

Jeremy de Beer, editor

Implementing the

WORLD INTELLECTUAL PROPERTY ORGANIZATION'S

Development Agenda



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LIST OF ACRONYMS

A2K	access to knowledge
AYUSH	Department of Ayurveda, Yoga and Naturopathy, Unani, Sidhha, and Homeopathy
BERD	Business enterprise expenditure on R & D
BIRPI	Bureaux internationaux réunis pour la protection de la propriété intellectuelle
BRICs	Brazil, Russia, India, China
CC	Creative Commons
CDIP	Committee on Development and Intellectual Property
CSIR	Council of Scientific and Industrial Research
CTS	Centre for Technology and Society
DST	Department of Science and Technology
FGV	Fundação Getulio Vargas
FTA	free trade agreement
GDP	Gross domestic product
GERD	Government expenditure on R & D
IBRE	Brazilian Institute of Economics
ICANN	Internet Corporation for Assigned Names and Numbers
ICTSD	International Centre for Trade and Sustainable Development
IDCs	innovative developing countries
IGOs	inter-governmental organizations
IGP-M	general price index-market
IIPA	International Intellectual Property Alliance
IMF	International Monetary Fund
INPI	Patent and Trademark Office
IP	Intellectual property
IPC4D	intellectual property coalitions for development
IPRs	intellectual property rights
LDCs	least developed countries
NGOs	non-governmental organizations
OECD	Organisation for Economic Co-operation and Development
PCDA	Provisional Committee on the Development Agenda
R & D	Research and development
SMEs	small and medium enterprises
SPLT	Substantive Patent Law Treaty

TDI	Tropical Disease Initiative
TPDCs	technologically proficient developing countries
TRIPs	Trade-Related Aspects of Intellectual Property Rights
UDRP	Uniform Domain Name Dispute Resolution Policy
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNESCO	UN Educational, Scientific, and Cultural Organization
USTR	US trade representative
WHO	World Health Organization
WTO	World Trade Organization
WIPO	World Intellectual Property Organization

Foreword

Why did the World Intellectual Property Organization (WIPO) start work on a Development Agenda? There are many answers to this question. A cynic might see it as paying lip service to the growing number of discontents of the globalization of “Western” intellectual property rules, in particular via the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs), a process that would then allow progress on negotiations toward higher intellectual property protection, whether on geographical indications, audiovisual performers, broadcasters’ rights, or non-original databases. Yet the empirical evidence shows that, since the conclusion of TRIPs, in April 1994—apart from the two WIPO “Internet treaties” on copyright concluded in December 1996 (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty) and mostly administrative and procedural agreements such as the Trademark Law Treaty (October 1994) and the Singapore Treaty on the Law of Trademarks (March 2006)—it has been difficult, if not impossible, to raise the multilateral level of intellectual property protection. In the past twelve years, the only new norms adopted in either WIPO or the World Trade Organization (WTO) were reinterpreted *exceptions* on patent compulsory licensing for certain pharmaceutical products, culminating with the adoption of Article 31 *bis* of the TRIPs Agreement (not in force as of January 2009). This cynical view, while it may have held some sway, does not (or does no longer) reflect the real purpose of the Development Agenda.

To find its purpose, one must look at the initial proposal in August 2004 by Argentina, joined by Bolivia, Cuba, Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania, and Venezuela. That proposal insisted on (1) the welfare costs of increasing intellectual property protection, (2) the difficulty for many developing and least-developed nations to benefit from higher protection levels, and (3) the different situation of many of those countries, especially when their economy, their industry, and culture were compared to those of the TRIPs demanders (the EC, Japan and the United States, with support mostly from Australia and Switzerland). Some of the issues identified in Argentina’s text were well argued, others more intuitive. Yet, unmistakably, the agenda

was an effort to illuminate the costs and challenges of implementing higher intellectual property protection as well as the distinctions among nations that must be made in that process. Cookie-cutter norm implants and paper compliance with TRIPs would not do.

As I have argued elsewhere,¹ we are now in the third phase of the TRIPs Agreement. The first was an *addition* phase (more IP is better), where compliance with TRIPs took the form of rapid legislative deployment. Model laws were adopted in many countries. A threefold belief informed the first phase: first, it was essential to protect the property of intellectual property holders in both rich and poorer countries; second, by generating additional profits, it would in turn lead to more research and development; third, it was necessary to jump-start economic growth in those countries (intellectual property seen as a necessary ingredient of development and foreign direct investment).

In a fairly typical cart-before-the-horse scenario, the first true detailed studies on the impact of intellectual property specific to developing countries emerged *after* the conclusion of the TRIPs Agreement.² Combined with the escalating public health issues posed by the HIV and malaria pandemics, a second phase of TRIPs started around 2000. It was characterized by highly critical analyses of the TRIPs negotiation process and its results. Indeed, the GATT Uruguay Round, which produced both the WTO and TRIPs, was the first example on such a huge scale of sectoral reciprocity: TRIPs (and the much weaker Agreement on Trade in Services–GATS) in exchange for agriculture and textiles.

Critics emphasized coercion to explain the bargain. They pointed to threats during the Uruguay Round to isolate developing countries from the global trading system or to impose punitive unilateral sanctions if they did not accede to the demands of the West. Other observers, such as economist Jagdish Bhagwati, opined that intellectual property was not proper subject matter for the WTO.³ However, the majority of critics underscored the absence of empirical data to justify the addition-based narratives. Many of them tried to demonstrate the inadequacy of Western intellectual property norms to protect certain forms of traditional medicinal knowledge or traditional cultural expressions (sometimes referred to jointly as “traditional knowledge”).⁴ Several books, articles, and reports were published⁵ to explain how TRIPs could and should be “fought” both within the WTO (for example by coalescing or insisting on technology transfers) and without (for example by fostering the emergence of alternative instruments in other forums, such as the *Convention on Biological Diversity*),⁶ either as countervailing international law norms or hermeneutic tools for TRIPs exegetes.

The second phase, which thus focused on *subtraction* (less IP is better), confronted head-on a fundamental two-prong query, namely: (1) What is the causal relationship between intellectual property protection and foreign direct investment? and (2) Does increased FDI necessarily lead to spur innovation in the recipient country? The queries are important because they underpin much of the pro-intellectual property discourse.

TRIPs has now entered a third phase, one that is informed by *calibration narratives*, against a backdrop of shifting geocommercial realities, including exponential outsourcing by Western enterprises to China, India, and other developing countries and the growing clout and tactical capabilities of developing countries in trade and other multilateral discussions. The building blocks of the calibration process that is under way are many: (1) the recognition that developing countries are very different, from Chile to China, from Bolivia to Burkina Faso, or from Egypt to India, and consequently may need different implementations of TRIPs; (2) the recognition that below certain developmental thresholds, the introduction of high levels of intellectual property protection will not generate positive impacts (as was evidenced by the extensions of transitional periods available for least-developed WTO members until 2013 and 2016, which periods are likely to be renewed); (3) the growing belief that intellectual property protection is necessary to develop innovation and draw foreign direct investment (including technology transfers) but in itself is insufficient to achieve developmental objectives; (4) consequently, the recognition that any complete TRIPs implementation must form part of a broader strategic initiative; and, finally, (5) the recognition that the sudden introduction of high levels of protection and enforcement may induce significant negative welfare impacts, which must also be managed.

The WIPO Development Agenda emerged at the beginning and as the poster child for the third phase. It focuses on most if not all of the critiques identified above. This includes work on how TRIPs implementation strategies must differentiate among countries based on several factors, including their industrial capacity and level of development, and work on a fuller understanding of how innovation can emerge in developing countries. The results of the work that WIPO might accomplish on the first issue should allow for fine-grained approaches to domestic TRIPs implementations. Work on the second fuller understanding is fundamental because TRIPs fails to recognize adequately (many of its drafters made assumptions that should have been expressly documented) that innovation does not follow automatically from the adoption and enforcement of higher intellectual property protection, for many reasons. Intellectual property

laws are not a magic wand. Essentially, intellectual property is but one of several ingredients of a successful national innovation policy. TRIPs assumed that each WTO Member knew and had the ability to develop and implement such a strategy. If domestic innovation and creativity cannot be developed in ways that harness TRIPs rules, many developing countries will see TRIPs as a net negative, a form of rent extraction benefiting multinationals. This problem is compounded by the perception that this additional rent is not used in sufficient quantity to produce goods of interest to the developing world (e.g., pharmaceuticals designed to treat tropical diseases). The Development Agenda could be the ultimate gap-filler.

If it is to be successful, the Development Agenda will need input not just from national delegates at WIPO or from the Secretariat, but also from leading academics and others (civil society). This book is precisely such a contribution. Giving voice to scholars from every continent, it sheds light on each of the aspects discussed above: What should the purpose and aim of the Development Agenda be (and its “localization”)? How can and should the impact of intellectual property in the developing world be measured, and how may countries be classified for the purpose of that analysis? How can intellectual property be retooled for development, and what is the appropriate interface between public and private sector research? How should developing countries adapt TRIPs and other rules, and which exceptions should they consider (for example in the educational context)? What may be the impact of ongoing multilateral and bilateral negotiations, and what should the role of civil society be? Finally, who else might play a role in this increasingly central picture?

This book adds an important stone to the edifice of calibrated multilateral intellectual property, and I am grateful, as many others no doubt will be, to Professor de Beer and the authors of the various chapters for their timely contribution.

– Daniel J. Gervais, Professor of Law, Vanderbilt University and
University of Ottawa

- 1 See Daniel Gervais, “TRIPs and Development,” in D. Gervais, ed., *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPs-Plus Era* (Oxford: Oxford University Press, 2007).
- 2 See id.
- 3 Jagdish Bhagwati, *In Defense of Globalization* 182-85 (Oxford 2004).
- 4 J. Michael Finger and Philip Schuler, *Poor People’s Knowledge: Promoting Intellectual Property in Developing Countries* (World Bank and Oxford, 2004).
- 5 See the list of TRIPs-related books and articles at www.tripsagreement.net.
- 6 Convention on Biological Diversity, 1760 UNTS 143, 31 ILM 818 (1992).

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This book reflects the intellectual contributions and hard work of many individuals, and it could not have been created without strong support from numerous organizations.

But first and foremost, I am grateful to my wife, Collette, and my two young daughters, Maggie and Sasha, for their love and inspiration. I appreciate their sacrifices during the time I spent writing, editing, and working on this book and, even more, during the many days I was traveling for project-related meetings and events.

In 2006 Professor Debra Steger of the University of Ottawa's Faculty of Law invited me to lead research on issues of international intellectual property law and technology. That was one of several research themes being pursued by the EDGE Network on the Emerging Dynamic Global Economies, a new initiative of Canada's Networks of Centres of Excellence program. I am grateful to Professor Steger, Director of the EDGE Network, for her confidence in my ability to lead this research theme, and to the NCE program for supporting the network. In addition, sincere thanks go to the International Development Research Centre for the funding to engage a research fellow for this project and to mobilize researchers and knowledge through the EDGE Network and beyond. I also want to acknowledge the University of Ottawa, Faculty of Law, for providing the institutional infrastructure for the EDGE Network and for my ongoing work in general.

Though organizations like the EDGE Network, the IDRC, and the university provided funding to facilitate the project, it was the personal support offered by their leaders and staff that made the results possible. So thank you to Rohinton Medhora, Robert Robertson, Bill Carman, and others at the IDRC, and to Irena Pawlowski, Anurag Sinha, and Peter Szyszlo of the EDGE Network. Thanks also to my colleagues at the University of Ottawa, Faculty of Law, and in particular to my dean, Bruce Feldthusen, and those who are working with me in the area of law and technology, for creating such a collegial and stimulating environment.

Among my first tasks as the EDGE Network's technology and intellectual property research theme leader was to convene a meeting of

experts from around the world to brainstorm project ideas. To that end a workshop was held in Ottawa, Canada, in the fall of 2006. Participants discussed and debated possibilities for a concrete plan of work over the coming years. The result was a consensus that there were more key issues than resources to address them. Of all potential topics to pursue, however, the most timely and important we identified related to a then relatively new proposal for reforms at and by the World Intellectual Property Organization: a proposal for a Development Agenda. By early 2007 it seemed probable that some agreement on recommendations for the agenda would be reached. We knew, however, that an agreement was one thing while concrete actions were another. To identify ways to turn the agenda's recommendations from words into actions, we met again in Vancouver, Canada, in the fall of 2007. At that meeting we worked on a series of implementation ideas to be fleshed out in essays we agreed to present to each other for critical review several months later. When we reconvened in the spring of 2008—in Hong Kong, China (thanks to support from the EDGE Network, the IDRC, and the University of Hong Kong's Faculty of Law)—we had produced a number of draft papers. The purpose of this meeting was to present and critique one another's work, initially with the aid of comments from independent peer reviewers and then in an open roundtable discussion format.

I appreciate the insights of all who attended one or more of those workshops, including Sara Bannerman, Shamnad Basheer, Susan Bincolletto, David Castle, Carolyn Deere, Jennifer Chandler, Peter Drahos, Michael Geist, Johanna Gibson, Richard Gold, Ronaldo Lemos, Lihong Li, Xuan Li, Jean-Frédéric Morin, Elizabeth Judge, Andy Kaplan-Myrth, Ian Kerr, David Krause, Pedro Paranaguá, Martin Phillipson, Andrew Rens, Robert Robertson, Teresa Scassa, Steve Song, V.C. Vivekanandan, Hong Xue, and Peter Yu.

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Turning a collection of papers into a published book was not a simple task. A debt of gratitude is owed to Andrea Kroetch and David Quayat,

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As I explain in the introductory chapter, my hope is that this book project marks the beginning, not the end, of this group of authors' efforts to aid implementation of the WIPO Development Agenda. Each chapter in this book represents a potential spinoff for future ideas and strategic discussion. If we proceed as I hope we do, further thanks will be forthcoming in the near future.

–Jeremy de Beer
Ottawa, March 2009

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Defining WIPO's Development Agenda

JEREMY DE BEER

INTRODUCTION

In the fall of 2007, the General Assembly of WIPO unanimously adopted forty-five recommendations regarding intellectual property (IP) and development.¹ These recommendations were the result of a proposal by Argentina and Brazil in 2004 to establish a "Development Agenda for WIPO" (WIPO 2004a). During a series of meetings, a provisional committee negotiated a list of items that at times included over a hundred proposals and could have included many more. Delegates from WIPO member states catalogued, debated, organized, and amalgamated the proposals into manageable clusters, within which recommendations were ultimately grouped. At the same time that the recommendations were endorsed, a new permanent Committee on Development and Intellectual Property (CDIP) was established to work on development-related issues at the organization.

The importance of obtaining consensus on the forty-five recommendations should not be understated. It was acknowledged by the member states and observers alike to be a tremendous success. At the same time, however, the General Assembly's decision to adopt the recommendations means little if they are not followed by concrete implementation. Implementation is the litmus test for the Development Agenda's success. To meaningfully implement the agenda will take foresight, creativity, and, perhaps most of all, perseverance. Focused efforts are needed to ensure that the recommendations are not diluted or, worse, ignored. Techniques must be developed to monitor and assess WIPO's progress. Only by pursuing practical, concrete strategies will the Development Agenda lead to results rather than rhetoric.

Implementation will not be an easy task. There are many challenges to face, including the need to build consensus, to find the necessary resources, and to ensure that there is effective leadership throughout the process. One of the most daunting challenges is to more clearly define what the agenda is and what it seeks to achieve.

The Development Agenda emerged as a response to what Peter Drahos and John Braithwaite (2003, 12) have aptly described as “an agenda of underdevelopment” that dominated global IP law throughout the twentieth century. Early proponents of the agenda sought, at least as a first step, to stop the trend toward upward harmonization of global IP protections. Familiar with the pattern of past events, they could clearly see where discussions covering substantive patent laws, broadcasters’ rights, and other issues were leading. The Development Agenda served to stall those discussions. It was, to be blunt, initially a distraction for WIPO. The realistic possibility of new substantive rules or procedures turned out to be a pleasant, but perhaps surprising, side effect.

If the *underdevelopment* agenda was, as Drahos and Braithwaite (2003, 12) explain, “all about protecting the knowledge and skills of the leaders of the pack,” is the Development Agenda just the inverse? Would such an agenda serve to *unprotect* the knowledge and skills of the developed world? Or would it serve to protect the knowledge and skills of the *developing* world? Both? Or neither? Just what is the Development Agenda?

It is tempting to point to the formal list of forty-five recommendations, or to the six thematic clusters in which the recommendations are grouped, as being definitive of the Development Agenda. It seems that so far WIPO and the CDIP are proceeding with this sort of literalist interpretation (WIPO 2008a; 2008b). In this way, there is already a disjoint between the way that WIPO sees the agenda and the way it is described in much of the scholarly and policy literature. Regardless of this discrepancy, the recommendations, on their face, do say something about the principles at the heart of the agenda, but they do not say enough. The Development Agenda is much more than just the sum of these parts. And even if the agenda were simply a “to do” list, the clusters and recommendations that are commonly referred to as constituting the agenda are vague, in some ways overlapping, and yet also incomplete.

One thing is fairly certain. The Development Agenda represents at least an attempted paradigm shift for IP policies in the twenty-first century. It is normatively different than the underdevelopment agenda of the late twentieth century. Its key demand, according to Christopher May

(2007, 78–79), is to re-establish the public policy aspects of IP rights, emphasizing that the protection and enforcement of IP cannot be an end in itself. Thus, the Development Agenda rejects a one-size, especially a supersize, model of global IP law.

Still, defining the Development Agenda in negative terms—by what it is *not* rather than by what it *is*—is hardly satisfactory if it is to be implemented successfully. Despite justifiable enthusiasm for the agenda, particularly in developing countries, non-governmental organizations, and the academic community, there is still no clear consensus on a positive definition of the agenda. Without a better sense of what WIPO's Development Agenda is, implementation is destined to be a long, difficult, and unproductive process.

So how can the Development Agenda be better defined, and who has the power to define it? Is there a unifying principle or set of principles animating the clusters of recommendations that formally constitute the agenda? If so, how might a principled definition inform and guide implementation? These are the questions that this chapter probes. The objective is to establish a more concrete contextual framework for further discussion and debate about the Development Agenda.

To begin such discussion and debate, this chapter introduces a collection of essays on specific, practical strategies to implement the agenda. It commences with a brief narrative of the agenda's evolution and formal content, including its six clusters of forty-five recommendations. Next, this chapter identifies four defining characteristics of WIPO's Development Agenda in an analytical, rather than a descriptive, manner. Two characteristics—the agenda's malleability and complexity—pose formidable challenges to its implementation. However, two other features—the opportunity and gravity of the agenda—show why these challenges can and must be overcome. This chapter concludes by linking the essays included in this collection to the agenda's defining characteristics and offering insights on possible strategies to move forward.

THE AGENDA'S EVOLUTION

It is not possible here to reprise the whole history of the Development Agenda. Ample background information is available from WIPO (on its website), in various scholarly works (for example, May 2007 and Netanel 2008), and through the websites of organizations such as the Consumer Project on Technology, Intellectual Property Justice, the Electronic

Frontier Foundation, South Centre, Intellectual Property Watch, and others. Nevertheless, it is worthwhile summarizing the agenda's evolution and placing it in context before describing its current content.

The year 2004 was not the first time that a country or countries had demanded greater emphasis on development when addressing international IP issues. Debate about a development round for WIPO is not new. Such concerns were present even before the organization's inception (Halbert 2007, 254). As early as 1958, doubts about the appropriateness of reforming international patent law were voiced by developing countries (Stoll 1995, 1437). In 1961, Brazil put forward to the UN a draft resolution on the relationship between IP and development (Menescal 2006).

However, through a series of conferences and reports, WIPO's predecessor, the *Bureaux internationaux réunis pour la protection de la propriété intellectuelle*, effectively stifled the intent of that resolution (May 2007, 22–23). WIPO was originally created to “promote the protection of intellectual property throughout the world.”² This objective remains a cornerstone of its convention. It is not surprising, therefore, that there has always been an awkward relationship between development and IP policies at WIPO.

In 1974, WIPO officially became a specialized agency of the UN, which means that it must contribute to the UN's overall development mandate. More specifically, WIPO was and is responsible “for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development.”³ In addition, many or most of WIPO's member states are developing countries, and since WIPO works on a one state-one vote basis, the majority of member states, in theory, control WIPO's strategic direction, budget, and activities. As a result of this structure WIPO ought to be a very development-friendly organization. However, against the background of theoretical representivity is the practical reality that the interests and perspectives of developing countries are often marginalized within WIPO (Visser 2007, 1458; Paranaguá 2004). Such division is attributable to a combination of factors, ranging from the procedural processes that are necessary for introducing new norms through standing committees that consist of non-experts from developing countries, to the substantive biases that result from WIPO's dependence on funds generated by administering systems used by IP rights holders.

WIPO's preoccupation with promoting strong IP rights presents an even greater challenge to fulfilling its UN-mandated development objectives. In WIPO's view, protecting IP is promoting development. It is noteworthy that

WIPO's outgoing director general chose to describe IP as a power tool for "economic growth" rather than for "development" (Idris 2003). At one time, these terms might have been interpreted synonymously.

Economic growth remains an essential indicator of development; however, it is no longer accepted as the only relevant metric for measuring progress. Nobel laureate Amartya Sen and renowned philosopher Martha Nussbaum, among others, have helped to usher in a framework in which development is linked to freedom and the realization of basic human capabilities (Sen 1999; Nussbaum 2000). Thus, the concept of development, as accepted and implemented by the UN Development Programme through the human development indices, for example, "is about much more than economic growth." It is about "expanding the choices people have to lead lives that they value." Of course, GDP is still a very important indicator of development, especially as a per capita figure. Sen, Nussbaum, and others would not dispute that. The key, though, is not to lose sight of the instrumental utility of economic growth for facilitating people's freedom to choose how they live their lives.

This more robust development paradigm is already informing the work of neo-liberal institutions including the World Bank and others (Netanel 2008), so WIPO may eventually do the same. But it seems that WIPO has yet to abandon its view of development as solely, or at least primarily, economic growth and embrace the concept of development as freedom. The proposal for a development agenda may, however, have marked a turning point for the organization. The central thrust of the initial proposal was to ensure that development concerns are fully integrated into all of WIPO's work, in particular, norm setting, technical assistance, and enforcement-related activities (WIPO 2004a).

