IP AND DEVELOPMENT

Observations from the United Kingdom

Introduction

In 2001 the UK Government established an independent Commission on Intellectual Property Rights (IPR Commission) to consider how Intellectual Property Rights and Development Policy could be integrated. That Commission comprised members from developing as well as developed countries. The report produced by that Commission[1] was widely recognised as a valuable contribution to the debate on the many complex issues surrounding this topic and has been influential in shaping UK Government policy in this area.[2]

Although the main driver for setting up that Commission was the issue of intellectual property and health, the brief provided to the Commission was much wider. This enabled it to address broader issues relating to IP and development some of which have been raised in the WIPO development agenda paper put forward by Argentina and Brazil. This paper touches on some of these wider issues.

The UK believes that IPRs can play a vital role in the course of the development process for developing countries today, just as they did, and continue to do, in the UK, other developed countries and the most successful developing economies. A prerequisite for sustainable development in any country is the development of an indigenous scientific and technological capacity. As the IPR Commission recognised, an IP system is capable of being an important element in developing that capacity, notably in those countries which have already developed a scientific and technological infrastructure. But as the IPR Commission Report makes clear, an IP system cannot of itself ensure a country attains its developmental goals. This we believe is true irrespective of how the IP system is constituted. The degree to which development goals are met depends on many different factors, particularly the economic, social and environmental policies it chooses to pursue, for example, openness to trade and effective governance.

This has been further brought out in the recently issued report of the Commission for Africa[3] which was established by the UK Government to take a fresh look at Africa's past and present and the international community's role in its development path. That Commission comprised distinguished people from a number of countries, mainly African and was chaired by the Prime Minister of the UK acting in an independent capacity. This Commission also highlighted the imperative of strengthening science and technology capacity in Africa in order to enable countries there to find their own solutions to their own problems and

[1] 2002 The Report of the Commission on Intellectual Property Rights and the UK Government Response http://www.iprcommission.org/graphic/documents/final_report.htm

[2] See the 2003 UK Government Response to the Report: http://www.iprcommission.org/graphic/uk_government_response.htm

[3] 2005. The Report of the Commission for Africa http://www.commissionforafrica.org/english/report/introduction.html

critically to unlock the potential of innovation and technology to accelerate economic growth and enter the global economy.

The UK has for some time recognised that there is a need to build the capacity of developing countries in science and technology and that international cooperation between developed and developing countries is a means to this end. The UK's Department for International Development (DFID) is amongst the largest spenders on research and development of bilateral aid donors. In addition it contributes its share to European Union programmes for research cooperation with developing countries. Much of DFID's research expenditure involves scientific and technological cooperation between developed and developing country research institutions. As the Report of the Commission for Africa acknowledges it is also important for research institutions to set up public-private partnerships or what they refer to as "innovation hubs" to foster innovation, entrepreneurship and technology diffusion. The UK believes that an appropriate IP system has a part to play in encouraging such activities. Indeed the UK Government continues to promote such partnerships with British public research bodies.

What constitutes an appropriate IP system has already been and will continue to be the subject of much debate. One of the overriding messages that emerged from the IPR Commission Report was that IP regimes can and should be tailored to take into account individual country's circumstances within the framework of international agreements such as TRIPs. The IPR Commission Report also raised the important issue of how technical assistance from developed countries and international organisations such as the WIPO can be provided so as to ensure that developing countries fully understand how to create an effective intellectual property system appropriate to their needs. The UK Government has already signalled its commitment to this goal, in its own technical assistance programmes, in participating in the reflection on how to better provide technical assistance on IPR and in influencing those of international organisations.

