technical assistance can be identified in the post-TRIPS era. What can we infer from this evidence for the future of IP-related technical assistance, particularly in relation to least-developed country WTO members?

Technical assistance: the lessons for least-developed countries

While transitional periods available to developing countries under Article 65(2) and 65(4) TRIPS have now expired, for least-developed country WTO members a crucial period for TRIPS implementation and enforcement is now underway. In view of the special needs and requirements of least-developed members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, Article 66(1) TRIPS set out that least-developed country members should not be required to apply the provisions of the TRIPS (other than Articles 3, 4 and 5) for a period of 10 years from the date of application of the Agreement (i.e. until 1 January 2006). That transitional period was subsequently extended, by the TRIPS Council Decision of 29 November 2005, until 1 July 2013⁴⁵ (except in respect to patents for pharmaceutical products, where the transitional period had already been extended until 1 January 2016).⁴⁶

The TRIPS Council Decision of 29 November 2005 contained, in Article 2, a commitment that, with a view to facilitating targeted technical and financial cooperation programmes, all least-developed country members of the WTO will provide the TRIPS Council, preferably by 1 January 2008, with as much information as possible on their individual priority needs for technical and financial cooperation in order to assist them taking steps necessary to implement the TRIPS Agreement.⁴⁷

In response to the needs identified by least-developed countries by 1 January 2008, Article 3 of the TRIPS Council Decision requires that developed country members to then provide technical and financial cooperation in favour of least-developed country members in accordance with Article 67 of the TRIPS Agreement.

In addition, to assist least-developed country members in drawing up the information to be presented with a view to making technical assistance and capacity building as effective and operational as possible, under Article 4 of the TRIPS Council Decision, shall seek to enhance its cooperation with WIPO and other relevant international organisations.

Although least-developed countries have already been recipients of some IP-related technical assistance, particularly in the context of regional initiatives such as ECAP II, since Article 66(1) allowed for additional transitional periods, relatively little technical assistance has focused thus far to implementation and enforcement of TRIPS obligations in these territories.

Technical and financial cooperation will, therefore, be a key element in ensuring that least-developed country members of the WTO are prepared to apply the TRIPS Agreement in a manner appropriate to local conditions when the revised transitional period expires on 1 July 2013 (and on 1 January 2016 in respect to patents for pharmaceutical products).

In conclusion, given the foregoing review of IP-related technical assistance provided to developing country members by the U.S., Japan and the EC and its member states, we would suggest that there are important lessons to be learnt by least-developed countries as they prepare to submit requests technical assistance to the TRIPS Council. These countries should be mindful of the different types of technical assistance available, on request, from developed country members. They should identify the likely approaches, given the previous record of these countries as technical assistance providers in the TRIPS area. We would suggest that least-developed country members of the WTO should also seek to ensure that the technical assistance they receive does not focus only on TRIPS implementation and enforcement, but also assists with the utilisation of Articles 7, 8 and 66(1) and TRIPS flexibilities.

About the Authors

Duncan Matthews is a Senior Lecturer in Intellectual Property Law at Queen Mary Intellectual Property Research Institute, Centre for Commercial Law Studies, Queen Mary, University of London; email: d.n.matthews@qmul.ac.uk

Viviana Munoz-Tellez is a Research Assistant at Queen Mary Intellectual Property Research Institute, Centre for Commercial Law Studies, Queen Mary, University of London; email: v.c.munoz-tellez@qmul.ac.uk

Notes

¹ WTO-WIPO Cooperation Agreement of 22 December 1995 provides for legal-technical assistance and technical cooperation relating to the TRIPS Agreement to be provided to developing countries by WIPO. Full text available at: http://www.wto.org/english/tratop_e/trips_e/intel3_e.htm.