The 2004 session of the General Assembly welcomed the proposal and convened a series of inter-governmental meetings between future sessions (WIPO 2004b). The inter-governmental meetings were not easy. There were hard discussions on both substance and procedure. After three such meetings in 2005, the Provisional Committee on the Development Agenda (PCDA) was struck to debate details of evolving proposals. Two meetings of the PCDA took place in 2006. Again, consensus building was a challenge, and, at times, it looked as if an agreement would not be reached (New 2006). However, the committee did agree on a report presented to the General Assembly in September 2006. It was accompanied by Annexes A and B containing 111 specific recommendations to be discussed during the meetings in 2007. The 2007 PCDA meetings narrowed and reduced the number of recommendations from 111 to forty-five (WIPO 2007a).

Then, at its meeting in September 2007, WIPO's General Assembly decided to adopt the recommendations for action (WIPO 2007b, 152).

CONTENT: CLUSTERS AND RECOMMENDATIONS

The forty-five recommendations for action adopted by the General Assembly are distributed unevenly into six separate but overlapping clusters. Nineteen of the forty-five recommendations have already been identified by WIPO as being ones that could be implemented immediately, not because they are of a higher priority than the other recommendations but because WIPO has decided that no further financial or human resources are required to move forward on them (WIPO 2007b, 152).

Given that the recommendations have been divided into separate topical clusters, and also divided for immediate or deferred implementation, there are various ways in which the agenda can now be analyzed or described. Extremely helpful work has been done to focus on the agenda's overall themes rather than on its formal clusters (Netanel 2008). The clustered approach, however, has become the *de facto* standard framework for presenting the components of the Development Agenda for WIPO, if only because of the way the negotiation process evolved. The CDIP, and WIPO at large, are already working with these clusters when they discuss implementation.

Cluster A deals with matters of technical assistance and capacity building. This cluster revolves around ensuring that WIPO's delivery of such programs are "development-oriented, demand-driven and transparent" as well as country-specific and context-sensitive (WIPO 2007, Nos. 1 and 13). Recommendations to "display general information on all technical assistance activities on its website" and "make widely known ... a roster of consultants" who are neutral and accountable pertain to the transparency issues (*ibid.*, Nos. 5 and 6). The call for demand-driven programs is repeated in a number of recommendations, which emphasize that technical assistance to the member states, especially the least developed countries, must come "at their request" (*ibid.*, Nos. 4 and 7).

There is a specific recommendation in Cluster A that WIPO should "further mainstream development considerations," although there is no indication whether development in this context means more than simply economic growth (*ibid.*, No. 12). If it does not carefully implement this recommendation, then WIPO may continue to teach that stronger IP protection is necessarily in the public interest when it technically assists

member states to “promote fair balance between intellectual property protection and the public interest” (*ibid.*, No. 10). A similar worry applies to the recommendation to “strengthen national capacity for protection of domestic creations, innovations and inventions” (*ibid.*, No. 11).

Cluster B focuses on WIPO's role in norm setting, particularly in regard to the flexibility in international agreements, public policy, and the public domain. Recommendation No. 15 is the heart of this cluster, as it requires norm-setting activities to be “inclusive and member driven” and “participatory” (including inter- and non-governmental organizations), to “take into account different levels of development,” and to balance costs and benefits (*ibid.*, No. 15). Related recommendations mention the need for “open and balanced consultations” prior to new norm-setting activities (*ibid.*, No. 21).

Recommendation No. 22, in Cluster B, is important. It states that WIPO's norm-setting activities “should be supportive of the development goals agreed within the United Nations system” (*ibid.*, No. 22). In order to fully implement this recommendation, it is necessary to shift paradigms. WIPO must stop thinking about IP as “a power tool for economic growth” and start thinking about whether and how it really affects “development” that is defined also in terms of freedom and human capabilities. And since most of WIPO's activities—including the supposedly “technical” assistance programs—directly or indirectly set norms, this recommendation affects the attitude of the entire organization (May 2007).

Recommendations under Cluster C pertain to technology transfer and access to knowledge, specifically through information and communication technologies. Many of these recommendations emphasize information flows from WIPO and developed countries to developing and least developed countries (*ibid.*, Nos. 24, 26–27, and 30–32). In Cluster C, there are also important references to a broader definition of development than WIPO has promoted in the past. Specifically, Recommendation No. 27 acknowledges that WIPO can play a role in promoting not just economic growth but also “economic, social and cultural development” (*ibid.*, No. 27).

Cluster D deals with the crucial topic of assessing, evaluating, and studying the impact of WIPO's activities. Recommendations mention the need for “yearly review and evaluation mechanisms” of its own development-oriented activities as well as “objective assessments” of its activities on development (*ibid.*, Nos. 33 and 38). There are also references to an improved evaluation of the effects of IP in member states (*ibid.*, Nos. 34–35 and 37).

Like other clusters, Cluster D also refers to metrics other than economic growth, including the economic, social, and cultural impact of IP, and the link between IP and employment (*ibid.*, Nos. 34–35).

Although the recommendations contained in other clusters have implications for WIPO as an organization, Cluster E deals specifically with institutional matters including WIPO's mandate and governance. Institutional matters, of course, overlap with the recommendations in other clusters. For instance, Recommendation No. 41 calls for a review of technical assistance activities, and Recommendation No. 44 states that formal or informal meetings relating to norm-setting activities should be open and transparent (*ibid.*, Nos. 41 and 44). Most of the other recommendations in this cluster address WIPO's linkages with other agencies, such as the UN Conference on Trade and Development (UNCTAD), the UN Environment Programme, the World Health Organization, the UN Industrial Development Organization, the UN Educational, Scientific, and Cultural Organization (UNESCO), and especially the World Trade Organization (WTO), as well as civil society and possible partners to fund and execute IP-related assistance (*ibid.*, No. 43).

Cluster F covers "other issues." Although there is only one recommendation in this cluster, its importance should not be understated. Recommendation No. 45 states that WIPO's approach to enforcing IP rights should be undertaken "in the context of broader societal interests." It cross-references Article 7 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement), which explicitly states that the protection and enforcement of IP rights should be "to the mutual advantage of producers and users of technical knowledge in a manner conducive to social and economic welfare" (*ibid.*, No. 45).⁴

Looking at all of the clusters and recommendations as a whole, it is apparent that considerable overlap exists. It is also apparent that, despite hints of a central theme or organizing principle, the clusters and recommendations on their face reflect a diverse array of issues for WIPO and its member states to deal with.

In addition to deciding to adopt the recommendations, the General Assembly took steps in 2007 toward implementing them. At the suggestion of the PCDA, the General Assembly established the CDIP whose task it is to further study and implement the clusters of recommendations. The CDIP's work began with a meeting in early 2008. One hundred member states, seven inter-governmental organizations, and thirty non-governmental organizations discussed rules of procedure and established a work plan for addressing the clusters of recommendations (WIPO 2008a;

2008b). The CDIP will go through each recommendation in each cluster one by one, in sequence, dealing with the recommendations that are listed for immediate implementation before moving to the next cluster. For each recommendation, the member states may comment on a list of related WIPO activities, suggest modifications, consider new activities, or seek clarification. The Secretariat will assess the human and financial resource requirements related to many of the recommendations. This process of implementing all of the recommendations will be long and tedious. However, before proposing concrete strategies to facilitate implementation, it is appropriate to further identify and analyze the characteristics that define not just the clusters of recommendations but also the Development Agenda as a whole.

DEFINING CHARACTERISTICS

Better defining the Development Agenda is a necessary prerequisite for effective implementation. There are at least four features that define the agenda: malleability, complexity, opportunity, and gravity. Each of these characteristics is discussed in the following sections.

Malleability

When negotiating difficult topics, parties often accept ambiguities in order to reach a general agreement. Conflicts of interest can then be deferred for resolution during the implementation or interpretation of the agreement, when each party can resolve “constructive ambiguities” to their convenience (Watal 2001, 7). At an institution such as WIPO, which prefers consensus building to potentially divisive voting, constructive ambiguities are inevitable (G. Yu 2007, 1452). The forty-five recommendations constituting the formal Development Agenda are full of such ambiguities. There are nine references to the need for “appropriate” actions in different contexts. The principle of “balance” is cited four times. More fundamentally, there are nearly twenty invocations of the concept of “development,” yet there is no consensus on its connotation. Only twice do the recommendations state expressly that economic, social, and cultural development are important objectives.

To many people at and influencing WIPO, IP is the tool to promote economic growth. Increased protection equals development. However, developing countries, who know the Development Agenda's context and subtext, do not necessarily share that view. Christopher May (2007, 79) explains: “Mainstreaming development for the Group of Friends of Development,

and their supporters, is much more than merely adding new ‘tools’ to the technical assistance program.” This ambiguity in the Development Agenda is, of course, symptomatic of larger definitional questions surrounding what “development” means in the context of IP and trade norms and in general (Chon 2006).

Rather than thinking of the Development Agenda as being ambiguous on this point, however, it might be better to describe it as being malleable. That is, the agenda has definite meaning, but this meaning can be shaped and formed to suit different stakeholders’ interests in different contexts. For the organization, it can provide validation that it is acting in accordance with UN-mandated development objectives. Developed countries can use the agenda to show that they take IP and development issues seriously. Developing countries and civil society organizations can claim victory in putting development more squarely on WIPO’s radar.

An advantage of this conception of the agenda is that it enables flexibility in implementation, particularly when recommendations must be implemented in different ways and in different places. As explained, one of the only clear consensus points in defining the Development Agenda is that it rejects a one-size-fits-all model of IP protection. If this point is true, it may be unreasonable to expect all stakeholders to interpret and implement aspects of the Development Agenda in precisely the same manner. Norms embedded in the agenda should be calibrated to suit the context, just like IP protection in general (Gervais 2007, xvi-xvii and 17).

However, there are also drawbacks to defining the agenda in this way. Without a shared understanding of exactly what the Development Agenda involves, relevant actors may not behave as expected or as desired by the stakeholders, especially the Friends of Development and other supporters of the agenda. There is a substantial risk that, with too much interpretive leeway, nothing will change.

Related to this issue are questions about the technical legal effect of the Development Agenda. Some scholars argue that WIPO’s Development Agenda “reinforces even more profoundly [the] development tilt in global intellectual property” than the Doha Ministerial Declaration on the TRIPs Agreement and Public Health and other legal agreements and practices (Barbosa, Chon, and Moncayo Von Hase 2007, 94–95).⁵ Does the Development Agenda truly carry more weight than a ministerial declaration?

The agenda is often spoken about in terms of what it mandates or requires, but does it actually “require” anything? What is its status under international law? Is it binding on anyone, including the organization itself? It is hard to answer these questions, since even the provisional committee

process was “an unprecedented form of deliberation” for the organization (May 2007, 82). The General Assembly’s “decision” to “adopt” the recommendations for action made by the PCDA is equally novel. Effective recommendations have been made in the past by WIPO standing committees, but these decisions were much less ambitious than the Development Agenda purports to be (WIPO 1999; 2001).

Although the WIPO General Assembly, the WIPO conference, and the coordination committee can all create their own rules of procedure (United Nations 1972, 13–25), no new rules have resulted from the adoption of the Development Agenda. Technically, only the WIPO Conference is expressly empowered to “adopt recommendations” (*ibid.*, 17), although, perhaps implicitly, the General Assembly may perform this function too. The General Assembly is also empowered to instruct both the Director General (head of the International Bureau, WIPO’s Secretariat) and the Coordination Committee of WIPO, so its decisions clearly have some clout (*ibid.*, 15).

Unlike some other international organizations and their bodies, such as the UN Security Council and the Organisation for Economic Co-operation and Development, recommendations adopted by the WIPO General Assembly are not binding on member states. WIPO lacks the power to make international law. At most, the forty-five recommendations and the Development Agenda in general constitute “soft law,” which does not bind individuals, organizations, or states (Boyle 2006; Gruchalla-Wesierski 1984). This limitation is not necessarily bad. Respected scholars have recently suggested that soft laws are an appropriate way to make progress on issues related to the agenda, such as an international agreement on minimum limitations and exceptions to copyrights (Hugenholtz and Okediji 2008). The advantages of soft law include political saleability, practical efficacy, future adaptability, the potential to evolve into a hard legal framework, and a likely calming effect on international copyright relations (*ibid.*; Kwakwa 2002).

Soft laws do have their downsides. In particular, they have recently come under attack for their tendency to inevitably conflict with other hard and soft laws, leading to public relations battles over a balance of normative opinion (D’Amato 2008). One could easily see how the Development Agenda might degenerate into a rhetorical battle.

Aside from the Development Agenda’s legal ineffectiveness to bind member states to any obligations, it is important to note that the agenda may also have little or no binding effect on WIPO itself. The agenda, after all, consists of recommendations, not requirements. Many of the proposals are

merely suggestive of steps that the organization “should” take or might “consider.” Some of the enumerated points use the word “shall,” but, given that all of them are termed and being treated as “recommendations,” their intended effect is not exactly clear. By adopting the recommendations, has the General Assembly elevated their status? Or is the General Assembly itself just passing along what remain recommendations to the International Bureau, Coordination Committee, and other WIPO organs?

Despite these questions, the Development Agenda’s soft law status is likely to have at least a moral effect on both WIPO and its member states. Although the recommendations risk dilution, ignoring the agenda is obviously not an option for anyone. And with enough sustained effort, developing countries, civil society, and other friends of development can crystallize the agenda’s aspirations into accepted normative principles. The challenges will be to generate a common understanding of the agenda’s essential principles and to foster the normative change within WIPO to put those principles into practice.

Complexity

Another characteristic of the Development Agenda that challenges implementation is complexity. This complexity is manifested in a variety of ways, from the web of institutions affected by the agenda to the schizophrenic positions of WIPO member states. Thus, WIPO’s Development Agenda is actually a microcosm of the whole global IP system (P. Yu 2007). An appreciation of its nuances is essential for implementation to be successful.

Within WIPO, there is a standing arrangement of seven groups, into which countries are lumped (G. Yu 2007, 1451). Most of these groups are classified geographically, comprising an African group, an Asian group, a Latin American and Caribbean group, an eastern European and Baltic group, and a central Asian group. China is alone in a group, and there is also a “Group B” that includes Europe, North America, and other developed countries such as Japan, Australia, and New Zealand. The sixteen countries in the group called Friends of Development, which supported the proposal for a Development Agenda, are not yet recognized on an equal footing with the regional groups (G. Yu 2007, 1451). This position can and should change. Clearly, there is a precedent for a group constituted along non-geographic lines, such as Group B.

However, even Group B should not be treated as being homogenous. Canada, for example, is ideally suited to break from the developed world pack to assume a leadership position on the Development Agenda (de Beer and Geist 2007, 167–68). Given its cultural vulnerability vis-à-vis

the United States, status as a net importer of IP, and continuing appearance on the United States Trade Representative's Section 301 Watch List of supposed IP renegades, Canada has much in common with the Friends of Development.

Similarly, there are several countries that may no longer be appropriately classified as ordinary developing countries. In many respects, the dynamic "BRICs" economies of Brazil, Russia, India, and China deserve to be treated distinctly (Wilson and Purushothaman 2003). Although Brazil was among the initial proponents of the Development Agenda, its position could change significantly as it develops over the coming decades. Amartya Sen (1999, 6) observes that the presence of such inter-group contrasts is an important aspect of understanding development and underdevelopment generally. In implementing the Development Agenda, WIPO will need to be more flexible with its taxonomy of stakeholders.

The Development Agenda is also complex because inter-state negotiations cannot fully reflect the dynamics of intra-state dilemmas. Peter Yu (2007, 22–33) has highlighted the Chinese experience in order to illustrate the various regional, sectoral, and issue-based conflicts that contribute to "intellectual property schizophrenia." Hints of these intra-state conflicts are brought to the international arena through non-governmental organizations, which add to the complex dynamic of global IP and the Development Agenda (Matthews 2007). Although WIPO has taken strides to open its doors to civil society, several of the agenda's key recommendations suggest that even more openness is needed. Greater participation and transparency is likely to facilitate the implementation of other recommendations and the agenda as a whole.

Certain aspects of the Development Agenda call for greater integration between WIPO and other international organizations. The agenda must, therefore, be viewed in light of the "forum proliferation" that exists throughout the entire "international intellectual property regime complex" (May 2007, 96–98; P. Yu 2007, 12–21; Helfer 2004; Raustiala and Victor 2004; Braithwaite and Drahos 2000, 564–71). Sisule Musungu (2005) has explained how working beyond WIPO, with over a dozen other UN institutions playing a role in knowledge governance, is an important part of rethinking innovation, development, and IP. However, in a global IP system that is partially overlapping and, at times, even inconsistent, without centralized or hierarchically ordered decision making, it is not always clear what WIPO's role is (Raustiala 2007).

Recommendations call for WIPO to intensify cooperation and collaboration with its UN sister agencies and organizations such as the WTO.

It is tempting to assume that opening communications channels with those other organizations will positively influence WIPO to take greater account of the new development paradigm. A word of caution is warranted, however. It is possible that inter-organizational collaboration will have only insignificant effects (Chon 2006, 2847). Or greater integration might help to transmit old norms *from* WIPO *to* more development-friendly organizations, rather than transmitting development norms from these organizations to WIPO (May 2007, 84). This possibility should not be ignored when implementing the Development Agenda.

In sum, the complexities of the global IP arena and the actors in it present a considerable challenge to successful implementation of the Development Agenda. Given also the agenda's malleability, there is reason to believe that implementation will not be easy. Nevertheless, there are two features that suggest implementation challenges must be overcome. Never has there been a greater opportunity for change at and by WIPO and never have the consequences been more grave.

Opportunity

Development has been on WIPO's radar since before the organization became a specialized UN agency in 1974. Previous attempts to better integrate development concerns, however, have so far failed to have meaningful impact. Fundamentally, WIPO remains normatively committed to the idea that IP is a universally appropriate instrument for achieving economic growth. Yet this idea may be changing.

Many policy makers in developing countries better understand the linkages, positive and negative, between IP and development than they did a decade ago. Ironically, a deeper awareness of the potentially adverse effects of IP is in part a result of WIPO's technical assistance regarding the implementation of the TRIPs Agreement and other treaties. Despite, or perhaps because of, WIPO's evangelism, developing countries are beginning to question the appropriateness of global IP policies in relation to their local social, cultural, and economic conditions.

One reason is the growing stock of interrogatory research and evidence-based analysis that is now available to policy makers on the subject of IP and development. The work of bodies such as the United Kingdom's Commission on Intellectual Property Rights (2002) and a World Bank report (Fink and Maskus 2005) on the impact of IP are illustrative of the objective data and analysis beginning to emerge in this field.

Academics, inter-governmental organizations, and civil society have channelled such information to the relevant policy makers and delegates.

They were especially influential during the period immediately preceding and following the introduction of the Argentina-Brazil proposal for a development agenda. Serious momentum began to build with the creation of such documents as the Geneva Declaration on the Future of WIPO (Boyle 2004) and a draft Treaty on Access to Knowledge (Consumer Project on Technology 2005).⁶

Daniel Gervais (2007, iv-ivi) has described three recent phases of global IP policy making. Up to the moment when the TRIPs Agreement was created, and for a time afterward, proponents of stronger protection dominated what Gervais calls the “addition narratives,” according to which more IP was supposed to lead to economic growth. This phase was later countered by critics who promoted “subtraction narratives,” which attempted to minimize or undermine the impact of the TRIPs Agreement. We are now entering the third phase—a “calibration” phase—during which IP protections will be neither unquestioningly accepted nor skeptically rejected but, rather, calibrated to levels appropriate for the circumstances. Other scholars have also recognized that the global IP system is undergoing recalibration right now (Chon 2006, 2831).

As such, it is an auspicious moment for implementing WIPO's Development Agenda. If May (2007, 96) is correct that WIPO is “an organization that is seeking to shift and transform the normative political economy of intellectual property,” then now is its chance for resurgence in this regard. WIPO has an opportunity to again become a leader in global knowledge governance. It remains to be seen whether the organization is up to the challenge.

Gravity

WIPO's Development Agenda is the most significant IP matter to confront the international community since the TRIPs Agreement and perhaps ever. The agenda goes to the heart of WIPO's mandate and its ongoing relevance in the global governance of IP. It should have broad-ranging impacts on many aspects of international IP law and policy making in all sectors, from the life sciences to information communication (de Beer and Geist 2007, 166).

If WIPO waters down or ignores the concerns underpinning the Development Agenda, the consequences will be grave. To some developed countries, WIPO has already become marginalized for failing to give effect to their desires for even stronger IP protections. These member states are seeking out bilateral agreements to achieve their objectives or else are negotiating plurilaterally outside of WIPO. Recent talks over a proposed

anti-counterfeiting trade agreement are illustrative. Unless WIPO can make progress on the Development Agenda, other norm-setting initiatives of interest to developed countries are likely to be stalled indefinitely. WIPO's developed country members therefore have an incentive to move forward to implement the agenda.

There is also a significant risk that if WIPO does not fully implement the Development Agenda in good faith, it will isolate its largest constituency, the developing country member states. These countries will be forced to go elsewhere with their concerns. The ground that WIPO gained back from the WTO following the TRIPs Agreement will be lost to other organizations, including, but not limited to, other UN agencies such as UNCTAD, UNESCO, or others.

The problem facing WIPO if it fails to implement the agenda is, however, even more fundamental than alienating some or even most of its member states. At stake is the validity of WIPO's status as the specialized agency of the UN primarily responsible for IP and development issues. Sisule Musungu and Graham Dutfield (2003, 19) have pointed out that attaining (and, one might add, retaining) the status of a specialized UN agency depends upon maintaining the compatibility of an organization's purposes with the those of the UN. Although the Economic and Social Council, which is the UN organ that coordinates the economic and social work of specialized agencies, is unable to force WIPO to act consistently with the aims of the UN, WIPO's International Bureau openly acknowledges that it has an obligation to do so (*ibid.*, 20).