Role of WIPO

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

In its response the UK Government indicated its full support for these recommendations. It also recognised the importance of integrating IP policies with the formulation and implementation of Poverty Reduction Strategy Papers which are compiled by a wider range of developing countries more generally as the basis for focussing development assistance on country priorities. It is within the

overarching framework of these more general poverty reduction or development plans that WIPO needs to act. The UK will continue to work to ensure this happens. As the IPR Commission noted, if WIPO is unable to do this within its existing mandate then that mandate should be changed. A specific proposal to do this is included in the Argentina/Brazil paper. We are however not as yet persuaded that WIPO's existing mandate is such that it is prevented from effectively integrating development objectives into its activities. We will of course consider carefully any suggestion to the contrary.

Technical Cooperation

WIPO is widely recognised as a major provider of technical assistance. Its program for cooperation with developing countries has for example been allocated resources in excess of SFr55 Million for the 2004-05 biennium. Despite the relatively large sums being devoted to technical cooperation activities, concerns have been raised about the nature and transparency of this cooperation. The IPR Commission Report expressed concern about whether IP was being promoted in a balanced manner, recognising that it carries costs as well as benefits for all countries. Also highlighted was the importance of engaging with the full range of stakeholders involved in IP, including both the producers and users of technologies and products so as to ensure that each country is assisted to find the right balance for itself. This was considered especially important in respect of the legislative advice that WIPO provided to countries seeking to meet their international obligations. The UK believes that WIPO has taken steps to improve transparency particularly in the context of its legislative advice. This is to be welcomed.

Technical cooperation must be tailored to countries' needs and should be seen in a broad sense including enhancing capacity to facilitate the development of balanced IP-related policies. This implies integrating technical assistance in a broader context. In this respect it seems clear that WIPO is engaging with a wider range of stakeholders when drawing up nationally focused action plans. Whether the extent of this engagement is sufficiently broad is less clear. It is also unclear whether these action plans for specific countries or regions have taken account of broader development or poverty reduction strategies applicable to those countries. We would invite the WIPO Secretariat to provide information on this as a basis for a further discussion, possibly within the PCIPD. Indeed we believe WIPO Member States should consider strengthening and refocusing the PCIPD to create a rejuvenated active and specific committee for defining WIPO programmes on development and acting as a seed bed for development discussions.

Complementing policy coherence, donor coordination and TA effectiveness is also key. WIPO is not alone in providing IP technical assistance to developing countries. As indicated above the UK Government, principally through its Department for International Development is also an active provider of IP related technical assistance albeit on a more modest scale. Numerous other public and private organisations and countries also contribute significantly in this area. With such a range of donors and potential recipients there is clearly the possibility of wasteful overlapping, duplicating, and piecemeal efforts. The recently submitted

proposal by the US to improve coordination between donors and potential recipients is therefore to be welcomed. Such a proposal would also provide a valuable contribution to a more general stock take of current activities in this area.

As well as improved coordination it is also necessary to effectively monitor the impact of any technical assistance on development in the recipient country. Such assessments could serve to identify best practices which could then be utilised to shape future programs. Methodologies for such impact assessments should also conform to best practice as practiced by both IP and non IP technical assistance providers. We are aware that the PCIPD has in the past been invited to consider evaluation reports produced with the aid of external auditors on technical cooperation activities undertaken by WIPO[4]. However it is unclear to us whether these reports have been sufficiently focused on the actual impact on development in the participating countries, whether the PCIPD or any other body has adequately scrutinised the findings of these reports and whether robust mechanisms are in place to ensure that lessons learnt are incorporated into future activities. A rejuvenated PCIPD with input from both IP and development specialists from Member States would seem well capable of enhancing the evaluation process.

Patent Law Harmonisation

The UK believes that further harmonisation of patent laws has the potential to bring benefits to stakeholders in both developed and developing countries. This is true even if harmonisation is restricted to a reduced package of issues. Common laws on novelty, inventive step, prior art and grace periods should serve to reduce the cost of acquiring patent rights in multiple jurisdictions. This should be especially so if harmonisation leads to a reduction in duplication of search and examination in the jurisdictions in which protection is sought. Whilst the majority of patent applicants continue to originate from developed countries, there is also a growing number of filings from applicants from developing countries. For example according to recent WIPO figures[5], whilst the overall growth of PCT filings in 2004 compared with 2003 was estimated at just over 4%, the growth in PCT filings from 23 selected developing countries apparently grew by more than 23% over the corresponding period. The number of PCT applications from applicants from these 23 developing countries when expressed as a percentage of the total PCT applications although small also grew between 2003 and 2004.