² D. Vivas-Eugui and C. Bellmann, Towards Development Oriented Technical Assistance in Intellectual Property Policymaking, Paper prepared for “Reflections on IPR Technical Assistance to Developing Countries and Transition Economies” workshop, 15-17 September 2004, Burnham Beeches, UK. [draft]

³ See also K. M. Koepsel, ‘How Do Developed Countries Meet Their Obligations Under Article 67 of the TRIPS Agreement?’, IDEA: The Journal of Law and Technology, 44(2) (2004).

⁴ Information on the technical and financial cooperation programmes provided by developed country Members and intergovernmental organizations is available on the WTO website at: http://www.wto.org/english/tratop_e/trips_e/intel9_e.htm.

⁵ The least-developed country WTO members are: Angola; Bangladesh; Benin; Burkina Faso; Burundi; Cambodia; Central African Republic; Chad; Democratic Republic of the Congo; Djibouti; Gambia; Guinea; Guinea Bissau; Haiti; Lesotho; Madagascar; Malawi; Maldives; Mali; Mauritania; Mozambique; Myanmar; Nepal; Niger; Rwanda; Senegal; Sierra Leone; Solomon Islands; Tanzania; Togo; Uganda; Zambia.

⁶ Summary of the Information on Technical Cooperation Activities: Note by the Secretariat, WTO TRIPS Council, IP/C/W/22, 26 April 1996.

⁷ T. Pengelly (2004) Technical Assistance for the Formulation and Implementation of Intellectual Property Policy in Developing Countries and Transitional Economies, Issue Paper 11, International Centre for Trade and Sustainable Development (ICTSD), Geneva, at 5.

⁸ According to Pengelly, *ibid.* at 5.

⁹ *Ibid.* at 5.

¹⁰ *Ibid.* at 6.

11 Ibid. at 7.

12 Ibid., at 7.

13 Article 67 of the TRIPS Agreement defines developed countries' commitments on technical assistance to developing and least developed countries.

14 The submissions regarding the technical assistance activities of developing countries with respect to Article 67 of the TRIPS Agreement are available in the WTO website, www.wto.org.

15 Commission on Intellectual Property Rights, Integrating Intellectual Property Rights and Development Policy, London, CIPR, September (2002) at 150.

16 See also S. Musungu, , Susan Villanueva, and Roxana Blasetti, Utilizing TRIPS Flexibilities for Public Health Protection Through South-South Regional Frameworks, 'South Perspectives' series, Geneva, South Centre (2004) at 24.

17 A view corroborated by Musungu et al, *ibid.*, at 25.

18 Ibid. at 151.

19 See D. Matthews 'TRIPS Flexibilities and Access to Medicines In Developing Countries: The Problem with Technical Assistance and Free Trade Agreements', *European Intellectual Property Review*, 2(11) (2005).

20 This is particularly true in cases where bilateral or regional trade agreements with developing countries have been negotiated, or are in the process of being negotiated, by countries that are also providers of IP-related technical assistance. The U.S., for example, has been criticised for seeking 'TRIPS-plus' standards of IP protection through bilateral and regional trade agreements.

21 Uruguay Round Agreements Act, 19 USC Sec 3581.

22 See statement of J. W. Dudas, Acting Under Secretary of Commerce to Intellectual Property and Acting Director of the US Patent and Trademarks Office (USPTO) before the Commission on Judiciary United States Senate, March 23, 2004, available at www.ustpo.gov/web/offices/com/speeches/2004mar23.htm.

23 Detailed information concerning the official views of the US administration can be found in the US Department of State website, usinfo.state.gov/topical/econ/ipr, as well as in the Trade Policy Agenda reports that are submitted by the administration to the Congress pursuant to Section 163 of the Trade Act of 1924, as amended (19 U.S.C 2213). The Trade Policy Agenda reports outline the administration guiding principles and trade priorities for the next year.

24 See WTO document IP/C/W/455/Add.5 dated December 2005.

25 See WTO documents IP/C/W/12/Add.2 dated 11 September 1995 and IP/C/W/12/Add.2/Suppl.1, dated 11 December 1995. The websites of each agency also provide detailed information on the IP technical assistance they provide to developing countries.