For a long time, WIPO has enjoyed the considerable benefits of affiliation with the UN as a specialized agency. Among these benefits are diplomatic privileges for its staff. The Development Agenda suggests that the time has come for WIPO to make good on its express and implied obligations to behave more consistently with the development norms informing the work of the UN generally.

It is highly doubtful, of course, that the UN would take the unprecedented step of rescinding the 1974 agreement granting WIPO its special status. If it could somehow be proven that WIPO was in violation of that agreement, perhaps WIPO could be brought before the International Court of Justice for committing a wrongful act. That too would be a highly improbable, if not impossible, consequence of WIPO's inactivity on the Development Agenda.

More likely, interactions with other UN agencies could, argues May (2007, 85), "be the avenue through which the concerns of the Development Agenda can be brought into the heart of WIPO's activities." Indeed, this could be the door through which a more robust development paradigm

is brought into the global IP discourse, at WIPO and beyond. If WIPO pays closer attention to the studies, decisions, recommendations, and approaches of the UN at large, it is likely to begin to acknowledge and promote the linkages between IP and development not just as economic growth but also as freedom.

Implementation of the Development Agenda thus presents a chance to measure the ethical and distributional consequences of IP protection, perhaps, for example, by incorporating a substantive equality principle (Chon 2006). This could be the moment when developing countries are given a meaningful opportunity for equitable participation in knowledge governance negotiations, with full information and without coercion (Drahos and Braithwaite 2003, 189–92). WIPO *could* play the central role in facilitating an international, informed, democratic debate about the current trajectory of global IP protections (Boyle 2004, 11). The challenge, of course, is to determine how to take advantage of the momentous opportunity now presented by the Development Agenda. The strategies contained in the following collection of essays form a starting point for thinking about this question.

IMPLEMENTATION STRATEGIES

As Sara Bannerman argues in Chapter 2, implementation of the Development Agenda requires sustaining the successful development dialogue that has now begun at WIPO. Bannerman, a communications scholar at the University of Ottawa, Canada, highlights the competing conceptions of the Development Agenda by optimists and pessimists and describes how the agenda might be implemented differently based on those conceptions. She premises her own optimistic but realistic view of success on the fact that international IP governance institutions have, since their emergence in the nineteenth century, managed to evolve in response to changing circumstances.

Chapter 3, authored by the Chinese economist Li Xuan, deals with the crucial topic of impact assessment. As coordinator of the Access to Knowledge Programme at the inter-governmental South Centre in Geneva, Switzerland, Li understands why WIPO's developing country member states must have the tools to properly evaluate the quantitative and qualitative impact of IP. Thus, she begins to sketch out a conceptual and methodological framework for a workable impact assessment system.

The Development Agenda contains numerous recommendations for behavioural changes and/or institutional reform at WIPO. Carolyn Deere, director of the Global Trade Governance Project at the University of

Oxford and resident scholar at the International Centre for Trade and Sustainable Development in Geneva, lays out a plan for fundamentally reforming WIPO's governance structures. In Chapter 4, she proposes ways to solve problems associated with internal management practices, decision-making processes, and institutional culture and design at WIPO in order to advance the objectives of the Development Agenda, while acknowledging that actions in other areas and by other actors may also be needed.

Along those lines, Richard Gold from the Faculty of Law at McGill University teams up with Jean-Frédéric Morin, professor of international relations at Université libre de Bruxelles, to suggest in Chapter 5 that proponents of the Development Agenda must begin to think outside the WIPO box. They advocate for a networked approach to implementing the agenda, in which WIPO would play a co-ordinating role by connecting other UN agencies, inter-governmental and non-governmental organizations, academic institutions, industry partners, and others who are better suited to facilitate change. In essence, they creatively propose ways to outsource the implementation of the Development Agenda.

If WIPO is to successfully implement its own Development Agenda, there is no doubt that effective leadership will be essential to the process. This topic is tackled by Sisule Musungu, a Kenyan national and president of the development research and policy think tank IQsensato. Chapter 6 contains Musungu's analysis of the implications of the controversial departure of WIPO's former director general, Kamil Idris, and indicates what will be required of the new director general to ensure that the agenda is effectively implemented.

Of course, the Development Agenda is not only about WIPO reforming itself. Peter Yu, an international IP law professor who teaches in both the United States and China, strategizes about what developing countries can do to promote further change at WIPO and beyond. In Chapter 7, he explains how "intellectual property coalitions for development," which he terms IPC4D, can help developing countries strengthen their collective bargaining position, influence negotiation outcomes, and promote effective and democratic decision making in the international IP regime. Yu also provides insightful strategies for overcoming challenges in this regard.

One potential obstacle to coalition building that Yu identifies is the diversity among developing countries. This diversity is captured empirically using econometric data and proxies, and its consequences are analyzed in Chapter 8, co-authored by Shammad Basheer, who holds the Ministry of HRD Chair in IP at India's National University of Juridical Sciences in

Kolkata, and economist Annalisa Primi of the UN Economic Commission for Latin America and the Caribbean based in Santiago, Chile. They explain why failing to strategically recognize the distinctiveness of “technologically proficient developing countries” such as India will restrict WIPO to the very same one-size-fits-all mentality that the Development Agenda seeks to eliminate.

Li Lihong, a doctoral candidate at the University of Ottawa and former research fellow with the Emerging Dynamic Global Economies Network, follows up on the idea that simply switching from a super-size to micro-mini model of IP will not work to advance the objectives of the Development Agenda. His argument in Chapter 9 for “localizing” the Development Agenda uses the example of China to explain specifically how WIPO might more effectively deliver assistance by paying greater attention to local economic, cultural, and political circumstances.

Chapter 10 also provides a look at how local conditions might impact the implementation of the Development Agenda, by examining the example of research and development funding in India. V.C. Vivekanandan of India's NALSAR University of Law in Hyderabad suggests that in countries where research and development is supported primarily by the state, WIPO ought to encourage more public-private partnerships. Doing so requires tools other than IP, some of which are presented as options for furthering the Development Agenda's objectives.

Chapter 11 by Pedro Paranaguá of Brazil's Fundação Getulio Vargas offers insights on the role of civil society in implementing the Development Agenda. He describes in detail how a Brazilian non-governmental organization, the Centre for Technology and Society, has helped to influence national and international discourse about IP policy. His chapter provides a strategic template for other grassroots organizations seeking to support the implementation of the Development Agenda.

South African national Andrew Rens, an intellectual property fellow with the Shuttleworth Foundation, provides in Chapter 12 a concrete example of what coalition building among developing countries, civil society, industry, and others might accomplish. He suggests that education is at the heart of the Development Agenda and advocates for an agreement on globally applicable minimum exceptions to copyrights for educational purposes. By linking several specific recommendations under the Development Agenda with broader objectives such as the UN Millennium Development Goals, Rens argues convincingly that harmonizing educational exceptions could begin to reverse WIPO's course of promoting minimum requirements for IP protection rather than access to knowledge.

The implementation strategies offered in the chapters that follow are not exhaustive of the work that needs to be done to advance the Development Agenda. Nor are these strategies intended to be complete solutions to the challenges faced now or in the future. They are intended instead to lay the groundwork for further study of, and conversation about, the steps that need to be taken to ensure that the remarkable potential of the Development Agenda is not squandered while WIPO and its member states consider how to implement the recommendations they have now endorsed.

NOTES

- 1 Development Agenda for WIPO, <http://www.wipo.int/export/sites/www/ip-development/en/agenda/recommendations.pdf>.
- 2 Convention Establishing the World Intellectual Property Organization, 14 July 1967, in *Treaties and International Agreements Registered or Filed or Reported with the Secretariat of the United Nations*, 828, no. 11846 at 11.
- 3 Agreement between the United Nations and the World Intellectual Property Organization, 27 September 1974, in *Treaties and International Agreements Registered or Filed or Reported with the Secretariat of the United Nations*, 956, no. 729 at 406–7.
- 4 Agreement on Trade-Related Aspects of Intellectual Property Rights, in *Marrakech Agreement Establishing the World Trade Organization*, 15 April 1994, 33 I.L.M. 15 (1994).
- 5 Doha Ministerial Declaration, Doc. WT/MIN(01).DEC/1 (20 November 2001).
- 6 Geneva Declaration on the Future of WIPO, <http://www.futureofwipo.org/>; and Treaty on Access to Knowledge, 5 May 2005, http://www.cptech.org/a2k/a2k_treaty_may9.pdf.

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2

The WIPO Development Agenda Forum and Its Prospects for Taking into Account Different Levels of Development

SARA BANNERMAN

INTRODUCTION

The WIPO Development Agenda was first proposed in 2004 by a coalition of developing countries called the “Friends of Development” as a set of reforms intended to make WIPO more responsive to the needs of developing countries. Over the next three years the proposal generated a rich and heated debate over the role of WIPO and intellectual property (IP) in development. By September 2007, when a set of forty-five proposals relating to a Development Agenda was agreed upon by member states, a place for wide-reaching discussion and critique on IP and development had been established within WIPO. This chapter argues that this forum is as important to WIPO and the Development Agenda as are the proposals themselves.

On the one hand, the Development Agenda can be seen in terms of its concrete and specific proposals for change. On the other hand, the Development Agenda can be viewed as an expansion of dialogue intended to better address the needs of developing countries within WIPO. Seen purely as a set of proposals for reform, the Development Agenda might be viewed as being fairly weak. In comparison with the World Trade Organization (WTO)’s Doha Ministerial Declaration on the Agreement on Trade-Related Aspects of Intellectual Property and public health, which was released as a result of the fourth session of the WTO Ministerial Conference in 2001, the Development Agenda proposes little in terms of substantial change (WTO 2001). While the Development Agenda suggests that norm-setting activities at WIPO should, in one form or another, “take into account different levels of development,” concrete measures for adjustments on par with those made under the Doha Ministerial Declaration have not been specified (WIPO 2007b, Annex, No. 15).

If the Development Agenda is weak in terms of proposed changes to IP norms, it is strong in terms of the breadth of issues it has addressed and in the proposals it has introduced for including a broader range of interests in norm-setting processes and other WIPO activities (*ibid.*, Nos. 5, 6, 15, 21, 42, and 44). Whereas the Doha Ministerial Declaration led to fairly specific and narrow changes to IP norms for least-developed countries, the Development Agenda addresses a broad range of issues and proposes changes to WIPO's institutional procedures that could see the inclusion of a wider range of interests and perspectives in the organization's activities, with particular focus on transparency, participatory norm setting, member state consultation, and non-governmental organizations' participation (*ibid.*, Nos. 5, 6, 15, 21, 42, and 44). These strengths are as important as any concrete measures proposed because, if taken seriously, they could help to ensure that the Development Agenda evolves as an ongoing project that will bring into WIPO the information and insights necessary to challenge and improve WIPO's practices and norms with regard to developing countries.

In this chapter I argue, first, that one of the most important battles of the Development Agenda at WIPO—the battle over the inclusion of development in WIPO's mandate—has already been won. Second, I show that there are opposing interpretations of the Development Agenda and how it should now be implemented. Although WIPO has agreed to take into account different levels of development in its norm-setting activities, some groups envision relatively minor changes, while others envision more radical change. Third, I argue that WIPO's mandate in promoting IP protection around the world originated as an idea from the eighteenth-century Enlightenment, which today stands open both to critique and reformulation. Finally, I conclude that, while great obstacles stand in the way of a true re-envisioning of WIPO's approach to IP, such a shift is possible and necessary.

THE BATTLE ALREADY WON

The Friends of Development have already won what is perhaps the biggest contest of principles to have faced WIPO in the past forty years—the question of whether WIPO's mandate includes development. During the three years of talks on a Development Agenda, it has been necessary to shift the thinking of some member states, and perhaps the secretariat itself, on this issue. The initial US position was that

[d]evelopment, in general, was the domain of other UN Agencies, not WIPO. The Delegation stated that WIPO must continue to focus on

promoting IP protection. It did not believe that the UN needed another development agency as it already had several such agencies, exclusively devoted to, and with specific competence in development, such as UNCTAD and the UNDP. (WIPO 2005b, Item 35)

However, by July 2005, after protracted discussions on the issue of WIPO's mandate, a consensus had been achieved that there was room within WIPO's current mandate for development issues (WIPO 2005c). The issue was not raised again substantively as a way of blocking further discussion of WIPO's role in development.

As Christopher May (2006, 4) notes, "this attempt to shift the WIPO's priorities [was] underpinned by the argument that as the WIPO is a specialized agency of the UN it should share the UN's focus on global developmental issues rather than a more technical focus on the governance and protection of IPRs [IP rights]." WIPO's formal commitment as a United Nations (UN) specialized agency to facilitate technology transfer "in order to accelerate economic, social and cultural development" was what allowed the Friends of Development to counter claims that development was not the domain of WIPO.¹ As such, WIPO's agreement with the UN has begun to be inscribed onto WIPO's practices and translated into a broader mandate for development within the organization.

THE DEVELOPMENT AGENDA: OPTIMISTS AND PESSIMISTS

When it comes to the future of the Development Agenda, there are both optimists and pessimists. Pessimists (or realists) might generally predict that more powerful states will ultimately prevail over weaker ones, with the international IP regime maintaining its rights-centred focus. The Development Agenda forum is seen by pessimists as being an extension of, and infused with, international power relations—a struggle through which developing countries are unlikely to achieve substantial gains. The views of pessimists are substantiated by the fact that some of the most concrete proposals for change, such as those involving major institutional changes at WIPO (WIPO 2007c, Nos. 42 and 60), those strongly encouraging the exploitation of public interest flexibilities in IP treaties (*ibid.*, Annex A: No. 23; Annex B: Nos. 3 and 37), and those calling for a treaty on access to knowledge (*ibid.*, Annex B: No. 35), were not included in the Development Agenda. The inclusion of proposals to encourage and assist developing countries with implementation and enforcement of current IP treaties further buttresses the concerns of pessimists (WIPO 2007a).

Optimists, on the other hand, focus on the potential for international institutions to solve problems in international relations. They would argue that the active involvement of less powerful countries and interests in the discussions held as part of the Development Agenda has the effect, at least, of encouraging efforts to call to light and address the problems experienced by developing countries in the international IP system and, at most, to adjust the international IP system in a more concrete way.

The optimist/pessimist debate is already beginning to manifest itself as WIPO sets about the task of implementing the Development Agenda. One notable example concerns the agenda's Recommendation No. 15, which states:

Norm-setting activities shall:

- be inclusive and member driven;
- take into account different levels of development;
- take into consideration a balance between costs and benefits;
- be a participatory process, which takes into consideration the interests and priorities of all WIPO Member States and the viewpoints of other stakeholders, including accredited inter-governmental organizations and non-governmental organizations; and
- be in line with the principle of neutrality of the WIPO Secretariat. (WIPO 2007b, Annex, No. 15)

The second element of Recommendation No. 15—that norm-setting activities should take into account different levels of development—is a central purpose of the Development Agenda. It focuses on WIPO's principle task of norm setting and inextricably links this task to considerations of the level of development of WIPO member states. While Recommendation No. 15 is an agreed principle, its translation into concrete measures will be hotly contested by those who wish to maintain the status quo at WIPO and those who call for more fundamental transformation.

The idea that norm-setting activities should take into account different levels of development is connected to the observation made by the Friends of Development in their 2004 proposal that “[IP] protection is a policy instrument the operation of which may, in actual practice, produce benefits as well as costs, *which may vary in accordance with a country's level of development*” (WIPO 2004, Annex, No. 2; emphasis added). Ha-Joon Chang (2001, 303), who is a proponent of more radical change in IP regimes, similarly notes that

[t]he domestic benefits of a stronger [IP rights] system—namely, increased knowledge generation by nationals—are likely to be very small for most

developing countries, given that they do little [research and development] and a lot of the new knowledge that they generate is not patentable. The “international” benefits of such a regime—greater technology transfer, greater [foreign direct investment], greater efforts at innovation in the developed countries—are also close to zero, if any. On the other hand, the costs of such system are likely to be considerable—increased royalty payments, monopolistic abuses, the human (and financial) resource costs of administering an elaborate [IP rights] system, and so on.

As such, Chang (*ibid.*) advocates that

there should be a greater acceptance that the developing countries need fundamentally different [IP rights] regimes from the ones that the developed countries have. There *is* some recognition of this in the current TRIPS regime, but this is highly circumscribed, possibly except for the “least developed countries.” There have to be more provisions for the developing countries. Developing countries should be allowed to grant weaker [private IP rights] (e.g. shorter patent life, easier compulsory licensing and compulsory working, easier parallel imports) and to pay lower licensing royalty rates (probably graduated according to a country’s ability to pay).

The inclusion of special treatment or greater flexibilities in WIPO treaties would be a radical change that, in the past, has been difficult to achieve at WIPO. Although there are a few provisions available under the current WIPO agreements that are specifically for developing countries, these have been little used and have come to be viewed as largely ineffectual (Ricketson and Ginsberg 2005, 956–60). WIPO treaties generally require signatory states, whether developed or developing, to meet similar standards and to operate under the same IP rights provisions.

Other relatively radical changes that could benefit developing countries (and perhaps developed ones too) have also been proposed that would alter or adjust international IP norms. A treaty on access to knowledge has been proposed that would have countries agree to adopt a minimum set of limitations and exceptions, invest in a knowledge commons, promote open standards, and allow copyright collecting societies in developing countries to direct a larger portion of their distributions to domestic rights-holders, among other things (WIPO 2007c, No. 35). As well, the formulation of a minimum set of limitations and exceptions has been proposed as a way of ensuring a minimum level of access to works, “not only to guarantee the right of humankind to participate in cultural activity and scientific and economic progress, but also to facili-

tate and promote the creative activity of authors and cultural industries which require those exceptions to carry out a part of their activities” (WIPO 2005a, Annex, page 2). Although neither of these proposals were included directly in the Development Agenda, further discussion on access to knowledge was agreed upon under the Development Agenda. Discussions regarding a minimum set of limitations and exceptions continues at WIPO (New 2008).

Those parties who favour the status quo at WIPO argue that WIPO *already* takes into account different levels of development in its norm-setting activities. For example, Enrique Manalo, president of the WIPO General Assembly from 2005 to 2007, argued in a working document prepared as part of the Development Agenda’s process that WIPO already took into account different levels of development in several ways. First, WIPO provides technical and financial assistance to developing countries in meeting their obligations under the treaties. Second, with regard to all countries, WIPO’s treaties provide specific public interest clauses and exceptions and limitations in its patent and copyright treaties. Member states also have a certain amount of discretion in how they will implement the IP protection provisions of WIPO treaties. For example, there is a minimum period of copyright protection that countries must provide in national legislation, but this protection period can be freely extended by the countries in their national legislation. Finally,

Member States are obliged to continue accepting paper documents for the purposes of obtaining a [patent] filing date and for complying with a time limit, thus taking into account the different levels of development of Member States in terms of electronic filing of documents. (WIPO 2007c, Annex A: No. 19)

What is clear is that there are differing views on the meaning of accounting for differing levels of development in the WIPO context. One view involves a substantial change to existing international treaties or new treaties, while the other involves concessions that are as minor as accepting paper instead of digital documents in patent filing processes. Under one interpretation, the fundamental norms of international IP would be either significantly adjusted or reformulated. Under another interpretation, the current system would remain the same, and different levels of development would continue to be taken into account in WIPO processes such as its technical assistance programs, which can often serve to extend and reinforce the current system.

ENLIGHTENMENT AND CRITIQUE

IP and its role in development must be viewed in the context of a long history of intellectual and political change. IP emerged in connection with the Enlightenment in eighteenth-century Western Europe (Woodmansee 1984, 425–48; Hesse 1990, 109–37), and international institutions such as WIPO and its predecessors followed. That is, intellectual property and the idea that an author owned his or her own work emerged along with the commercial book trade and valorization of the individual intellectual work (Woodmansee 1984, 425–48; Hesse 1990, 110). International institutions in general have been seen as a product of the Enlightenment's optimism about the possibility of creating a rational and harmonious international system (Howard 2001, 113).

Concerns about international development were integrated into the mandates of international institutions after the Second World War as industrialized countries began to formulate policies toward their former colonies, which had emerged as newly independent countries. WIPO was also faced with this new reality beginning in the 1960s when developing countries' issues began to be addressed in the organization and in modifications of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) itself (Ricketson and Ginsberg 2005, 887–963).

As with the Enlightenment and its various projects, the intellectual rationale with respect to international development and international institutions has been criticized for its potential to sanction and extend forms of hidden domination and dependency (Horkheimer and Adorno 2002, 282). Such domination could occur by imposing the political ideals and institutions of the powerful on less powerful countries or by making use of a system of thought and discourse that tends to recreate and extend dependency and domination (Stiglitz 2002, 282; Escobar 1995, 290).

Some thinkers are nevertheless optimistic about the ongoing potential to reformulate structures of power through dialogue (Habermas 1983). Some view the conceptual foundations of the Enlightenment, and of IP, as being fundamentally unstable and therefore open to renegotiation and rebalancing (Hesse 1990, 130). It is for this reason that the acceptance of the development dimension in WIPO's mandate is seen as an achievement by those who believe that it is a necessary tool for reform at WIPO. The Development Agenda, while rightly viewed with skepticism by pessimists, is also rightly seen by optimists as a vehicle for re-examining WIPO's view of the policy goals of IP in general and for evaluating and critiquing the current contribution of WIPO in developing countries in particular. The Development Agenda, as a forum in which

challenges, evidence, and new insight can be brought to light, is extremely important to this process.

There is reason for a certain degree of optimism, based on historical experience. WIPO's historical antecedent originated, in the case of copyright, in the nineteenth century as a project initiated by a highly particular set of interests: authors and publishers. What began as a pact between a few countries acting mainly in the interests of their authors and publishers slowly expanded into the broad international system that we know today (Ricketson and Ginsberg 2005, ch. 2). Various interests, originally on the periphery of the international IP system, engaged in national and international forums and have since been accommodated in very concrete ways. Gramophone companies, photographers, broadcasters, performers, and producers of phonograms each had special interests that had to be accommodated by fairly major changes to the international IP system (*ibid.*, ch. 3 and 4). The special interests of early twentieth-century Canada, a country that was in the unique situation of being the neighbour to the United States when it stood outside the Berne Convention, were accommodated in 1914 via a special protocol to the Berne Convention that took this situation into account (*ibid.*, 102–3). Newly independent countries entering in the 1960s were also met with (limited) accommodations (*ibid.*, 887–963). In each of these cases, it was necessary for new knowledge about the conditions experienced by various interest groups under the international IP system to be internalized through information and challenges brought forward by various fora.