As well as having the potential to reduce the cost of applications, harmonisation also has the potential to reduce the time taken to process applications, including the time taken to refuse applications. Any reduction in the period of uncertainty whilst an application is pending benefits not just applicants but also third parties in all countries. It is however important to ensure that any reduction in the cost and time to obtain patents does not lead to a reduction in quality. The development of a quality framework for applications processed within the framework of the PCT, work that was led by the UK, should go some way to ensuring that only patents

[4] See for example Document PCIPD/2/8 discussed at the 2nd Session of the PCIPD in 2001
[5] WIPO PCT Statistical Indicators Report January 2005
http://www.wipo.int/ipstats/en/statistics/patents/pdf/pct_monthly_report.pdf

with a high degree of validity are granted under the PCT. This too will benefit legitimate competition.

In terms of the measures that might be harmonised, harmonisation of prior art to potentially include any disclosure including through use anywhere in the world should, as noted in the IPR Commission Report, help to reduce the number of patents granted for traditional knowledge that is already in the public domain although not through written disclosure. It should also make it easier to challenge any granted patents claiming such knowledge.

The UK does however recognise that for some countries, particularly least developed countries where there is little or no domestic demand for patents, further harmonisation is unlikely to bring any direct benefit to offset the costs of further amending their patent laws. For such countries it may be appropriate to explicitly provide in any harmonisation proposal an extended transition period or even a clear opt out. The Commission on Africa commented, albeit in a slightly different context in relation to Free Trade Agreements, that African countries should have the flexibility to implement reform at an appropriate pace and in line with their own development strategies. This we believe is equally relevant and applicable to the poorer developing countries within WIPO. We would nevertheless encourage such countries to continue to engage in and help shape the debate.

As with any negotiations it will ultimately be up to each party to weigh up in consultation with all the relevant stakeholders the costs and benefits of any proposals. Central to that consideration in many countries will be the question of whether any proposal is likely to increase or reduce uncertainty in the patent system. The UK continues to believe that an agreement acceptable to all member states of WIPO is possible.

Technology Transfer

The IPR Commission Report rightly notes that the determinants of effective technology transfer are many and various. For example the ability of countries to absorb knowledge from elsewhere and then make use and adapt it for their own purposes is of crucial importance. This is a characteristic that depends on the development of local capacity through education, through R&D, and the development of appropriate institutions without which even technology transfer on the most advantageous terms is unlikely to succeed. The IPR Commission Report felt that the broad nature of the issue meant that the focus of any discussions should be more on the WTO in general rather than TRIPs. This is now being done through the Working Group on Trade and Transfer of Technology which was established at the Doha Ministerial Conference.

It therefore seems questionable whether given these ongoing discussions in the WTO, and the broad range of issues raised by the subject, it is necessary at this stage to create a new standing committee on IP and technology transfer within WIPO. Specific IP related issues already known to be, or which emerge as, relevant to the subject could however be taken up within existing WIPO bodies and programs. For example Article 40 of TRIPs recognises that some licencing

practices or conditions pertaining to intellectual property rights which restrain competition may impede the transfer and dissemination of technology. The assistance and advice already provided by WIPO to countries wishing to adopt measures to prevent or control such practices could be reviewed in for example a rejuvenated PCIPD and if necessary enhanced.

Conclusion

In this paper which is presented in the spirit of cooperation we have sought to make some observations on a number of issues surrounding this debate. The paper makes specific proposals particularly in respect of how WIPO's technical cooperation program is managed. We recognise however that the debate is much broader than technical cooperation. We have touched briefly on a number of other areas and look forward to engaging more fully as the debate, which we hope will be inclusive and informed, matures.