26 See Intellectual Property Rights Training Database, sponsored by the Bureau of Economic and Business Affairs of the U.S. Department of State, at <http://www.training.ipr.gov/index.cfm?fuseaction=content.about>.

27 Supra n. 15 at 163

28 See also E. Ghanotakis, 'How the U.S. Interpretation of Flexibilities Inherent in TRIPS Affects Access to Medicines for Developing Countries', *Journal of World Intellectual Property* 7(4), (2004).

29 *Supra* n. 26.

30 The Council consists of the Prime Minister, the Chief Cabinet Secretary, the Minister of State for Economic and Fiscal Policy and IT Policy, the Minister of State for Science and Technology Policy, the Minister for Public Management, Home Affairs, Posts and Telecommunications, the Minister of Justice, the Minister of Education, Culture, Sports, Science and Technology, the Minister of Health, Labour and Welfare, the Minister of Agriculture, Forestry and Fisheries and the Minister of Economy, Trade and Industry as well as experts. See http://www.kantei.go.jp/foreign/policy/titeki/index_e.html.

31 The Intellectual Property Strategic Program 2004 is available at http://www.kantei.go.jp/foreign/policy/titeki/kettei/040527_e.html#40.

32 Japan Patent Office (JPO), Intellectual Property Cooperation in The Asia-Pacific Region, available at http://www.jpo.go.jp/torikumi_e/kokusai_e/asia_ip_e/apip_4e.htm.

33 Japan Proposes New IP Enforcement Treaty, IP-Watch, 15 November 2005, available at: <http://www.ip-watch.org/weblog/index.php?p=135&res=1280&print=0>.

34 Detailed information of these activities is contained in the annual submissions by Japan to the TRIPS Council. See for example, WTO documents IP/C/W/12, IP/C/W/377 and IP/C/W/455/Add.2.

35 For the official position of the European Commission on IP, see http://europa.eu.int/comm/trade/issues/sectoral/intell_property/index_en.htm.

36 See European Commission, Strategy for the Enforcement of Intellectual Property Rights in Third Countries, available at: <http://www.trade-info.cec.eu.int/doclib/html/120025.htm>.

37 See Communication from the European Communities, WTO document IP/C/W/468, dated 10 March 2006.

38 See Proposal by the European Community and its Member States to WIPO, Disclosure of Origin or source of generic resources and associated traditional knowledge in patent applications, received 16.12.2004, available at http://www.wipo.int/tk/en/genetic/proposals/european_community.pdf.

39 See European Commission, Guidelines for European Commission Trade Related Assistance, May 2003.

40 More information on the EC-ASEAN Intellectual Property Rights Cooperation Programme (ECAP II) is available on the project website at www.ecap-project.org.

41 Evaluation of Trade Related Assistance by the European Commission in Third Countries, 24 May 2004, ADE. http://europa.eu.int/comm/europeaid/evaluation/evinfo/sector/951654_ev.htm

42 Some of the annual EU submissions to the TRIPS Council regarding IP technical cooperation are WTO documents IP/C/W/455/Add.6, IP/C/W/426/Add.5, IP/C/W/408, and IP/C/W/377/Add.7.

43 See ICTSD website, www.ictsd.org.

44 See UNCTAD-ICTSD Project on IPRs and Sustainable Development website, <http://www.iprsonline.org/unctadictsd/description.htm>.

45 Poorest Countries Given More Time to Apply Intellectual Property Rules, WTO Press Release 424, 29 November 2005, available at: http://www.wto.org/english/newse/pres05_e/pr424e.htm.

46 Council Approves LDC Decision with Additional Waiver, WTO Press Release 301, 28 June 2002, available at: http://www.wto.org/english/news_e/pres02_e/pr301_e.htm.

47 The full text of the Decision of the Council for TRIPS of 29 November 2005 providing for the extension of the transition period under Article 66.1 for least-developed country members is available at: http://www.wto.org/english/news_e/pres05_e/pr424_e.htm.