At the same time, it could be said that some of these interests have adapted more to WIPO than WIPO has adapted to them. As Christopher May (2006, 65) notes, the education of diplomats and elites within WIPO—a process that can take place in many formats, including development agenda discussions—along with its technical assistance and education programs, serves to extend and strengthen the dominant WIPO views among less powerful countries and their interests. In order for the real challenges facing the international IP system in developing countries to be met, WIPO must ensure that the dialogue taking place in the forums and projects of the Development Agenda is really a two-way dialogue—one that is open to hearing about, and addressing, problems, challenges, and opportunities for change.

CONCLUSIONS

Optimists see an opportunity in the Development Agenda to initiate real transformation at WIPO, to re-evaluate and reformulate long-held ideas,

to change minds, reformulate interests, and eventually to adjust the international IP system in ways that will serve the interests of both developed and developing countries. Such a transformation is seen to have already begun through the more widespread recognition of development as an important aspect of WIPO's mandate, which is a direct result of the Development Agenda's discussions.

Others are pessimistic about the potential for the Development Agenda to lead to concrete change. The most potent proposals that emerged as part of the discussions between 2004 and 2007 did not survive to become part of the Development Agenda, and powerful interests objected strongly to fundamental changes to the international IP system. Indeed, there is room for concern that a forum such as the one created for the Development Agenda discussions could serve as a tool for advancing and extending already-dominant views, with little room left for views that raise challenges and critique. WIPO, its member states, and observers must guard against this type of stagnation as the Development Agenda moves forward. Great obstacles stand in the way of significantly adjusting WIPO's approach to IP. However, the international IP system has undergone continuous adjustment since its establishment in the nineteenth century, and these changes have come about as a result of dialogues such as the one fostered through the Development Agenda forum.

NOTES

- 1 Agreement between the United Nations and the World Intellectual Property Organization, 27 September 1974, in *Treaties and International Agreements Registered or Filed or Reported with the Secretariat of the United Nations*, 956, no. 729.

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3

A Conceptual and Methodological Framework for Impact Assessment under the WIPO Development Agenda (Cluster D)

XUAN LI

INTRODUCTION

The integration of development into the consciousness of WIPO is a historic achievement. However, translating this achievement into concrete results in terms of WIPO's practices will likely present significant challenges. Impact assessment is an evaluative tool that is designed to determine the consequences of an intervention. Little conceptual and empirical literature has been developed to measure the effect that the incorporation of development has, or will have, on WIPO's effectiveness in serving its mission. This chapter offers a conceptual and methodological framework for a development impact assessment in the context of intellectual property (IP): a qualitative and quantitative tool drawing a set of data to assess whether development goals are achieved and to monitor WIPO's institutional activities in advancing the Development Agenda.¹

CLUSTER D: ASSESSMENT, EVALUATION, AND IMPACT STUDIES?

Cluster D of the Development Agenda is entitled "Assessment, Evaluation and Impact Studies." Six recommendations are listed within Cluster D, including two that are flagged for immediate implementation by WIPO:

35. To request WIPO to undertake, upon request of Member States, new studies to assess the economic, social and cultural impact of the use of intellectual property systems in these States ...

37. Upon request and as directed by Member States, WIPO may conduct studies on the protection of intellectual property, to identify the possible links and impacts between intellectual property and development.

The other four recommendations will be subject to further study in the development of a work program implementing the Development Agenda. These four recommendations state:

33. To request WIPO to develop an effective yearly review and evaluation mechanism for the assessment of all its development-oriented activities, including those related to technical assistance, establishing for that purpose specific indicators and benchmarks, where appropriate.

34. With a view to assisting Member States in creating substantial national programs, to request WIPO to conduct a study on constraints to intellectual property protection in the informal economy, including the tangible costs and benefits of intellectual property protection in particular in relation to generation of employment ...

36. To exchange experiences on open collaborative projects such as the Human Genome Project as well as on intellectual property models ...

38. To strengthen WIPO's capacity to perform objective assessments of the impact of the organization's activities on development.

CONCEPTUAL FRAMEWORK FOR IMPACT ASSESSMENT

Categorization of the Recommendations

Conceptually, these six recommendations on impact assessment can be roughly grouped into three categories: (1) the economic impact (of IP policy) assessment; (2) WIPO activity (input/output/outcome/impact) assessment; and (3) WIPO institutional capacity impact assessment. The aim of the economic impact assessment is to assess the overall impact of IP policy on development in a broad context, while the activity impact assessment seeks to assess whether, and to what extent, WIPO activities have contributed to development. The institutional impact assessment seeks to assess WIPO's ability to conduct assessments of its activities.

The economic impact assessment is the most important among the three types of assessments. It assesses the effectiveness of IP as a policy instrument in the development policy milieu. Such an assessment, if effective, will allow policy makers to tune national laws and policies to better meet development challenges. In order to be useful, economic impact assessments should be country and sector specific. Additionally, economic impact assessments should allow WIPO to identify issues that can best be remedied through international regulation.

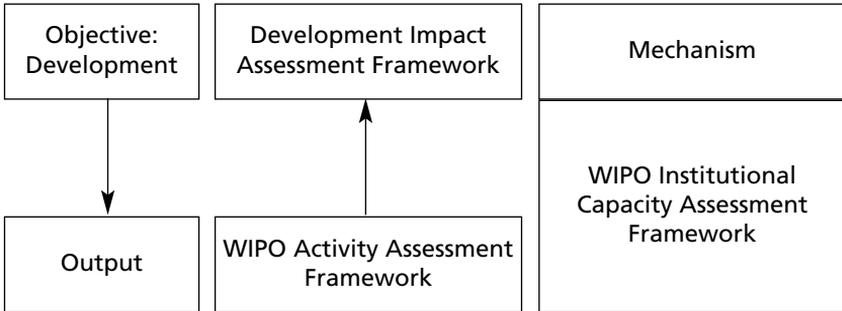
Relationship between the Three Categories of Assessment

When conducting an activity impact assessment, for example, on technical assistance, a number of key issues should be addressed. Questions that should be answered include how WIPO's technical assistance contributes to development (instead of measuring the contribution of technical assistance to the application of international IP standards and the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement));² whether technical assistance includes training on how to use the flexibilities of the TRIPs Agreement; whether technical assistance provides support to help member states understand both the positive and negative impacts of IP as a policy instrument; what alternatives exist to help member states develop innovation capacity; what kind of anti-competitive activities IP rights may incur; how to prevent abuse of IP rights; and what limitations are inherent in using patent counts as an indicator to evaluate national innovation capacity? From these questions, a number of quantitative indicators can be developed to measure the effect of technical assistance, including with/without and before/after scenarios.

In order to vigorously and objectively assess the institutional impact of WIPO capacity, appropriate reforms at WIPO are essential, given its inadequate management system. At the policy level, a proper conceptualization of how WIPO should incorporate the work of dealing with both IP and development needs should be crafted and adopted. At the operational level, the merits of establishing two separate bodies to differentiate the role of policy development and assessment/evaluation should be studied seriously. The policy development function should seek to *establish* a general direction and targets. For example, policies dealing with technology transfers to developing countries, the systematic introduction of exemptions and limitations, and/or the consideration of a treaty on access to knowledge would be within the purview of a policy development branch. Separately, an independent WIPO evaluation body that is responsible for *conducting* an assessment of whether targets are being met should be created. Existing WIPO bodies could then shift their focus to implementing the agreed upon policies (see Figure 1).

METHODOLOGICAL FRAMEWORK FOR IMPACT ASSESSMENT

In setting out the proposed methodological framework for impact assessment, a number of key terms must be defined. The term "impact" equates

Figure 1: Relationship between the Three Categories of Assessment

Source: Author.

to long-term goals or objectives (that is, economic and social development at the macro level), where as the term “outcome” refers to short-term specific objectives at the sector or project level. Consequently, specific “outputs” will need to be identified to achieve these determined short-term objectives. In turn, achieving these objectives will require the delivery of a series of outputs that will contribute to the outcome and goal. Inputs, outputs, outcomes, and their effects should be measured using quantitative indicators with reliable data sources.

Economic Impact of IP Policy

The goal of economic impact analysis is to determine to what extent IP policy contributes to, or hinders, national innovation and economic growth, as well as assessing any distributional consequences. Typical economic models often treat IP rights as a single parameter in determining optimal national innovation policy. However, patents, copyrights, trademarks, geographical indicators, plant variety rights, design protection, and trade secrets, which are all different subjects of IP policy, require different approaches in terms of impact assessment.

A conceptual framework for assessing the effect of patents will involve a number of variables. The growth of the gross domestic product (GDP) may serve as an output parameter of innovation, and research and development (R & D) expenditures may serve as an input parameter of innovation. Patents should be considered as an intermediate parameter of innovation inputs and outputs (see Table 1).

Table 1: The Impact Assessment Framework for Patents

	Performance Indicators	Data Sources
<p>Impact/ outputs Social and economic development</p>	<ul style="list-style-type: none"> • GDP growth rate • Innovation indicators • Patent filings • Resident filings by office • Resident filings per million population • Resident filing per GDP • Resident filings per R & D expenditures by year • Resident filings per R & D expenditures by country of origin • Non-resident filings by office • Non-resident filings by country of origin • Non-resident filings as a percentage of total filings by office • Patent grants • Patent Cooperation Treaty statistics • Launch of new products • Sales of limitation and innovation products • Sales of new-to-firm products (percentage of total turnover) • Sales of new-to-market products (percentage of total turnover) 	<ul style="list-style-type: none"> • National statistics bureaus • UN Development Programme • World Bank • WIPO
	Innovation indicators	Data Sources
<p>Inputs</p>	<ul style="list-style-type: none"> • GDP expenditure on R & D (GERD) • Government expenditure on R & D (GERD) by source of funds: Percentage of GERD financed by industry, government, and other national sources as well as from abroad • GERD by performance sectors: Percentage of GERD performed by the business enterprise sector, the higher education sector, the government sector, and the private non-profit sector • Business enterprise expenditure on R & D (BERD): BERD by source of funds • Higher education expenditure on R & D • Government expenditure on R & D • R & D expenditure of foreign affiliates • R & D personnel (R & D personnel expenditure only occupies one portion of the total product development expenditure, which involves, <i>inter alia</i>, new machinery and equipment, acquisition of external technology, design of new products, and training related to innovation and the marketing of new products) • BERD personnel • Higher education R & D personnel • Government R & D personnel 	<ul style="list-style-type: none"> • National statistics bureaus • National IP organizations • WIPO • Surveys

To evaluate the innovation performance of a patent policy, appropriately constructed time-series innovation indicators can show dominating trends, help describe causes and effects of innovation conditions, and make it possible to track the implementation of IP rights and other innovation-related policies in developing countries and to assess their efficiency. Many studies have heavily relied on statistics respecting patent filings and grants as indicators to evaluate national innovation performance (Li 2007, 1). Although patent counts are certainly one indicator, they do not necessarily reflect the level of inventiveness within a particular geographical location. Therefore, a series of proper innovation indicators should be developed to assess national innovation capacity and the performance of patent policy in a given country. On this basis, a single composite index such as an innovation index can be further developed to measure the national and global innovation performance.

Alternatively, the impact of an IP regime on innovation can be evaluated through an innovation scoreboard. The innovation scoreboard has several advantages. It can summarize input and output dimensions of innovation to help decisionmakers. The composite indicators are easier to interpret than trying to find a trend in many individual indicators. It can facilitate ranking and assessing countries' innovation performance, reduce the size of the set of indicators, place issues of country performance and progress at the centre of the policy arena, and promote accountability and communication with the general public. However, comparisons by an innovation scoreboard can only be used over time on the assumption that there is constant linkage or interplay between individual innovation indicators. The composite indicators may fail because they can hardly reflect highly dynamic innovation systems. National idiosyncrasies are excluded in the measurements. In addition, within the theoretical model, the selection and aggregation rules are seldom taken into account by policy makers or other recipients of the final benchmark.

Surveys are also a means of assessing innovation performance at the micro level. One of the most significant innovation capabilities is knowledge that is accumulated by firms, which is mainly embedded in human resources but can also be in procedures, routines, and other characteristics of the firm. In developing countries, innovation surveys should be designed to analyze the various innovation strategies present in the innovation system under consideration as well as to evaluate and understand how these patterns contribute to strengthening the competitiveness of particular firms and to a country's economic and social development. Both innovative firms and potentially innovative firms should be included

in the survey so as to help developing countries to formulate innovation policies to assist potentially innovative firms in overcoming barriers to innovation. Therefore, the measurement priorities in an innovation survey may include human resources, linkages, quality assurance systems, and the incorporation and use of information and communication technologies. More complex issues would include identifying the type of decision-making support systems and the firm's potential for knowledge absorption.

Activity Impact Assessment

Effective implementation of the WIPO Development Agenda will contribute significantly to the integration of development, IP, and innovation policies for developing countries. Given the complexity of IP rights as an economic instrument in development, the evaluation of WIPO activities should be conducted in a holistic and balanced approach. For instance, patents that are used as an economic policy instrument may facilitate innovation positively or may raise imitation costs for innovation negatively. They may encourage technology dissemination through the publication of technical details in patent applications or raise the prospect of a monopolistic strangle hold. Given the paradox of IP rights, WIPO's development paradigm should not only promote an understanding and protection of IP rights in accordance with international obligations but also provide an appreciation of the challenges of access to knowledge and technology in the developing world.

In assessing activity effectiveness, such as technical assistance, long-term goals should be broken down into concrete outcomes and specific outputs (as shown in Table 2). For instance, whether a policy maker is equipped with the capacity to design an optimal IP regime is critical for ensuring that technical assistance achieves its development objectives. Accordingly, performance indicators of outcome should include, at least: (1) an understanding of the flexibilities of the TRIPs Agreement; (2) the capacity to use IP as a policy instrument; (3) the capacity to design optimal national IP strategies; and (4) the capacity to design optimal national IP enforcement mechanisms from a development perspective. Such outcomes can be achieved through the realization of a number of outputs such as the number of seminars organized per year, the number of people trained in member states, and the number of publications/manuals published in a given state. On this basis, the required resources can be determined (see Table 2).

Different assessment methods should be adopted to evaluate other WIPO activities including technology transfer and licensing, SMEs (small

Table 2: The Evaluation of a WIPO Activity: A Holistic Approach

	Performance Indicators	Data Sources
Impact	<ul style="list-style-type: none"> • GDP growth • Domestic innovation capacity 	<ul style="list-style-type: none"> • National IP/patent office • Surveys
Outcome	<ul style="list-style-type: none"> • Understanding of the flexibilities of the TRIPs Agreement • Capacity to use IP as a policy instrument • Capability to design national optimal IP strategy • Capability to design national optimal IP enforcement mechanism from a development perspective 	<ul style="list-style-type: none"> • Feedback from member states • Technical assistance reports
Output	<ul style="list-style-type: none"> • Number of seminars (for example, the number of flexibilities under the TRIPs Agreement that are organized) per year. • Number of people trained in member states • Number of publications/manuals published 	<ul style="list-style-type: none"> • Evaluation by participants • Technical assistance reports
Inputs	<ul style="list-style-type: none"> • Number of experts from developed countries • Number of experts from developing countries • Financial resources spent on technical assistance • In-kind support provided by member states 	<ul style="list-style-type: none"> • WIPO

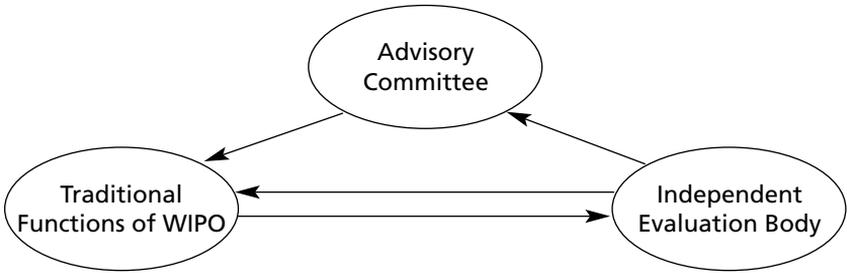
and medium enterprises), creative industries, public policy, information disclosure, legislative assistance, and automation assistance.

Institutional Capacity Impact (WIPO Capacity)

An independent WIPO evaluation body should be established to ensure WIPO's capacity to conduct objective assessments. Such a body should be designed to monitor and evaluate implementation independently and objectively (see Figure 2 for an example).

CONCLUSION

Impact assessment is an essential tool for effective implementation of WIPO's Development Agenda. Such assessments will help to identify needed resources, the specific outputs to be achieved, and the desired long-term development objectives. Without vigorous and objective assessment, and appropriate actions based on the assessment, the Development Agenda may fail to yield tangible results. This chapter has provided some guidance on how to frame an impact assessment exercise from both

Figure 2: WIPO Independent Body on Evaluation

a conceptual and methodological perspective in order to ensure that development concerns are incorporated in the implementation of the Development Agenda. In the past, WIPO activities have largely disregarded development concerns. It is hoped that, armed with a proper framework for analysis, the Development Agenda will be implemented and evaluated coherently, thereby meeting the needs of the developing world.

NOTES

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- 1 Development Agenda for WIPO, <http://www.wipo.int/export/sites/www/ip-development/en/agenda/recommendations.pdf>.
- 2 Agreement on Trade-Related Aspects of Intellectual Property Rights, in *Marrakech Agreement Establishing the World Trade Organization*, 15 April 1994, 33 I.L.M. 15 (1994).

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4

Reforming Governance to Advance the WIPO Development Agenda

CAROLYN DEERE

INTRODUCTION

The implementation of the WIPO Development Agenda will depend upon reforms to the agency's governance.¹ At the 2007 WIPO General Assemblies, several of the recommendations on the Development Agenda adopted by member states proposed particular governance reforms (WIPO 2007). Alongside specific proposals for improvements, this article argues for consideration of a deeper overhaul of WIPO's governance, including the internal management and working practices within the WIPO Secretariat, reforms to decision-making processes among member states and member oversight of the Secretariat, strategies for altering the Secretariat's institutional culture, and alternative institutional arrangements, including with respect to how WIPO is financed.

WHAT IS WRONG WITH WIPO'S GOVERNANCE?

Governance-related deficiencies at WIPO were key factors that prompted the Friends of the Development to push for the Development Agenda. WIPO's institutional culture has long been characterized by opaque decision making, a pro-intellectual property (IP) outlook, and an imperial management style (Musungu 2005; Halbert 2007; May 2007). Since it became a United Nations (UN) agency in 1974, WIPO has known only two directors general. Together, their legacy has included a narrow technocratic approach to IP law that has neglected public policy considerations, a bias in favour of the interests of IP right-holders and developed countries, and an institutional momentum in favour of stronger IP rights and new global IP rules (Boyle 2004). The Development Agenda emerged as a direct challenge to this institutional culture and to the intensity of

WIPO's pro-IP commitments (Chon 2006; Menescal 2008; Netanel 2008). While the former director-general, Kamil Idris, launched several efforts to address some developing country concerns, particularly by expanding WIPO's capacity-building activities, the debates on the Development Agenda confirm that developing countries as a whole remain far from persuaded that such efforts are adequate (Idris 2003; WIPO 2004, 2007). Indeed, for the countries that form the Friends of Development coalition at WIPO, the content and quality of WIPO's capacity-building is a key issue they hope to address through the Development Agenda (South Centre 2004).

Beyond WIPO's internal culture, its institutional design and, in particular, its unique financing arrangement present challenges for the implementation of the Development Agenda. While member states formally approve WIPO's program and budget each year, the primary financiers of WIPO are the users of the system of international IP treaties that WIPO administers, which are mostly multinational corporations from developed countries. While several of the larger developing countries are becoming more active users of WIPO's services, such as those related to the Patent Cooperation Treaty, developed countries will continue to dominate for the foreseeable future. The WIPO Secretariat openly views the IP holders that use its services as its core non-government constituency. In 1988, the incumbent WIPO director-general established an Industry Advisory Commission to ensure that the organization responded to industry needs and enable their direct input into decision making (Musungu and Dutfield 2003). Over 90 percent of the non-governmental organizations (NGOs) accredited as being permanent observers to WIPO's work are the companies, associations of IP holders, and other interested groups, such as IP attorneys.

WIPO's governance is also weak in terms of its accountability to member states and its relationship with the public at large. Often misperceived as an agency dealing only with technical issues, WIPO largely escaped public scrutiny until a few years ago. Interaction with WIPO was left to a small technocratic community of IP officials and lawyers spurred on by major commercial interests (Braithwaite and Drahos 2000). This relative obscurity was reinforced by the nature of WIPO's relationship with its primary interlocutors at the national level, namely IP offices that in most countries operate away from the spotlight of public debate and policy discussion within government (Deere 2008b).

The capacity for developing country delegations to provide effective oversight of WIPO and serve as effective advocates of change is circum-

scribed in several ways. First, over time, a technocratic rapport has emerged between the staff of the WIPO Secretariat and those of many developing country IP offices, many of which rely on WIPO for capacity building, technical assistance, and training. Through such activities, and the normal day-to-day processes of engagement at WIPO meetings and conferences, the WIPO Secretariat has been effective at reproducing a pro-IP perspective among many of the developing country delegates charged with oversight of the organization (May 2007). In most developing countries, WIPO is perceived as an agency with considerable technical authority, and staff of national IP offices consistently defer to it for advice. Second, many staff in national IP offices benefit personally and professionally from WIPO's training and travel opportunities (as well as from the lucrative per diem payments that it provides). Delegates to WIPO meetings perceive their primary role as one of securing further capacity-building and technical assistance from the agency. In the context of ongoing norm-setting processes, it should not surprise us that this dependence can skew the incentives facing national IP officials, particularly from weaker developing countries, leading them to agree to outcomes favoured by the WIPO Secretariat and key developed country members (Abdel Latif 2005; May 2007). Third, WIPO's practice of organizing consultations and government input on a regional basis has been criticized by some for weakening the ability of developing countries to organize globally or thematically in regard to specific debates at WIPO (Kwakwa 2002; Yu 2007; Visser 2007; Abdel Latif 2005).

A further challenging aspect of WIPO's governance concerns decision-making processes. There is inadequate day-to-day oversight of the Secretariat by WIPO member states—a fact highlighted by recent evidence of financial mismanagement (New 2007). The WIPO Coordination Committee, charged with overseeing the organization between the annual General Assemblies, which gather all WIPO members, is widely acknowledged as being unwieldy, with a membership of over fifty countries. The engagement of many members of the Coordination Committee is often too weak to ensure effective oversight. Using the terminology of organizational theory, the result is that the principals (WIPO member states) exercise inconsistent control over their agent (the Secretariat) (Hawkins et al. 2006). In the vacuum that results, the political space is open for particular member states and vested interests to dominate, for the Secretariat to advance a bureaucratic agenda in favour of institutional growth, and for the institution to be harnessed by disreputable staff to deliver personal favours or secure personal benefits.

In the absence of adequate oversight, severe problems in internal management have developed, including low staff morale, poor human resources policies, and numerous allegations of financial irregularities and corruption (New 2007). To date, the staffing pool at WIPO has suffered three shortfalls: it is overly technocratic, draws too heavily on the diplomatic community and former industry lobbyists, and is dominated by a pro-IP perspective. Hiring practices have been non-transparent, and a revolving door has enabled key staff to move between government IP offices, Geneva missions, corporate lobbying firms, and the WIPO Secretariat.

All organizations, particularly government institutions, are difficult to change in both the short term and the long term. The challenge is particularly strong in the case of international organizations where change demands collective decisions, action and oversight from member states (Haas 1990). At WIPO, the secretariat is a large international bureaucracy with over a thousand staff members and an annual budget of around US\$550 million. Debates on the reform of the World Bank, International Monetary Fund (IMF), and a range of UN agencies over the past decade have drawn attention to several tools that the membership of international organizations can use to stimulate reform, including alterations to approved work programs, instructions to alter staffing, decisions to revise budgets, and the withholding or withdrawal of financial support. In addition, the scholarly literature on improving the accountability of international organizations emphasizes options such as changes to the practices and procedures of decision making and budgeting, the organization's mandate, or the leadership of the agency (Woods 2008). Decisions to introduce new evaluation mechanisms and financing arrangements can also alter the incentives at play within the organization. The appropriate tools vary according to the objectives at hand, which might range from improving efficiency or cost effectiveness to mainstreaming an organization's orientation toward the needs of developing countries.

What kind of governance reforms would promote and enable the change necessary to advance the goals of the Development Agenda? Importantly, implementation of the WIPO Development Agenda will demand a culture shift in global IP policy making that will require far more than internal governance reforms at WIPO. That said, governance reforms at WIPO are vital among the range of actions needed both within and beyond the organization to translate the Development Agenda into practice.

IMMEDIATE ACTION

To fulfil the promise of WIPO's Development Agenda, the goals of governance reforms should include greater accountability, effectiveness, and development orientation. Reform of WIPO's governance could be undertaken in two phases. To begin, WIPO's member states and senior management could take several immediate steps to reorganize and improve internal management practices that would boost the long-term prospects for WIPO's Development Agenda. At the same time, governments should initiate a discussion on further, deeper reforms to WIPO's institutional design and structure, which will demand deeper, longer, and more political deliberation. That discussion should include a fundamental reconsideration of how the range of functions currently clustered within the WIPO Secretariat might be better organized, managed, and financed.

In order for both this short- and longer-term agenda to advance, concerted efforts to transform the institutional culture at WIPO will be necessary. Firm and enlightened leadership by the new director-general will be critical, albeit not sufficient. The new director-general must embody, and be perceived to embody, the objectives and values advanced in WIPO's Development Agenda. This will demand more than commitments to improve technical assistance and capacity building for developing countries. The director-general must exemplify an interest in public policy goals beyond the technocratic discussions of IP norms and administration, as well as a willingness to move beyond the mindless reiteration of the absolute benefits of IP. He must show himself to be a listener who enjoys and commands the full support and respect of the diversity of WIPO's members and stakeholders.

The top tasks of the new director-general must be to undertake a series of internal reforms to restore confidence in financial and human resources management, improve accountability to member states, and demonstrate an active commitment to concrete changes in the activities of the organization to reflect WIPO's Development Agenda. To this end, the new director-general needs to draw together a professional team experienced in the management of organizational transformation that will champion and implement change.

A critical component of this effort must be reforms to staff management and recruitment policies. Such changes will demand tough decisions to upgrade norms of staff conduct and practices, including those that apply to consultants. The Secretariat should propose a new code of ethics

to complement the standard UN codes governing all staff, which would demonstrate to WIPO members and the public how seriously the senior management takes issues of accountability. Change will demand a recruitment policy that focuses on going beyond the usual pool of candidates to attract a more diverse, multi-disciplinary staff. It will also demand efforts to retain high-quality staff that could serve as internal agents and promoters of change.

New leadership will not, however, resolve all of the challenges. WIPO's membership also has work to do. It needs to provide clear instructions to the WIPO Secretariat regarding the reform agenda. Immediate decisions that members should consider include:

1. A New Policy for Public Consultation and Participation

The prospect of a more development-friendly WIPO will depend upon an expansion of the community involved in IP policy decision- and law-making beyond the grip of IP lawyers, industry lobbyists, and technocrats. To match the best practices in other international organizations, there is a need for clear policy guidelines for transparency and public access to meeting documents and also for public consultation and participation across all of WIPO's activities (e.g., training, meetings, research, impact assessments, capacity building, and norm setting). Such mechanisms should supplant WIPO's existing Industry Advisory Commission and Policy Advisory Commission. Increased civil society participation in the Development Agenda meetings, various public symposia, and the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore should be replicated elsewhere in WIPO and across its various functions.

2. An Expanded Office of External Relations

Beyond efforts by WIPO member states and external stakeholders to promote change at WIPO, the consolidation of informal and formal partnerships with other UN agencies could help bring a more development-oriented perspective to the organization. Dialogue with the family of international agencies and inter-governmental processes will help the Secretariat and its member states identify how WIPO and its new Development Agenda can contribute to the achievement of overarching UN priorities, such as the UN Millennium Development Goals. WIPO could also take a more active role within the UN system by co-convening and participating in policy debates on the global IP system and its relevance to a broad range of issues, including innovation, access to knowledge, development, trade, energy, climate, environment,

agriculture, and public health. Importantly, WIPO's members and external stakeholders will need to ensure that such partnerships do not become vehicles for promoting deference in the UN system to WIPO where issues of intellectual property arise in debates on global challenges. Instead, they should provide opportunities to bring new perspectives to WIPO and for WIPO to enrich and inform global discussion with development-oriented perspectives and expertise on IP, consistent with the Development Agenda. Importantly, the prospect of a network of institutional partnerships also poses the risk of diluting the capacity of members, particularly developing countries, to properly monitor what role WIPO plays in them and the nature of the agenda it advances. The Office should also be responsible for enhancing WIPO's partnerships with civil society, academia, and the private sector and ensuring implementation of its policy for public consultation and participation.

3. An Independent Evaluation Office

The mandate of this office should be to provide evaluation services for all of WIPO's activities against benchmarks of effectiveness, accountability, and development orientation. Learning from the experience of the IMF, an Independent Evaluation Office for WIPO should be structured to have the autonomy and authority to investigate and report on matters without interference from particular members, the Secretariat, or stakeholders (Woods 2008). It should have its own executive director who is appointed by and reports directly to the WIPO General Assembly, as well as an independent budget approved by the membership.

4. A Research and Impact Assessment Unit

The credibility of research and impact assessment relies upon independence. WIPO member states and the Secretariat need to be involved in these activities, but a unit charged with these tasks should be managed in a way that ensures its standing as an unbiased and independent authority. A new Research and Impact Assessment Unit should, on the basis of work plans and a budget approved by the General Assembly, undertake ongoing activities in three areas: (1) research requested by the General Assembly and various committees; (2) development and public interest impact assessments of proposed and existing treaties and norm-setting initiatives; and (3) responses to requests for research by particular countries. The unit would report annually to the General Assembly and its Coordination Committee. The unit's ongoing activities should, however, be overseen by an expert board

(ten experts selected by WIPO members, with consideration for regional representation and expertise) and managed by a managing director appointed by the expert board and subject to yearly performance reviews. The unit's work would be evaluated annually by the Independent Evaluation Office. Staffed by a small multi-disciplinary team of economists, lawyers, and development specialists, it would be charged with working in partnership with experts and researchers in countries and regions from academia, industry, NGOs and government to implement its workplan. Importantly, the Research and Impact Assessment Unit should not serve to build and concentrate expertise in Geneva. Rather, it would operate as a research network and clearing house, with a focus on building processes at the national level to foster local IP research capacity and expertise.

5. Reorganizing Capacity Building

WIPO's capacity-building activities, which include education, training, technical assistance, and infrastructural support, should be separated from WIPO norm-setting processes. A new Capacity Building Unit should receive its funding and mandate from the General Assembly, but its work program should be set by its own board that is comprised equally of donor and recipient countries. The managing director should be hired and reviewed by this board. The board and the managing director would in turn report annually to the WIPO General Assembly. The unit would accept contributions through special trust funds and voluntary funds. The work of the unit would be evaluated annually by the Independent Evaluation Office based on criteria derived from the recommendations made in the context of the WIPO Development Agenda and from internationally agreed principles to improve ownership of development assistance, such as those set forth in the OECD's Paris Declaration on Aid Effectiveness.² Each recipient and donor country interacting with the unit would be required to involve representatives of both their development/foreign affairs agencies and their IP agencies. The provision of capacity building would be linked to diagnostic studies that assess capacity building needs in light of national development and poverty alleviation goals and that draw on consultative processes at the national level. The process would also involve participation from donors working on other aspects of the country's public administration. To implement projects, the unit would draw on a range of capacity-building providers and experts according to the preferences and needs of the country at

hand. According to choices made by countries, projects could be led by, or involve, experts from NGOs, private law firms, industry, other UN agencies, as well as WIPO staff involved in treaty administration and research.

Each of these five proposed reforms will likely encounter some internal resistance from the WIPO Secretariat and from some member states. Progress will require the director-general to be open to negotiation and consultation with member states regarding reform. The challenge will be for the Secretariat and the member states to balance the already well-heard but legitimate voices of private IP holders with those of development and public interest advocates. Some WIPO staff are already keen to support a process of an internal renewal. With confident leadership, these staff could help WIPO to deliver on the new priorities set forth in the Development Agenda recommendations.

Critically, achieving greater effectiveness, accountability, and development orientation at WIPO will rely on efforts by member states to improve oversight of the Secretariat and to engage in a critical assessment of their own performance. Most notably, member states must:

- build national IP policy-making processes that engage the full range of relevant national ministries and non-governmental stakeholders from industry, civil society, and the research community. In order for development-oriented IP reforms at WIPO to advance, national IP policies in both developed and developing countries, as well as their strategies with respect to international negotiations and the global IP system, must also reflect development goals.
- improve the quality of their own participation in WIPO meetings. This will require boosting the accountability of national representatives to WIPO. Governments should broaden the composition of their delegations to WIPO to include representatives of the ministries of foreign affairs, development, agriculture, and education, where appropriate. WIPO members should also reconsider whether IP offices alone are the most appropriate national focal points for interaction with WIPO.
- uphold the principles of the Development Agenda in their national decision making and norm setting. In order for WIPO's activities and processes to reflect the goals of the Development Agenda, governments must engage in an ongoing process of consultation with relevant private and public interest groups and experts. With these improvements in hand, governments should commit to, and operationalize, new principles for WIPO's norm setting (set out in Table 1).

Table 1: Principles for WIPO Norm Setting

Guided by principles advanced by WIPO members in 2007, the norm-setting activities of WIPO should:

- be member-driven and based on transparent work plans and strategic vision;
- take into account differences in the level of economic, social, and technological development among members;
- preserve and protect a robust and lively public domain;
- be fully compatible with, and actively support, other international instruments that reflect and advance development objectives, such as international human rights instruments;
- provide developing countries with policy space commensurate to their development needs and requirements through flexibilities, exceptions, limitations, and the provision of protection adequate to the level of development and national conditions of each country;
- reflect careful, evidence-based impact assessments of costs and benefits to different stakeholders and countries;
- be preceded and effectively guided by debates and public hearings, with open participation by all member countries and all stakeholders, with a view to assessing potential impacts as well as the desirability of new norm-setting activities; and
- include provisions on objectives and principles to curb anti-competitive practices and abuse of monopoly rights, promote technology transfer of technology, and provide longer compliance periods for developing countries, as well as to enable the use of flexibilities and “policy space” for the pursuit of public policies, and to include safeguards, exceptions and limitations where relevant for public policy goals.

Source: WIPO (2007).

ISSUES FOR FURTHER DEBATE

Implementing WIPO’s Development Agenda will also demand systematic attention to proposals for deeper governance, such as (1) improving oversight by creating an executive group of member states (bringing WIPO in line with many other international organizations); (2) separating WIPO’s norm-setting processes from other organizational functions, such as treaty administration; and (3) insulating the management of WIPO’s capacity-building activities from undue influence on the part of any member states, the Secretariat, or public stakeholders, whether IP right-holders or advocacy groups. Following are several options that WIPO members could consider:

1. An Executive Board

WIPO members should consider establishing an executive board comprised of representatives of no more than twenty-five WIPO members to oversee the organization’s budget and work program on a monthly basis and to report annually to the WIPO General Assembly. The executive board would combine the functions of the existing Coordina-

tion Committee and the Program and Budget Committee. It would also be responsible for hiring and reviewing the performance of the director-general. Several options for electing representatives could be discussed. One option would be to follow the example of the World Health Organization where positions on the board rotate among groups of countries who must nominate qualified national representatives.

2. Restructuring the WIPO Secretariat

Consideration should be given to reorganizing the activities of the WIPO Secretariat. Headed by the WIPO director general, the Secretariat should retain its mandate to provide services to the General Assembly and its committees as well as to ongoing norm-setting processes, and to manage the agency's core budget. The other existing activities of the Secretariat, such as treaty administration, capacity building, and research could be delegated to semi-autonomous units with distinct heads and management structures as described above (e.g., a Research and Impact Assessment Unit, a Capacity Building Unit, an Office for Independent Evaluation, and a Treaty Administration Unit, discussed below). WIPO would thus be transformed from a single, centralized, top-down bureaucracy to a system of interlocking parts with governance structures appropriate to the objectives and activities of each function.

3. A Treaty Administration Unit

On the basis of a work plan and budget approved by the WIPO General Assembly, a Treaty Administration Unit could be responsible for activities in two areas: (1) administration of WIPO's twenty-three treaties and (2) arbitration and mediation related to IP disputes. The Treaty Administration Unit could be involved in norm-setting processes, but only to the extent that members call upon it to provide information or advice. Similarly, the unit would not be a direct provider of training, technical advice, or capacity building to countries, although it would participate in activities organized by the Capacity Building Unit as an information-provider. Fees that the unit collects for treaty-related services provided to IP right-holders and other clients would be channelled directly to WIPO's central budget and distributed to the priority activities of the organization, according to the workplan and budget approved by the General Assembly. The Treaty Administration Unit would have a managing director appointed by the executive board for three years and would be subject to periodic evaluation by the Independent Evaluation Office.

4. Reconsider Practices Related to Regional Groups

Governments should also consider different options for organizing collectively to ensure their interests are properly represented and they effectively execute their oversight responsibilities. To this end, a careful evaluation of the benefits and risks associated with the use of regional groupings to generate consensus in WIPO's norm-setting activities and to organize the Secretariat's interactions with member states should be undertaken.

Finally, to ensure proposals for improved governance attract the careful consideration they warrant, WIPO member states should not let them languish in tortuous inter-governmental negotiation processes. Instead, they should follow the example set by many other international organizations and call for an independent evaluation of WIPO's governance that would consider a full range of options for ensuring that WIPO better addresses the needs of its full membership and fosters a global IP system that more fairly balances IP protection, development priorities, and the public interest. Meanwhile, the Friends of Development will also need to intensify their effort to sustain support among the diversity of member states and within the organization for the Development Agenda.

NOTES

The views expressed in this chapter are personal and do not reflect those of any institution with which the author has an affiliation.

- 1 Development Agenda for WIPO, <http://www.wipo.int/export/sites/www/ip-development/en/agenda/recommendations.pdf>.
- 2 Paris Declaration on Aid Effectiveness, 2005, <http://www.oecd.org/dataoecd/11/41/34428351.pdf>.

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5

From Agenda to Implementation: Working outside the WIPO Box

E. RICHARD GOLD AND JEAN-FRÉDÉRIC MORIN

INTRODUCTION

The Development Agenda adopted by WIPO on 28 September 2007 presents a formidable implementation challenge.¹ This challenge does not simply arise from the breadth and aspirations of the document but also from its critical demand that WIPO take on the very lifeblood of the organization—that sometimes less, not more, intellectual property (IP) is best. Any paradigm shift, as represented by the Development Agenda, is daunting and would challenge any large institution attempting to manage it. For example, it took significant effort for the World Bank to transform its objectives from infrastructure reconstruction in Europe to facilitating economic growth in developing countries and, more recently, from debt management to sustainable development and poverty reduction. This chapter suggests, however, that the challenge of making the necessary changes at WIPO may be even more challenging than the World Bank's transformation. Such a shift is daunting for three reasons: (1) WIPO is not in a position to manage the cultural change required by the Development Agenda; (2) WIPO's principal strength is in administering technical IP treaties rather than in norm development; and (3) WIPO members have a tendency to say one thing internationally but to do the opposite nationally. Given these factors, WIPO should not be entrusted with implementing its own agenda. Instead, it should restrict its role to finding and funding outside organizations to do the transformative work that is required to implement the Development Agenda.

WIPO'S INTERNAL CULTURE

WIPO is not, and has never been, neutral with respect to the function of IP. The organization's core mission is "to promote the protection of intellectual

property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organisation.”² In recent times, WIPO has exhibited an unquestioning belief in the fact that IP necessarily brings prosperity to all. This attitude is well illustrated by the words of the former WIPO director-general Kamil Idris (2003, 25):

Intellectual property could be called the Cinderella of the new economy. A drab but useful servant, consigned to the dusty and uneventful offices of corporate legal departments until the princes of globalization and technological innovation—revealing her true value—swept her to prominence and gave her an enticing new allure.

This unquestioned belief in IP dogma rather than in the ambiguous reality of how IP functions in practice as revealed by empirical research poses a significant obstacle to WIPO’s ability to implement the Development Agenda (Gold et al. 2004; Fink and Maskus 2005). After all, the agenda calls for a critical approach to IP. For example, Recommendation No. 10 notes the importance of requiring a “fair balance between IP protection and the public interest,” while Recommendation No. 16 calls on WIPO to “[c]onsider the preservation of the public domain within WIPO’s normative processes and deepen the analysis of the implications and benefits of a rich and accessible public domain” (WIPO 2007, No. 16). Recommendation Nos. 17 and 19, for their part, require the organization “to take into account the flexibilities in international IP agreements, especially those which are of interest to developing countries and least developed countries (LDCs)” and to “facilitate access to knowledge and technology for developing countries.” As Christopher May (2006, 106) points out, “[t]he underlying logic of the Development Agenda, therefore is perhaps best understood as an attempt to ‘mainstream development’ at the WIPO.”

Given the conflict between its institutional dogma and the critical perspective on IP inherent in the Development Agenda, WIPO is now confronted with the need to manage internal change. In his seminal book on internal change within international organizations, Ernst B. Haas (1990) distinguishes adaptation from learning. He defines adaptation as an incremental adjustment during which an organization adds new activities or drops old ones without questioning its original justifications and values. A learning process implies, by contrast, that the organization redefines its ultimate ends and implicit norms. Under this typology, the implementation of the Development Agenda involves a process of learning rather than of adaptation. However, as Haas (1990, 37) con-

cludes, learning is far less common. The “very nature of institutions is such that the dice are loaded in favor of the less demanding behavior associated with adapting.”

WIPO’s own history shows that it has consistently favoured adaptation over learning. As May (2007) points out in his book, the pro-IP inclination of WIPO is a resilient feature of the organization. Its predecessor organization, the *Bureaux internationaux réunis pour la protection de la propriété intellectuelle* (BIRPI), was established by developed countries in 1893. At critical moments of its life, such as when it expanded to include developing countries, when it joined the UN system, and when it fought off the call of the New International Economic Order to set aside orthodoxies of IP, the BIRPI/WIPO always preserved its pro-IP orientation. One thing that is of particular relevance to the Development Agenda is the fact that both the BIRPI in the 1960s and WIPO in the early 1970s successfully maneuvered around developing country objections to the organization’s pro-IP orientation (*ibid.*, 22–25).

Nothing indicates that WIPO is more open today to the possibility of abandoning its century-old view that IP is universally applicable and that it inevitably leads to economic development. Pressure for change is external, coming in particular from developing country members and not from WIPO management (*ibid.*, 76–82). On the eve of the passage of the Development Agenda, the director-general continued to advocate WIPO’s traditional worldview:

These ideas—that patents are not relevant to developing nations, or that they are incompatible with the economic objectives of the developing nations—are inaccurate because they give the impression that it is possible to simply opt out of the international patent system, and yet still achieve economic development. This is an error, as patents are an essential component of economic strategy regardless of whether the country is developed or developing. (Idris 2003, 133)

Until a new WIPO management team willing to challenge current assumptions takes charge of the organization, WIPO will not be in a position to implement the necessary cultural shift. According to one study, most organizations fail in their efforts to manage change, with success levels as low as 10 percent, primarily because of the preferences of management (Oakland and Tanner 2007). As one group of authors concluded about their study, “these findings suggest an inextricable link between the effectiveness of change initiatives and top management commitment” (Soltani, Lai, and Mahmoudi 2007, 172). Clearly, the outgoing WIPO management is not

committed to implementing the Development Agenda. As Sisule Musungu noted on 2 October 2007 in his posting on the Intellectual Property Watch blog: “It does not need a management expert to tell us that for an organization to navigate such major reform requires leadership from the top. Such reform cannot happen with an embattled Director General and a divided Secretariat and it cannot happen with a sharply polarized membership.”

WIPO’s management team is not the only obstacle to its successful implementation of the Development Agenda. Even with a willingness to change organizational culture, WIPO lacks the capacity to transform itself. Such a capacity depends on the organization’s environment and the flow of communication between it and its environment. And in this respect WIPO is failing.

One of Haas’s (1990, 40) conditions for learning is that those outside of the organization—for example, academics, think tanks, and experts—must believe that change is necessary. This condition has been fulfilled by WIPO. An ever-growing number of academic and policy articles have argued for the contextual and contested nature of IP rights. The resulting conclusion is that, over history, it has been the multiplicity of approaches and the porous nature of IP, not harmonization, that has led to innovation (Inkster, forthcoming). As May (2006, 11) notes, “the position that development will automatically be furthered by the recognition of intellectual property rights, for all states in all developmental stages, is in the critical perspective unsustainable.”

This growing consensus outside of WIPO, however, has had little impact on the organization. WIPO displays the characteristics of what one could call a “Gore-Tex syndrome”: it repels outside influences—values and beliefs—while breathing out its intellectual airs in the form of educational activities at the WIPO Worldwide Academy. The normative traffic route is thus unidirectional. Non-state actors that work with WIPO often learn and adapt to the organization’s beliefs but do not, in turn, succeed in transmitting their own values to WIPO. This Gore-Tex syndrome is due, in large part, to WIPO’s pathological lack of openness. In a 2006 report published by One World Trust, WIPO is listed as the *least* transparent international governmental organization (Blagescu and Lloyd 2006).³ Furthermore, WIPO’s staff openly complained about the outgoing management’s lack of transparency (Cincinnatus 2007). WIPO’s management has been so lacking in transparency that when Intellectual Property Watch, which provides independent IP news and analysis, published an open letter from WIPO’s staff on its website, WIPO demanded that it be removed (Intellectual Property Watch Blog 2007a). In order to change its internal

culture, WIPO must open itself to outside influence by becoming more transparent and welcoming.

WIPO'S EXPERTISE

WIPO's principal strength is in administering its numerous technical treaties, not in developing norms around the adaptation of IP to the needs of developing countries. While WIPO has played an important role in norm development over its history, most of its efforts have been geared toward promoting the advantages, and not the flexibilities, of IP. Cluster B of the agenda explicitly calls upon WIPO, however, to develop substantive norms relating to the role and implementation of IP that "take into account different levels of development; take into consideration a balance between costs and benefits;" consider "the preservation of the public domain;" and "take into account the flexibilities in international IP agreements" (WIPO 2007, Nos. 15–17).

This type of norm development required would be new for WIPO. Although some of WIPO's training activities do talk about adapting IP to developing country circumstances, its treaty-making activities have yet to reflect the norms of flexibility and development. Further, the bulk of the organization's effort is devoted to the administration of technical treaties involving IP such as the Patent Co-operation Treaty, the Madrid System for the International Registration of Marks, the Hague Agreement Concerning the International Registration of Industrial Designs, and the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration.⁴ Most of the organization's income comes from the fees that it charges to IP holders to administer their rights (May 2007, 37). These holders are overwhelmingly in developed countries (ibid., 43–44).

Further, WIPO has not, save for a few small departments with relatively few resources (for example, the Global IP Issues Division), had a role in IP strategy—the appropriate use of IP law, the development of supportive practices, and the encouragement of institutions with the mandate and skills to manage the grant and to supervise the exercise of IP rights. While WIPO operates the Worldwide Academy, which offers training and courses on IP, this institution, with a few notable exceptions, fails to take into account the very factors identified by the Development Agenda, namely the level of development, the need for a robust public domain, and IP flexibilities. It promulgates, instead, a one-size-fits-all approach to IP training that is suited to none (May 2007, 62). This approach does not

even compare to the more subtle and critical courses being provided by some law, management, and economic faculties around the world. If WIPO is to escape from this article of faith, it needs to truly and critically develop a social science of IP, examining whether and how intellectual property leads to both social and economic development.

In addition to the training that it provides through its academy, WIPO's Office for Strategic Use of Intellectual Property provides capacity building in developing economies. While one would think that, with a mandate "to assist Member States, particularly in developing countries and countries in transition, in effectively utilizing the IP system for development, extending support to SMEs and enhancing IP assets management capacity" (WIPO, n.d.), the office would provide exactly the kind of support that the Development Agenda requires, it is not the case. Rather, the office (as well as similar units within WIPO) promulgates a "faith-based" approach to IP, in which it attempts to convert non-believers to accepting the benefits of more IP. May (2006, 104) notes—and he is far from a lonely voice in this regard—that

the organization has deployed significant resources to attempt to socialize policy makers, legislators, negotiators and enforcement personnel into the "world of intellectual property." The WIPO encourages them to accept the stories deployed to justify the use of IPRs where the evidence that intellectual property directly promotes innovation and economic development is often absent.

Even if WIPO could overcome its management failure and its lack of an organization-wide engagement in understanding, let alone the development of IP norms, it faces another fatal hurdle. It simply does not have the human resources to provide the services and strategy that the Development Agenda demands. WIPO's staff comes largely from the diplomatic corps rather than from those groups with expertise in IP. Even fewer have previous experience in adapting IP to the needs of developing countries. It would thus require an aggressive staff renewal strategy for WIPO to provide the level and quality of service described in the Development Agenda.

WIPO'S MEMBERSHIP

Quite apart from these internal difficulties, WIPO's member states pursue dramatically different policies at the national and international levels. For example, while the United States pursues a maximalist IP agenda

at the international level, it possesses one of the most subtle and balanced domestic IP systems in the world (Abbott 2006, 20). Recent decisions by the Supreme Court of the United States in the field of patent law illustrate this well. In *KSR International Co. v. Teleflex Inc.* (2007), the court made it more difficult for patent holders to meet the non-obvious standard, while, in *Merck KGaA v. Integra Lifesciences I, Ltd.* (2005), it opened a vast scope for non-infringing health-related research. In *eBay Inc. v. MercExchange, L.L.C.* (2006), the court moved back from an absolutist position on interlocutory injunctions. The court has also recently affirmed the principle of exhaustion, which limits the rights of patent owners once a product has been sold (*Quanta Computer v. LG Electronics* 2008).

The effect of these decisions is to restore greater user rights in US patent law after years of increasing patent holder rights. This attempt to seek a subtle and evolving balance within IP law at the national level finds no equivalent in the absolutist approach that the United States follows at the international level, ranging from WIPO to the World Health Organization (WHO) and the World Trade Organization (WTO).

Brazil and Kenya, on the other hand, two of the countries that have most stridently called for greater flexibility in international rules relating to IP, carry few of these into their national laws. Both Brazilian and Kenyan IP laws contain restrictions that go beyond international minimum requirements. Brazilian law sets strict restrictions on photocopying, even for research purposes, and does not permit the issuance of a compulsory license for export despite the 2003 Cancun Decision (Basso and Edson, forthcoming).⁵

In addition, the flexibilities that the countries do use are under constant attack internally. For example, both Brazil and Kenya considered setting significant restrictions on these flexibilities in 2007. Brazil's Congress is contemplating Bill no. 2729/2003, which aims at increasing criminal sanctions against the use of non-authorized patented technologies, even though there are no international agreements or even developed countries that impose similar sanctions. In only the latest attempt to restrict its use of flexibilities, Kenyan legislators defeated a bill that would have prevented the country from issuing compulsory licenses (Intellectual Property Watch Blog 2007b). This is unlikely to be the last attempt.

All of these developments imply that a country's support or resistance to the exploration of flexibilities and new ways to conceive of IP internationally has seemingly little to do with its interest in exploring those flexibilities nationally. This contradiction will make WIPO's task all the more

difficult since those member states, who are most supportive of the Development Agenda, may resist its implementation in their own countries. While international governments must deal with this kind of inconsistency all of the time, a weak and rudderless organization such as WIPO has little hope of navigating itself through such an environment.

All of these three reasons—that WIPO is not able to manage the cultural change required by the Development Agenda, that WIPO is not constructed institutionally to deal with substantive norm development adapted to developing countries, and that the member states internally hold contradictory positions over the Development Agenda—point to WIPO’s incapacity to implement the agenda on its own. While those member states and non-governmental organizations (NGOs) that militated for the agenda have celebrated its passage, even they remain skeptical about WIPO’s commitment to it (Knowledge Ecology International 2007).

BUILDING A NETWORK AROUND WIPO

The situation is far from hopeless, however. While WIPO cannot, and should not be trusted to, implement the Development Agenda, other organizations can. Perhaps the most important recommendation of the agenda will turn out to be Recommendation No. 43: “To consider how to improve WIPO’s role in finding partners to fund and execute projects for IP-related assistance in a transparent and member-driven process and without prejudice to ongoing WIPO activities” (WIPO 2007). Given that WIPO is not currently in a position to carry out its own agenda, it should find and fund those who do.

As noted earlier, WIPO has grown rich from the administration of various IP-related treaties. It can and should use these funds to finance organizations that possess the knowledge, skill, neutrality, and commitment that WIPO currently does not possess. WIPO should therefore immediately develop a transparent process that will provide funding for the type of training and capacity-building activities that member states have requested. WIPO should no longer be responsible for decision making with respect to projects and for the selection of partners, and these responsibilities should be placed in the hands of external actors.

Included in this group of external actors are several inter-governmental organizations that may be able to provide assistance. The UN Development Programme, the Secretariat of the Convention on Biological Diversity, the Organization for Economic Co-operation and Development, the World Bank, the WHO, and the WTO are presently engaged

in initiatives related to IP and development. This multiplication of fora can be either a blessing or a curse. On the one hand, it creates greater avenues for competing and incompatible approaches to IP, leading to ever-greater opportunities for strategic forum shifting. On the other hand, if these organizations coordinate their activities, then together they can quickly push the Development Agenda forward. WIPO can play an extremely helpful role in ensuring that the latter, not the former, takes place. It can coordinate the activities of these organizations by engaging them as partners in carrying out portions of the Development Agenda. That is, WIPO can help build a broad consensus around IP and development, ensure consistency in the “regime complex,” and create new opportunities for valuable cross-issue collaboration (Helfer 2004).

Beyond these inter-governmental organizations, academics, think-tanks, and non-profit organizations have even greater expertise in training and in-country capacity building. Of particular importance will be organizations that have experience with the business sector since, for better or worse, IP will inevitably engage the private sector (in fact, it would not be needed without it). More general and activist NGOs may, on the other hand, provide assistance in pushing out the boundaries of discourse to include a greater number of communities and more points of view. All are necessary for a full and effective implementation of the Development Agenda.

One interesting example of a public-private partnership that has contributed significantly to framing the IP rights development nexus is the UN Conference on Trade and Development–International Centre for Trade and Sustainable Development (UNCTAD-ICTSD) Capacity Building Project on Intellectual Property Rights. UNCTAD contributed the funding and the credibility of a UN agency to the initiative, while the ICTSD brought the flexibility and adaptability of a NGO. Together, they created a successful platform through which academics, advocates, and policy makers can discuss the development implications of international IP law.

One can draw two lessons for WIPO from this partnership: (1) to engage multiple partners and (2) to work with organizations that have direct connections to bureaucrats in national capitals. On the first point, although UNCTAD decided to invest most of its modest IP-related capacity-building efforts in the Capacity Building Project on Intellectual Property Rights, WIPO, which has greater assets, would benefit by diversifying its partners. This seems necessary to reduce the risk that a single interest group might capture the development debate at WIPO. While ICTSD

did not try to do so, being itself very inclusive, there is a risk that another partner could. Thus, extending the spectrum of partners would likely enlarge the variety of views that are being considered.

Second, given the fact that not only the UNCTAD-ICTSD program but also many other initiatives are aimed at international negotiators visiting Geneva, WIPO should concentrate its efforts on unmet needs, particularly at the national level. There is a great need for bureaucrats and decision makers located in national capitals (and elsewhere within nations) to understand the implications of IP for health, the environment, education, and culture. WIPO should likely aim at meeting this need instead of duplicating the efforts of others. Further, developing country negotiators have little time to participate in the initiatives occurring in Geneva. Their stays in Geneva are limited due to cost, their portfolios are large and transversal, and their resources limited. They simply cannot afford the time to engage in events in Geneva, even if these events are free (Busch, Reinhardt, and Shaffer 2008). WIPO should therefore seek partners that have a direct connection with the stakeholders in the national capitals and outside the traditional international IP circles. Further, while large transnational NGOs and industry associations have become the usual participants in the global debate, it is crucial for WIPO to also reach the voiceless small businesses, university technology transfer offices, regional governments, local communities, artists, and scientists.

Outsourcing the implementation of the Development Agenda should not be taken as a sign of WIPO's defeat: quite the contrary. It is rather a crucial first step in demonstrating that WIPO is willing to enter into meaningful communication with its surrounding community. By opening its doors to academics, researchers, and other experts, by building trust and transparency, and by funding those who currently possess the capacity to provide assistance to developing countries, WIPO would be moving toward the incorporation of the Development Agenda within its policies. Such a change would also significantly contribute to WIPO's ability to react flexibly in the future to external pressures and environmental changes. After all, there is no one final lesson to be learned or one ultimate organizational change to implement—WIPO will undoubtedly face other crises and must remain in a position that will enable it to keep learning. From this perspective, a more decentralized and horizontal governance structure based on transnational networks would ensure a steady flow of new ideas, a direct involvement of small and remote actors, an improved diffusion of innovative and best practices, and, ultimately, an enhanced capacity for adaptation. Outsourcing is not only the most rational option for development, but it is also in WIPO's best interests.

NOTES

- 1 Development Agenda for WIPO, <http://www.wipo.int/export/sites/www/ip-development/en/agenda/recommendations.pdf>.
- 2 Convention Establishing the World Intellectual Property Organization, 14 July 1967, in *Treaties and International Agreements Registered or Filed or Reported with the Secretariat of the United Nations*, 828, no. 11846 at 5.
- 3 The report measures transparency “by analysing (1) whether organisations make a commitment to transparency and have in place a policy or other written document, underpinned by principles of good practice, that guide their approach to information disclosure; and (2) whether organisations have in place systems to support compliance with these commitments” (Blagescu and Lloyd 2006, 25).
- 4 Patent Co-operation Treaty, done at Washington on June 19, 1970, amended on September 28, 1979, and modified on February 3, 1984; and on October 3, 2001 (Geneva, World Intellectual Property Organization, 2007); Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods of April 14, 1891 I. Act revised at Washington on June 2, 1911 at the Hague on November 6, 1925, at London on June 2, 1934, and at Lisbon on October 31, 1958. II. Additional Act of Stockholm of July 14, 1967; and as amended on September 28, 1979 (Geneva: World Intellectual Property Organization, 2008) the Hague Agreement Concerning the International Registration of Industrial Designs of November 6, 1925 (Geneva: World Intellectual Property Organization, 2008); and the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration as revised at Stockholm on July 14, 1967, and as amended on September 28, 1979 (Geneva: World Intellectual Property Organization, 2008).
- 5 Article 46(II) of Law no. 9610/98 (Brazilian copyright law) sets stringent obstacles for photocopying copyrighted materials, even for educational purposes. Bill no. 1.197/07 forbids the use of photocopy machines on university premises. I am grateful to Edson Rodrigues, Jr., for drawing these provisions to my attention. WTO General Council, Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health, WT/L/540 and Corr. 1, 1 September 2003.

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6

The Role of WIPO's Leadership in the Implementation of WIPO's Development Agenda

SISULE F. MUSUNGU

INTRODUCTION

Three years after the initial proposal by Argentina and Brazil, WIPO adopted recommendations for a Development Agenda in September 2007.¹ This agenda is a major achievement in the history of WIPO. This historic moment was, however, overshadowed by the controversy regarding the conduct of the organization's former director-general, Kamil Idris.² The full implementation of WIPO's Development Agenda will depend on avoiding future leadership crises. There are several reasons why the effective leadership of WIPO is crucial for the implementation of the Development Agenda.

The smooth election of a new high-calibre director-general at the September 2008 WIPO General Assembly is an important step toward restoring WIPO to normalcy in terms of the implementation of its programs and activities. A large number of WIPO's future programs and activities will include the implementation of the Development Agenda. Ultimately, the leadership provided by the incoming director-general, as head of WIPO's Secretariat, which has a crucial role to play in the implementation of the agenda, will significantly shape the nature and impact of the reforms introduced in WIPO. The new director-general will also have to play an important role in healing the rifts that have developed in WIPO due to the controversy surrounding the outgoing director-general. Cooperation from the member states will be particularly important in providing smooth deliberations and action in the Committee on Development and Intellectual Property (CDIP) as well as at the General Assembly, which annually discusses the implementation of the agenda or new development-related issues.

This chapter discusses the relationship between the leadership of WIPO and the Development Agenda. The chapter starts with a brief review of the functions and role of WIPO's Secretariat, including the role of the director-general as the chief executive of the Secretariat, in formulating policy and programs. Thereafter, this chapter turns to a discussion of the linkages between WIPO's leadership and the Development Agenda at three levels. First, the chapter considers the connection between how WIPO has been led in previous years and its need for a development agenda. Second, it examines the impact of the leadership crisis, which developed following the allegations and eventual resignation of Kamil Idris, on the Development Agenda. Third and finally, this chapter concludes with a discussion of what will be required of the incoming WIPO director-general to ensure the successful implementation of the agenda.

THE ROLE OF WIPO DIRECTOR-GENERAL IN SHAPING NEGOTIATING PROCESSES AND IMPLEMENTING PROGRAMS

The Convention Establishing the World Intellectual Property Organization establishes an International Bureau as the Secretariat of the organization.³ The International Bureau is headed by the director-general who is designated under the convention as the chief executive. The director-general is assisted by two or more deputy directors general.⁴ In terms of the functions of the director-general, the convention states that his/her main functions shall be to prepare the draft programs and budgets and periodical reports on activities and serve as *ex-officio* secretary to the General Assembly, the conference, the Coordination Committee, and any other committee or working group. In practice, the director-general and, by extension, the International Bureau has played a much more significant role in shaping the direction of the organization than the merely secretarial functions that seem to be implied in the convention (Musungu and Dutfield 2003).

In particular, the director-general, as Graham Dutfield and I (ibid.) demonstrate elsewhere, plays a significant role in determining the strategic vision of the organization, shaping the nature and final outcome of treaty and other negotiations and discussions,⁵ drafting the recommendations by various bodies, admitting observers to various WIPO bodies, and preparing the draft agenda for the General Assembly. In at least one body, the Working Group on the Reform of the Patent Cooperation Treaty, a member of the International Bureau, has chaired some of the sessions.

While the influence of the International Bureau can be significantly reduced in treaty negotiations, which are typically driven by member states, it is much more difficult to curtail the International Bureau's influence in soft law processes, especially where such soft law can emanate from non-member bodies such as the advisory commissions. For example, in 2000, WIPO's Policy Advisory Commission (2000) adopted the World Intellectual Property Declaration, which makes far-reaching recommendations, and stated that the declaration should "be made readily available to all the peoples of the earth." The functions and role of the director-general in influencing the direction of WIPO's negotiations places him or her in a position to facilitate or frustrate efforts to integrate the development dimension into WIPO's activities. The impact, either positive or negative, will be significant (Musungu and Dufield 2003, 8–10).

WIPO LEADERSHIP AND THE NECESSITY FOR A DEVELOPMENT AGENDA

The proposal for the establishment of a Development Agenda for WIPO by the group Friends of Development was intended to provide a platform for long-term reforms at WIPO to ensure that the organization's programs and activities would be supportive of the development needs of its member states and the broader public interest (Chon 2006; Musungu 2005).⁶ In broad terms, changes are targeted in four areas. In particular, the Development Agenda seeks to ensure that:

- treaties and other intellectual property (IP) standards developed within the organization will have a better balance between promoting the public interest and the economic gains that accrue to rights holders;
- WIPO is not limited by the narrow interests of a small set of industries such as those that Keith Maskus and Jerome Reichman (2004, 295) have called "the knowledge cartel";⁷
- WIPO treaties and other IP standards will evolve, and be developed, based on better socio-economic and other evidence regarding the benefits and costs of such treaties or standards for different countries and stakeholders; and
- WIPO, as an organization, will be more democratic in terms of the accountability of its Secretariat to the member states and the global community and in terms of the transparency of its management and other activities.

Consequently, beyond the substantive integration of development and public interest policy into WIPO's work, the Development Agenda targets important governance and leadership questions. In particular, a number of proposals relating to technical assistance, norm setting, and governance are specifically addressed in relation to the conduct of the leadership of the WIPO Secretariat. In its elaboration of a proposal to establish a development agenda for WIPO, the Friends of Development explain the need for:

- ensuring that the WIPO Secretariat does “not play a substantive negotiating role by endorsing or supporting particular proposals for the implementation or development of intellectual property rules or standards” (WIPO 2005, para. 43);
- WIPO's formal and informal meetings or consultations to be held “in an open and transparent manner that involves all interested Members States” (ibid., para. 25);⁸
- WIPO to remain a member-driven organization “where the role of the Secretariat is focused on facilitating the work of the Members and implementing decisions and instructions received from Member States” (ibid., para. 27);
- a WIPO Evaluation and Research Office, which “would provide a transparent, independent and objective mechanism ... through which WIPO's programmes and activities would be evaluated.” This office would have the effect of “enhancing the credibility of WIPO and its programmes” (ibid., para. 29); and
- re-evaluating the role and relevance of the Policy Advisory Commission and the Industry Advisory Commission bodies that had been created by the director-general to advise him (ibid., para. 32).

These and other related proposals demonstrate clearly that poor leadership and/or poor judgment by the WIPO leadership, including the perception that the WIPO director-general and Secretariat take sides in norm-setting processes that were intended to be member driven, provide one of the important justifications for the need for a Development Agenda for WIPO.

THE IMPACT OF WIPO'S LEADERSHIP CRISIS ON THE DEVELOPMENT AGENDA

The leadership crisis at WIPO that transpired in 2007 and 2008 challenged the implementation of WIPO programs and activities including the Development Agenda (Musungu 2007).

However, the crisis may also have been a blessing in disguise for the Development Agenda. On the one hand, it is obvious that the chasms that were opened by the Idris debacle are likely to haunt WIPO for some time to come. The initial phase of the implementation of the Development Agenda will obviously be affected by the crisis. The reforms that were envisaged by the agenda could not have happened with an embattled director-general and a divided Secretariat, nor could they proceed with a sharply polarized membership (New 2008a). The delay in the adoption of the WIPO budget due to the crisis also had an important impact.

Even after the final resolution of the leadership question, it is likely that the divisions among the membership will ultimately affect all of the key discussions, including the implementation of the Development Agenda beyond 2008. There is also the possibility that problems caused by the leadership crisis may continue to simmer much longer, which may cause significant disruption to WIPO's activities, including those related to the Development Agenda. The full implications of how this crisis has affected the implementation of the Development Agenda and WIPO's overall operations may not become apparent for some time.

On the other hand, the leadership crisis at WIPO could be a positive development with respect to the agenda's implementation. To start with, because the adoption of the Development Agenda took place at the meeting at which the leadership dispute erupted, developed countries had other priorities than blocking the Development Agenda or otherwise frustrating the adoption of the agenda. It also meant that the main proponents of the Development Agenda had a significant interest in resolving the matter more speedily than they may have been otherwise inclined to do. This factor played a role in Idris's decision to resign from his position as opposed to fighting it out to the bitter end. A drawn out crisis would surely have negatively affected the adoption of the Development Agenda.

The falling out between WIPO's member states and Idris's resignation, which forced an early election for director-general, offered important opportunities for the proponents of the Development Agenda. First, because of the leadership crisis, there was more openness among WIPO's member states and other stakeholders in their consideration of reforms for the organization. Such an attitude may have permitted deeper structural and organizational changes than would have been otherwise possible with stable leadership. Openness to deeper reform provides more opportunities to entrench the Development Agenda recommendations into WIPO's programs.

Second, the high profile nature of the Development Agenda means that it became a campaign issue in the director-general election. By becoming a campaign issue, it is fair to say that the Development Agenda and its main proponents were better able to shape the race and its outcome. Although the new director-general might not necessarily be more enthusiastic about the Development Agenda, he will have spent considerably more time seeking to understand and develop implementation strategies for the Development Agenda than would have been otherwise possible (New 2008b). The result will be that the new director-general will be better placed to direct the Secretariat on the various issues confronting it.

IMPLEMENTING THE DEVELOPMENT AGENDA: WHAT IS REQUIRED OF THE NEW WIPO LEADERSHIP?

The full implementation of the Development Agenda will entail significant reform of WIPO. Coupled with the implementation of the recommendations from the *Report on Desk to Desk Assessment* (WIPO n.d.)⁹ and the new budgeting and auditing structure, WIPO is in the midst of its biggest reform since it was founded some forty years ago. For the organization to navigate these major reforms, it will require leadership from the top. In other words, the vision, attitude, and management abilities of the director-general will play a significant role in shaping the future of WIPO, including how the Development Agenda is implemented. It is also worth remembering that in addition to the Development Agenda's aim to change the way the WIPO Secretariat operates, the Secretariat has the primary role of implementing a significant number of the recommendations.

The new leadership at WIPO will therefore have to manage the internal changes and reforms that are being made necessary with the Development Agenda, while, at the same time, coping with a dynamic external environment. Apart from the current crisis at the organization, the world of IP, let alone the knowledge economy, is likely to change drastically during the new director-general's term in office (European Patent Office 2007). To be able to steer the implementation of the Development Agenda in a dynamic direction requires that the new leadership at WIPO have the ability to engage intellectually with substantive issues; be able to demonstrate managerial competence at a global level; and display political maturity (IQsensato 2008a–e). If the new director-general fails to solve the organization's current management problems, to keep the organization relevant by engaging it with the current knowledge governance and IP

debates, or to heal the divisions among the staff and the member states, then realizing the vision of the proponents of the Development Agenda will be exceedingly difficult. More concretely, in the context of the implementation of the Development Agenda, the new director-general could start by ensuring that he:

- appropriately reorganizes the International Bureau in order to be able to efficiently undertake the large range of tasks assigned to it under the various recommendations and to support the work of the member states in the CDIP;
- incorporates the thinking behind the Development Agenda into the strategic vision of WIPO; and
- takes the lead in reorienting WIPO's training programs, including the courses delivered by the WIPO Worldwide Academy.

CONCLUSION

The leadership of WIPO is intimately linked to whether or not the Development Agenda will be successfully implemented. This close connection is due to the fact that there are several linkages between the Development Agenda and the leadership of the organization as demonstrated in this chapter. First, the establishment of a development agenda for WIPO was, in part, a response to the insensitivity of the WIPO leadership to the concerns of developing countries and public interest groups. Second, the WIPO leadership crisis, occasioned by the Idris saga, has had a negative impact on the prospects for successfully implementing the agenda. At the same time, however, the crisis may have also opened up possible opportunities for further entrenching development concerns into WIPO—for example, by allowing the agenda to be a campaign issue in the election of the new director-general. Finally, because of the role of the International Bureau in implementing a large number of the agenda's recommendations, and facilitating the work of the CDIP, the director-general of WIPO will have a crucial role to play in ensuring the successful implementation of the agenda.

NOTES

- 1 The Development Agenda for WIPO, <http://www.wipo.int/export/sites/www/ip-development/en/agenda/recommendations.pdf>, is a set of forty-five recommendations for the reform of WIPO, organized under six clusters, namely: technical assistance and capacity building; norm-setting; technology transfer, information, and communications technologies (ICTs) and access to knowledge (A2K); assessment, evaluation, and impact studies; institutional matters including the mandate and governance; and other issues.

- 2 Former director-general Dr. Kamil Idris was accused of falsifying his age at the time of his employment with WIPO, among other malpractices. For useful coverage of the controversy, including issues raised by various parties, see Intellectual Property Watch Blog at <http://www.ip-watch.org/>.
- 3 Convention Establishing the World Intellectual Property Organization, 14 July 1967, in *Treaties and International Agreements Registered or Filed or Reported with the Secretariat of the United Nations*, 828, no. 11846.
- 4 *Ibid.*, Article 9.
- 5 For example, under the General Rules of Procedure of the WIPO General Assembly, the director-general or staff member of the International Bureau designated by him/her can speak, with the approval of the chairman, at any time during a session and make statements on any subject under discussion (WIPO 1998). The various WIPO committees apply the same rule in their sessions.
- 6 The Friends of Development is made up of Argentina and Brazil, which jointly presented the original proposal for the establishment of a development agenda for WIPO and the twelve other countries that co-sponsored this proposal, namely Bolivia, Cuba, the Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania, and Venezuela.
- 7 Maskus and Reichman (2004, 295) identify the knowledge cartel as being industries or companies that depend on the sales of existing innovations and therefore push their governments to regulate the global market, for example, through WIPO treaties, in a manner that would enable them to lock in their temporary competitive advantages (incumbency) without necessarily benefiting the global public interest in innovation and competition.
- 8 The call for transparency in the organization of meetings was in most part a reaction to the so-called Casablanca conclave on the draft Substantive Patent Law Treaty (SPLT). (Different versions of this document exist, since it went through a process of evolution. See <http://www.wipo.int/patent-law/en/harmonization.htm>.) The incident related to a case where the director-general of WIPO convened a group of handpicked individuals in Casablanca, Morocco, to endorse a proposal by developed countries, the so-called Group B of WIPO, on how to proceed regarding the SPLT, notwithstanding the fact that the majority of developing countries had specifically opposed the said proposal in previous sessions of the WIPO Standing Committee on the Law of Patents.
- 9 This report, prepared by Price Water House Coopers, was commissioned on the authority of the WIPO General Assembly to carry out a comprehensive desk-to-desk assessment of WIPO human and financial. The report makes a number of important recommendations to improve WIPO human and financial management systems.

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7

Building Intellectual Property Coalitions for Development

PETER K. YU

INTRODUCTION

In October 2004, Argentina and Brazil introduced an important proposal to establish a development agenda within WIPO. This proposal “call[ed] upon WIPO General Assembly to take immediate action in providing for the incorporation of a ‘Development Agenda’ in the Organization’s work program” (WIPO 2004). After years of deliberation in the Provisional Committee on Proposals Related to a WIPO Development Agenda and the Inter-sessional Intergovernmental Meeting on a Development Agenda for WIPO, the Development Agenda was finally adopted in October 2007 (WIPO 2007). The adopted agenda includes forty-five recommended proposals that are grouped into six different thematic clusters: (1) technical assistance and capacity building; (2) norm setting, flexibilities, public policy, and public domain; (3) technology transfer, information and communication technologies, and access to knowledge; (4) assessment, evaluation, and impact studies; (5) institutional matters, including mandate and governance; and (6) other issues.

Although the WIPO Development Agenda is key to reforming the current international intellectual property (IP) regime, similar pro-development initiatives have been undertaken in international fora outside of WIPO. Within the World Trade Organization (WTO), the Doha Development Round of Trade Negotiations (Doha Round) resulted in the adoption of the Doha Declaration on the TRIPS Agreement and Public Health (Doha Declaration) and a protocol to formally amend the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement). If the amendment is ratified by two-thirds of the WTO membership by

December 2009, the proposed Article 31 *bis* of the TRIPs Agreement will allow countries with insufficient or no manufacturing capacity to import generic versions of on-patent pharmaceuticals.¹

At the World Summit on the Information Society, which was held in phases in Geneva and Tunis, less developed countries—including both developing and least developed countries²—underscored their concerns over the widening digital divide between developed and less developed countries and the global importance of access to information and knowledge (WSIS 2003; 2005). At the World Health Assembly and within the Commission on Intellectual Property Rights, Innovation and Public Health of the World Health Organization, the lack of access to essential medicines in less developed countries and the unintended consequences of the TRIPs Agreement have received growing attention and debate (WHO 2006).

Most recently, the Committee on Economic, Social and Cultural Rights has provided an authoritative interpretive comment on Article 15(1)(c) of the International Covenant on Economic, Social, and Cultural Rights (1966), which requires each state party to the covenant to “recognize the right of everyone ... [t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author” (United Nations 2006). In an earlier resolution, the Sub-Commission on Human Rights also reminded governments “of the primacy of human rights obligations over economic policies and agreements” and the importance of other human rights, such as the right to food and the right to health (United Nations 2000).

In short, an extensive and wide-ranging array of pro-development efforts has been undertaken to revamp the international IP regime. A large number of international fora are involved, and support from non-governmental organizations (NGOs), activist groups, and academics is abundant. In light of this momentum, less developed countries now have a rare and unprecedented opportunity to reshape the international IP system in a way that would better advance their interests.

If these countries are to succeed, however, they need to take advantage of the current momentum, better coordinate with other countries and NGOs, and more actively share with others their experience, knowledge, and best practices. With these goals in mind, this chapter explains how building IP coalitions for development (IPC4D) can help less developed countries strengthen their collective bargaining position, influence negotiation outcomes, and promote effective and democratic decision making in the international IP regime. The chapter then discusses four coordination strategies that can be used to develop these coalitions. It

concludes with a discussion of the various challenges confronting the creation and maintenance of these coalitions.

IP COALITIONS

IPC4D is a concept that can take many different forms—blocs, alliances, regional integration, or other cooperative arrangement. The resulting coalitions have several attractive features. By bringing countries together, the coalitions can achieve leverage that does not exist for each less developed country on its own. If used strategically, they will enable less developed countries to shape a pro-development agenda, articulate more coherent positions, or even establish a united negotiating front. The coalitions will also help less developed countries establish a more powerful voice in the international debates on public health, IP, and international trade.

Moreover, from the standpoint of international relations, the creation of IPC4D will help many less developed countries combat the external pressure that each country will face on a one-to-one basis from the European Communities, the United States, or other powerful trading partners (Bird and Cahoy 2008, 317). With the appropriate arrangements, these coalitions may even facilitate the transfer of technology from the haves to the have-nots, targeting a major weakness of the current international IP regime (Yu 2008, 368–69).

If regional coalitions are set up—such as through regional economic integration; the institution of regional organizations, mutual recognition systems, or procurement systems; the facilitation of regional cooperation in research and development; or the creation of regional competition enforcement mechanisms—there may be additional benefits. As Sisule Musungu, Susan Villanueva, and Roxana Blasetti (2004, xiv) have noted in a South Centre study,

[a] regional approach to the use of TRIPS flexibilities will enable similarly situated countries to address their constraints jointly by drawing on each others' expertise and experience and by pooling and sharing resources and information. This approach has several advantages. First, it creates better policy conditions for addressing the challenges of implementing TRIPS flexibilities, which can be daunting for each individual country. Second, a common approach to improve access to essential medicines[, knowledge, information and communication technologies, and other key development resources] will enhance the efforts by developing countries to pursue common negotiating positions at the WTO and in other multi-lateral negotiations such as those on a substantive patent law at the ...

WIPO. In addition, a regional approach coincides with the objective of enhancing South-South cooperation on health and development.

Consequently, if strategically utilized, regional South-South frameworks will significantly help developing countries devise ways by which national constraints in the use of TRIPS flexibilities can be overcome.

Likewise, two political scientists remind us that “[s]hared historical experiences among states of a particular region develop over time ... and the cultural affinities which facilitate commerce are more likely with neighbouring peoples than with those from afar” (Coleman and Underhill 1998, 1). It is, therefore, no surprise that Amrita Narlikar (2003, 155) finds “coalitions that utilize regionalism as a springboard for bargaining [to] be ... ‘natural coalitions.’”

While IPC4D have many attractive features, building these coalitions is important for four additional reasons. First, the WTO has dominated current international IP discussions, and group representation of less developed countries is particularly deficient in this international trading body. As Sonia Rolland (2007, 483) recently noted, “[a]lthough the organization operates on a one-country-one-vote basis and on a consensus mechanism ... developing countries still find themselves in a relatively marginalized position and experience difficulties in linking their development agenda to multilateral trade negotiations.” Collective bargaining is therefore greatly needed.

Second, there is a rare and unprecedented opportunity for less developed countries to reshape the IP debate. At recent WTO ministerial conferences in Doha, Cancún, and Hong Kong, less developed countries have built considerable momentum in pushing for reforms that would recalibrate the balance of the international trading system. Greater collaboration, therefore, would help less developed countries take advantage of this momentum while protecting the gains they already have obtained in recent negotiations.

Third, and related to the second, the Doha Round will conclude soon, and development issues may not feature as prominently in the next round of WTO negotiations as in the current round. Indeed, without the urgency created by the 11 September tragedies, the fatalities caused by the 2001 anthrax attacks in the United States, and the United States’ resulting general interest in working more closely with the less developed world, one has to wonder whether the Doha Round could have been negotiated as far as it has gotten (Amoore, Germain, and Wilkinson 2003, xiii). Thus, if less developed countries want to continue their success in future rounds of trade negotiations, they need to significantly increase their collective bargaining leverage.

Finally, the international IP regime has recently expanded to cover issue areas that are traditionally covered by other international regime or fora, creating what I have termed the “international intellectual property regime complex” (Yu 2007c, 13–21).³ As a result of its complexity and fragmentary nature, this conglomerate regime is likely to harm less developed countries more than it has harmed developed countries (Benvenisti and Downs 2007). The growing complexities have also upset the existing coalition dynamics between actors and institutions within the international trading system, thus threatening to reduce the gains made by less developed countries through past coalition-building initiatives (Yu 2007c, 17–18).

COORDINATION STRATEGIES FOR DEVELOPING IPC4D

To help develop IPC4D, this section discusses four different coordination strategies: (1) the initiation of South-South alliances; (2) the facilitation of North-South cooperation; (3) joint participation in the WTO dispute settlement process; and (4) the development of regional or pro-development fora. It also explains the need for, and benefits of, each strategy. Since these four strategies are not intended to be mutually exclusive, countries seeking to strengthen their bargaining position are encouraged to maximize the impact by using a combination of these strategies.

South-South Alliances

Since the failure of the fifth WTO Ministerial Conference in Cancún (Cancún Ministerial) in 2003, the United States has initiated a divide-and-conquer strategy that seeks to reward countries that are willing to work with the United States while undermining efforts by Brazil, India, and other G-20 members to establish a united negotiating front for less developed countries (Yu 2006a, 403). Although the United States had begun negotiating new bilateral and regional trade agreements before the failed ministerial conference, these agreements have been increasingly used as a means to isolate uncooperative less developed countries. As Robert Zoellick, the former US trade representative, wrote in the *Financial Times* shortly after the Cancún Ministerial, the United States will attempt to separate the “can-do” countries from the “won’t-do” countries and “will move towards free trade with [only] can-do countries” (2003, 23).

This isolation strategy is not new. It was used by the United States to increase its bargaining leverage during the negotiation of the TRIPs Agreement. At that time, the United States used section 301 provisions to isolate major opposition countries, such as Argentina, Brazil, India,

Japan, Mexico, South Korea, and Thailand (Yu 2004, 413). South Korea, for example, was threatened with sanctions for inadequate protection for computer programs, chemicals, and pharmaceuticals as well as in the areas of copyrights, patents, and trademarks (Watal 2001, 18). Likewise, the US trade representative included on the Section 301 Priority Watch List or Watch List half of the ten hardliner countries that refused to expand the mandate of the General Agreement on Tariffs and Trade (1947) to cover substantive intellectual property issues, namely Argentina, Brazil, Egypt, India, and Yugoslavia (Drahos 2002, 774).

If less developed countries are to counterbalance the United States' divide-and-conquer strategy, lest more TRIPs-plus standards be developed at both the multilateral and regional levels, they need to initiate a combine-and-conquer strategy. Simply put, they need to build more coalitions within the less developed world. A recent successful example was the development of the G-20 during the Cancún Ministerial. Although its success was short-lived, the group was instrumental in preventing the WTO member states from reaching agreement on such issues as investment, competition policy, government procurement, and trade facilitation. Its success eventually led to the premature ending of the ministerial conference and the Bush administration's change of focus from multilateral negotiations to bilateral or regional agreements.

Today, there is a tendency to view bilateral or regional agreements with skepticism, partly as a result of their wide and controversial uses by the European Communities and the United States to ratchet up global IP standards. However, it is important to distinguish these North-South agreements from the more favourable South-South agreements. Bilateral or regional agreements are not always destructive to the international IP regime. Depending on their terms, South-South agreements may serve as an effective way to build coalitions within the less developed world. They may also promote multilateralism by fostering common positions among participating countries.

North-South Cooperation

Although the WTO and the international IP regime remain heavily state-centred, the participation of non-state actors (such as multinational corporations and NGOs) and sub-state agents has grown considerably. During the Cancún Ministerial, "most high-profile [NGOs], such as Greenpeace, Oxfam, and Public Citizen, explicitly backed the developing countries' stand and heavily criticized developed countries, in particular the US and the EU, for a lack of consideration for their poorer trading partners"

(Cho 2004, 235). While “[s]ome operated as think tanks in supporting the agenda of developing countries[, o]thers issued statements expressing political support for the demands of the G20” (Hurrell and Narlikar 2006, 424).

In addition, sub-state agents have become increasingly active. As Chris Alden (2007, 29) has noted with respect to China’s government and business ties in Africa, Chinese provincial and municipal authorities have undertaken major initiatives to establish formal and informal ties in South Africa, the Democratic Republic of Congo, Namibia, Angola, and Nigeria. In recent years, there has also been an interesting emergence of non-national systems, such as the adoption of the Uniform Domain Name Dispute Resolution Policy (UDRP) in October 1999 by the Internet Corporation for Assigned Names and Numbers (ICANN), a private not-for-profit corporation in California (Yu 2007a, 88–91).

Thus, instead of focusing on state-to-state relationships, less developed countries need to better understand the importance and challenges for working with NGOs and sub-state agents and within non-national systems. They also “need to work consistently with US and European political allies to alter the US and European domestic political contexts” (Shaffer 2004, 479). In doing so, these allies will be able to obtain support within the domestic deliberative processes in developed countries that is similar to the support they have already received within their own countries or in the less developed world. Even if these countries are unable to obtain their desirable policy outcomes through the political processes in the developed world, their foreign allies may be able to significantly reduce the political pressure developed countries will exert upon their less developed counterparts.

To date, there has been significant collaboration between policy makers in less developed countries and NGOs in both developed and less developed countries. Academics and the media in the North have also played important roles. For example, academics and their institutions have helped identify policy choices and negotiating strategies while developing technical capacity in less developed countries. Likewise, less developed countries can increase their leverage and negotiating outcomes if they are able to “capture ... the attention of the mass media in industrial countries and persuade ... the media to reframe the issue using a reference point more favorable to the coalition’s position” (Odell and Sell 2006, 87). As John Braithwaite and Peter Drahos (2000, 576) have noted, “[h]ad TRIPS been framed as a public health issue, the anxiety of mass publics in the US and other Western states might have become a factor in destabilizing the consensus that US business elites had built around TRIPS.”

The WTO Dispute Settlement Process

One of the major features of the WTO is its mandatory dispute settlement process. Although the United States and the European Communities had used the process predominantly in the first few years of the WTO's existence, especially when the disputes involved the TRIPs Agreement, less developed countries have begun to use the process more actively in recent years (Davey 2005, 17 and 24). While Brazil and India initially used the process primarily against less powerful WTO member states, such as Argentina, Turkey, Mexico, Peru, and Poland, they have started to use the process more aggressively against powerful WTO member states, such as the European Communities and the United States.

Today, globalization and international trade have deeply affected domestic policies, and an active participation in the WTO dispute settlement process is of paramount importance to WTO member states. By participating in this process, countries can help develop WTO jurisprudence in a way that can shape the ongoing negotiations in the areas of international trade, IP, and even public health. Gregory Shaffer (2004, 470) describes such participation as negotiation "in the shadow of" the WTO dispute settlement process. As he explains:

Participation in WTO judicial processes is arguably more important than is participation in analogous judicial processes for shaping law in national systems. The difficulty of amending or interpreting WTO law through the WTO political process enhances the impact of WTO jurisprudence. WTO law requires consensus to modify, resulting in a rigid legislative system, with rule modifications occurring through infrequent negotiating rounds. Because of the complex bargaining process, rules often are drafted in a vague manner, thereby delegating de facto power to the WTO dispute settlement system to effectively make WTO law through interpretation.

As a result of the increased importance of WTO jurisprudence and the rigidity of the WTO political process, those governments that are able to participate most actively in the WTO dispute settlement system are best-positioned to effectively shape the law's interpretation and application over time.

Shaffer's approach makes a lot of sense. After all, there is no indication that the WTO dispute settlement panels are biased toward stronger protection of IP rights. In the decisions issued thus far, the panellists have focused narrowly on the language of the TRIPs Agreement, taking into consideration the recognized international rules of interpretation, the context of the TRIPs negotiations, and the past and subsequent developments of relevant treaties. In *Canada—Patent Protection of Pharmaceutical Products* (2000,

para. 7.26), the panel even referred favourably to the limitations and public interest safeguards contained in the TRIPs Agreement. As the panel declared, “[b]oth the goals and the limitations stated in Articles 7 and 8.1 must obviously be borne in mind when [examining the words of the limiting conditions in article 30] as well as those of other provisions of the TRIPs Agreement which indicate its object and purposes.”

Moreover, as I have noted elsewhere in the context of the United States’ ongoing WTO dispute with China over the lack of IP enforcement, the European Communities and the United States did not win all of the disputes “litigated” before the Dispute Settlement Body (Yu 2006b, 939–40). In June 2000, for example, the United States lost its dispute with the European Communities over section 110(5) of the US Copyright Act (1976), which enables restaurants and small establishments to play copyrighted music without compensating copyright holders (*United States—Section 110(5) of the U.S. Copyright Act* 2000). In a subsequent ruling, section 211(a)(2) of the US Omnibus Appropriations Act of 1998 (1998), which prohibits the registration or renewal of trademarks previously abandoned by trademark holders whose business and assets have been confiscated under Cuban law, was found to be inconsistent with the TRIPs Agreement (*United States—Section 211 Omnibus Appropriations Act of 1998* 2002).

In addition, the WTO panel curtailed the ability of the US administration to pursue retaliatory actions before exhausting all remedies permissible under the WTO rules, even though it nominally upheld sections 301–10 of the Trade Act of 1974 (*United States—Sections 301–310 of the Trade Act of 1974* 1999). The Caribbean islands of Antigua and Barbuda successfully challenged US laws on Internet and telephone gambling in *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (2004). An arbitration panel subsequently determined that “the annual level of nullification or impairment of benefits accruing to Antigua is US\$21 million” (*United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* 2007).

While many of the United States’ losses before the WTO Dispute Settlement Body have come at the hand of the European Communities, the WTO dispute settlement process is not only reserved for use by powerful WTO member states. The last dispute has shown that, in the WTO process, even two tiny Caribbean islands can prevail over a trading giant such as the United States. One can imagine how effective the use of this process can be when less developed countries team up with others as co-complainants or third parties. On the one hand, such a collective effort can pull together scarce economic and legal resources to defend laws that

seek to exploit the flexibilities provided by the TRIPs Agreement and that are explicitly affirmed by paragraph 5 of the Doha Declaration. On the other hand, less developed countries can use these resources to design effective strategies to challenge non-TRIPs-compliant legislation in developed countries.

Compared to the uncoordinated arrangement where each country has to file a separate complaint, or join the complainant as a third party, the collaborative strategy has at least five benefits. First, countries will be able to significantly reduce the costs of WTO litigation, thus lowering the threshold for determining whether it would be worthwhile to file a WTO complaint. Shaffer's (2004, 473) analysis has shown how it may not be worthwhile for a small or poor country to file a WTO complaint even when there is a high economic stake. Based on 2004 figures, he found that "an average WTO claim costs in the range of US \$300,000–400,000 in attorneys' fees." Although a potential loss of US \$200,000 in trade may be highly important to the economy of a small, poor country, such a loss does not always justify taking the case to the WTO Dispute Settlement Body or defending it there. Instead, these countries often give up their valid claims (*ibid.*, 472). If they are sued, they often settle the claims either by abandoning legal or policy experiments that are permissible under the WTO agreements or by transplanting laws from abroad against their wishes and to their detriment.

Such an outcome is particularly problematic from the standpoint of the TRIPs negotiations. One of the primary reasons why less developed countries reluctantly agreed to increase IP protection is the ability to use the WTO dispute settlement process as a bulwark against developed countries' coercive, and often unilateral, tactics. As some less developed countries claimed at the time of the negotiations, it would be pointless for them to join the WTO if the United States were able to continue imposing unilateral sanctions despite their membership (Yu 2006a, 372). Unfortunately, the high start-up costs required by the WTO dispute settlement process have made it very difficult for less developed countries to benefit from the hard-earned bargains they won through the WTO negotiations.

More problematically, the lack of participation by some less developed countries in the WTO dispute settlement process can hurt the protection of other less developed countries. As Shaffer (2004, 465) reminds us, "[w]ho participates in the institutional process affects which arguments will be presented, which, in turn, affects how the competing concerns over patent protection, public health, and market competition will be weighed." Thus, if the WTO rules are to be shaped to advance the

interests of the less developed world, greater participation by less developed countries in the WTO dispute settlement process is needed.

Less developed countries can also benefit from the additional expertise and resources provided by other less developed countries. Instead of spending a substantial amount of money on outside counsel or spending even more in developing local expertise, less developed countries can take advantage of cost-sharing arrangements and devote more resources to improving the living standards of their nationals (*ibid.*, 475). If these countries team up with countries such as Brazil, China, or India, they can benefit from even more sophisticated expertise. Since the latter are active litigants in the WTO dispute settlement process, they have, over the years, developed considerable expertise that can be shared with other less developed countries.

Moreover, as repeat players in WTO litigation, less developed countries will benefit from the economies of scale in deploying legal resources (*ibid.*, 474). They are also more likely to possess the mindset to plan legal strategies that will help them advance the interests of the less developed world and strengthen their overall legal positions, rather than strategies that seek to win only one case at a time (*ibid.*, 470). In doing so, these countries can use the WTO dispute settlement process effectively to shape both the judicial interpretation and the future negotiation of the TRIPs Agreement in a pro-development manner. They may even be able to regain the momentum that less developed countries lost during the negotiation of the TRIPs Agreement due to their limited understanding of IP rights and weak bargaining power. Thus far, the European Communities and the United States have been able to advance their commercial interests through the WTO dispute settlement process because they are the predominant users of this process (*ibid.*, 470). If less developed countries are to curtail the ability by developed countries to advance these interests, they therefore need to make greater strategic use of the WTO dispute settlement process.

A further benefit of this collective approach is that less developed countries do not need to worry as much about the backlash they might encounter should they individually file a WTO complaint against the European Communities or the United States. As William Davey (1987, 71) has noted, when countries do not face each other often as adversaries in the WTO process, "initiation of a complaint would be something of a slap in the face. The ignominy of a loss would also loom larger." By taking collective action, many otherwise infrequent players in the WTO dispute settlement process will become more frequent players. As they become

involved in more complaints against the European Communities or the United States, and as each of these parties has its share of wins and losses, the impact of a WTO dispute on diplomatic relations will be greatly reduced (Yu 2006b, 945).

Finally, less developed countries may not “have the diplomatic or economic muscle to ensure that the decision is implemented” even if they win their case (Davey 1987, 90). Indeed, as Davey (*ibid.*, 102) points out, there is a good chance that “even massive retaliation by a small country would be unnoticed by a larger one.” Thus, by uniting together, less developed countries may be able to have more leverage at the enforcement level by increasing the economic impact of trade countermeasures permitted by the WTO dispute settlement panel.

Regional or Pro-Development Fora

Regional or pro-development fora are particularly effective means for coordinating efforts by less developed countries in the areas of public health, IP, and international trade. These fora will provide the much-needed focal points for countries to share experience, knowledge, and best practices and to coordinate negotiation and litigation strategies (Musungu, Villanueva, and Blasetti 2004, xiv–xv; Narlikar 2003, 206; Shaffer 2004, 478). Through these fora, less developed countries can “(i) raise political awareness of certain members ... (ii) help define the agenda, prior to the actual negotiations ... and (iii) achieve particular regulatory outcomes on a particular issue or economic sector or sub-sector ... and defend interests in dispute settlement” (Rolland 2007, 499).

In addition, these fora allow countries to reframe issues “in a way that eases impasses” (Odell 2006, 16), thereby providing a mechanism to balance interests internal to the group. In doing so, conflicts or negotiation deadlocks can be resolved before the negotiations are enlarged to include selected developed countries or the entire developed world (Rolland 2007, 501). These fora also facilitate “a pooling of organisational resources, and enable countries with ill-defined interests to avail themselves of the research efforts of allies and a possible country-wise division of research and labour across issue areas” (Narlikar 2003, 14).

Through these fora, the interests of the participating countries would be better and more symmetrically represented (Rolland 2007, 512). The fora would also “help build capacity for the group’s members as they would gain leverage through access to a more central and streamlined channel of information (through the group representation) and, in turn, be able to better formulate their own policy positions” (*ibid.*, 512). In

addition, regional or pro-development fora could help improve the human capital and WTO know-how of less developed countries and their WTO-related knowledge by “better coordinat[ing] training of developing country officials and non-governmental representatives” (Shaffer 2004, 478). These capacity-building functions are especially important, considering the fact that some less developed countries have given up their participation in international fora due to a lack of financial resources or political circumstances.

As commentators have pointed out, many less developed countries “lack the resources ... to send delegates to these fora and thus have resorted to using nongovernmental organizations ... to represent their interests” (McGinnis and Movsesian 2000, 557 n. 256). In one instance, the Foundation for International Environmental Law and Development, a London-based environmental NGO, negotiated a deal to represent Sierra Leone before the WTO Committee on Trade and Environment (Shaffer 2001, 62–63). Even if countries are willing to send delegates, they may have become formally inactive due to their failure to pay dues for a certain period of time. Within the WTO, for example, their inactive status would prevent them from chairing any bodies (Narlikar 2003, 15). Many delegations are also affected by their limited institutional capacity, delegation size, geopolitical capital, and overall expertise (Rolland 2007, 529).

Coordination at the regional level and among less developed countries becomes even more important in light of the proliferation of bilateral and regional trade agreements initiated by the European Communities and the United States. Since these agreements tend to transplant laws based on developed-country models, they are notorious for ignoring local needs, national interests, technological capabilities, institutional capacities, and public health conditions of less developed countries. Even worse, these agreements sometimes call for a higher level of protection than what is currently offered in the developed world (Correa 2004, 93; Yu 2006c, 41). If the European Communities or the United States does not consider it beneficial to have higher protection, one has to wonder why protection needs to be strengthened in countries that have even more limited resources and that do not possess adequate safeguards and correction mechanisms.

If these demands for higher protection are not disturbing enough, less developed countries may be “induced” into signing conflicting agreements with both the European Communities and the United States (Yu 2006a, 407). While these two trading powers are interested in having strong global IP standards, there remain a large number of IP conflicts

between the two. In the copyright context, for example, they take different positions on “the protection of moral rights, fair use, the first sale doctrine, the work-made-for-hire arrangement, and protection against private copying in the digital environment” (Yu 2002, 625–26). They also approach the patent filing process differently and greatly disagree on how to protect geographical indications (*European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* 2005). Indeed, had the United States refused to include geographical indications in the then-proposed TRIPs Agreement, the European Communities’ initial ambivalent position toward the creation of the new agreement might not have changed (Watal 2001, 23).

In view of these differences, conflicts may arise when less developed countries sign the trade agreements supplied by both the European Communities and the United States without appropriate review and modification. To be certain, it is not the fault of these trading powers that policy makers in less developed countries are unable to review or modify the agreement. Oftentimes, it is the result of a lack of resources, expertise, leadership, negotiation sophistication, bargaining power, or some or all of the above. Many policy makers in less developed countries are also blinded by the benefits that their countries *may* receive in other trade areas under a package deal—or, worse, they are just too eager to appease, or develop “friendship” with, the trading powers. Nevertheless, it is still highly lamentable that these countries would enter into conflicting agreements that could be avoided with greater caution, coordination, and information. It is bad enough to be forced to sign a bilateral agreement that does not meet local conditions. It is even worse to be put into a position where one has to juggle two conflicting agreements that do not meet local conditions and are impossible to honour.

Fortunately for less developed countries, regional or pro-development fora may provide the much-needed institutional response to the growing use of bilateral and regional trade agreements to push for stronger IP standards and to further reduce the policy space needed for the development of IP, trade, and public health policies. While the constantly short-staffed Advisory Centre on WTO Law provides legal advice and support in WTO matters and trains government officials in WTO law, they do not provide assistance in coordinating political, judicial, and forum-shifting strategies in an increasingly complex international IP law-making environment (Shaffer 2004, 478). They also provide very limited assistance in developing negotiating strategies concerning the bilateral or regional trade agreements initiated by the European Communities and the United States.

By bringing less developed countries together, these fora would allow policy makers in those countries to share their latest experience and lessons concerning these agreements. In doing so, the participating countries would have more information to evaluate the benefits and drawbacks of the potential treaties. They would also be able to anticipate problems and potential side effects created by these treaties. They might even be able to better design prophylactic or correction measures that would become handy should the treaties prove to be unsuitable for their countries.

Finally, as Sonia Rolland (2007, 505) has pointed out, “the ability or inability of developing countries to form and sustain effective coalitions in the WTO depends not only on the coalitions’ inherent characteristics and the political environment ... but also on the institutional and legal framework in which they operate.” Except for supranational entities such as the European Communities, special classifications such as least developed countries, or recognized regional trade agreements, the WTO offers very limited support for formal representation by groups in policy deliberation. Thus, if less developed countries can use these regional or pro-development fora to develop strategies to push for greater legal or structural changes within international organizations that will make group representation easier to obtain and the institution more coalition-friendly, they are more likely to be able to increase their bargaining leverage and to develop a stronger voice for the less developed world. After all, “the ability to sustain developing country coalitions depends in part on the WTO’s legal structure ... [M]embers whose interests might be more effectively served if they are promoted by a group strategy could [also] benefit from a legal framework that better supports developing country coalitions or groupings” (ibid., 485).

CHALLENGES TO BUILDING IPC4D

Although collective action can play an important role in the international IP regime and the use of the coordination strategies described in this chapter can help less developed countries strengthen their collective bargaining position, there are still many challenges.

Historically, less developed countries have had only limited success in using coalition-building efforts to increase their bargaining leverage (Abbott 2003, 42). Their lack of success was perhaps caused by the fact that these coalitions were usually too ambitious. They were set up to include a broad mandate, diverse membership, complex issues, and incompatible interests. As Amrita Narlikar (2003, 122–23) has shown,

issue-based coalitions work best for small and very specialized economies with common profiles and interests, such as those “small island economies with similar geographic/strategic endowments, concentrated interests in tourism exports, and travel imports.” These coalitions, however, do not work well for larger, more diverse, and often internally conflicting economies (*ibid.*, 176). They also do not work well for a large bloc of less developed countries that have various strengths, sizes, and interests and that are only linked together in an ad hoc fashion (Rolland 2007, 510).

The lack of success by less developed countries to build or maintain coalitions can be further attributed to their “high ... dependen[ce] on the developed countries as the source of capital, whether it is provided through the IMF [International Monetary Fund] or World Bank, or through investment bankers and securities exchanges” (Abbott 2003, 42). This lack of financial independence is further aggravated by a lack of stability in the economies of less developed countries—for example, in India during the negotiation of the TRIPs Agreement and in South America during the negotiation (Yu 2009) of the draft International Code of Conduct on the Transfer of Technology (1981).

Another challenge for less developed countries concerns how to set up a coalition in a way that would prevent the more powerful members from dominating their much weaker and more dependent partners. Since countries with more human capital, technical knowledge, and legal expertise may abuse their leadership roles at the expense of others, it is important to build safeguards into the coalitions to protect the weaker members and to allow them to retain their autonomy and identity. If IPC4D are to be successfully built and maintained, it is also important to develop trust among the participating members so that they can work together closely without worrying about potential exploitation.

These safeguards are particularly important in light of the complex economic interests of the larger developing countries, such as Brazil, China, and India, all of which have grown significantly faster than their poorer neighbours. In many areas of international trade, these middle-income developing countries already “have gained relatively more than their poorer counterparts from the multilateral trade process [and] have increasingly found themselves adopting positions divergent from those of [their poorer counterparts] on the question of preferential access to rich country markets” (Rolland 2007, 536). If history repeats itself, as in the cases of the United States, Germany, Japan, and South Korea, some of these countries eventually will want stronger IP protection once they

become economically developed. They may also benefit from the continued lack of manufacturing capacity in other less developed countries.

Finally, there are “IP-irrelevant” factors—factors that are largely unaffected by IP protection (Yu 2007b, 852–53)—that would make it difficult for countries to co-operate with each other, such as xenophobia, nationalism, racism, mistrust, and resentment. No matter how much more globalized and interdependent the world has become, some countries will always remain reluctant to participate in these coalitions, because of historical conflicts, border disputes, economic rivalries, cultural differences, or spillover issues from other areas.

The existence of all of these challenges, however, does not doom the IPC4D project. Rather, it demonstrates how coalition building is always a work in progress that requires care, vision, and continuous attention between and among the various parties. It also suggests the importance of using regional approaches to alleviate the impact of some of these factors. If the interests of the weaker coalition members are to be protected, a clear and detailed coalition agreement and a carefully designed benefit-sharing arrangement need to be put in place when the coalition is set up. It is also important for the weaker members to obtain a better understanding of how they can take advantage of the coalitions when the interests of the members are still close to each other.

CONCLUSION

There are many benefits to building IPC4D. There are some challenges, however. If countries are to work together to develop successful coalitions, they need to clearly articulate their goals, understand each other better, and work out mutually beneficial arrangements. In doing so, the development of IPC4D is not a mere hope but a realistic goal. The resulting coalitions will not only be able to reduce the ongoing push by the European Communities and the United States to ratchet up global IP standards, but they will also help enlarge the policy space needed by less developed countries for the development of their IP, trade, and public health policies. With better coordination and greater leverage, these countries may even be able to establish, shape, and enlarge a pro-development negotiating agenda that would restore the balance of the international IP system.

NOTES

This chapter has been abridged and adapted from Peter K. Yu, “Access to Medicines, BRICS Alliances, and Collective Action,” *American Journal of Law and Medicine* 34 (2008): 345–94.

- 1 Although the initial deadline for ratification was 1 December 2007, the deadline has been recently extended for another two years (New 2007). As of this writing, slightly over a quarter of the 153 WTO member states, including the United States, India, Japan, China, and most recently members of the European Communities, have ratified the proposed amendment (WTO 2008).
- 2 The TRIPs Agreement distinguishes between developing and least developed countries. This chapter uses “less developed countries” to denote both developing and least developed countries. When referring to the TRIPs Agreement, however, the chapter returns to the terms “developing countries” and “least developed countries.”
- 3 The term “regime complex” originated from Kal Raustiala and David Victor (2004). David Leebron (2002, 18) has also advanced the concept of “conglomerate regime” to describe this new development.

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8

The WIPO Development Agenda: Factoring in the “Technologically Proficient” Developing Countries

SHAMNAD BASHEER AND ANNALISA PRIMI

INTRODUCTION

The WIPO Development Agenda is in many ways, a reaction to the “one-size-fits-all” mantra that has plagued international intellectual property (IP) law making for many years now.¹ As James Boyle (2004, 3–4) puts it so eloquently,

[T]hough WIPO and the Trade Related Aspects of Intellectual Property Rights (TRIPS) both make claims to flexibility, critics have pointed out that the actual practice has been to push the developing countries to adopt “TRIPS-plus” levels of protection ... Again and again, one finds the same assumptions: Rights are always the best path to innovation. More rights means more innovation ... One size fits all. And it is “extra large.”

In an effort to counter this disturbing trend, which does not pay heed to either the relative economic status of the member countries (particularly the developing ones) or to their technological specificity, the Development Agenda clearly spells out that future “norm-setting activities shall take into account different levels of development” (WIPO 2007, Annex, No. 15). Unfortunately, some of the IP and development literature that is skeptical of this trend runs the risk of falling into the same trap of endorsing a one-size-fits-all mentality. At the risk of oversimplification, the broad notion in the literature is this: Developed countries need maximalist IP regimes, as they are highly innovative, and strong IP regimes provide the requisite incentives in this regard. Developing countries require minimalist IP regimes, as they are hardly innovative and are often net importers of technology.²

This chapter argues that the above black-and-white categorization of developed-versus-developing countries fails to account for the technolog-

ical heterogeneity between developing economies. It also ignores technological specificity between different sectors in the same country. In other words, emerging economies such as those of India, China, Brazil, and Russia, which are technologically more proficient in one or more areas of technology, may require different IP norms than their relatively less proficient counterparts in countries such as those in sub-Saharan Africa.

Indeed, viewing developing economies as one monolithic group is likely to endorse the very same one-size-fits-all ill that the development agenda was meant to cure. This chapter proposes a more nuanced approach to classifying developing economies and presents strategies to meet the challenges facing different segments of the developing world.

WHY THE POLARIZED VIEW OF ECONOMIC DEVELOPMENT DOES NOT WORK

The black-and-white categorization of economies as purely developed or developing does not hold true in the context of emerging economies such as India, China, and Brazil. India is neither developed nor developing. India has a rapidly growing economy, and strength in its technology sectors—such as software and pharmaceuticals—bestows upon India some developed-country characteristics (India 2006b). On the other hand, India’s Human Development Index ranks as one of the lowest in the world (UN Development Programme 2007). Over one-quarter of its people live below the poverty line (India 2006a), which keeps India from fully transcending its developing-country status. India continues to possess many of the features of less developed economies, such as a huge share of employment concentrated in the informal sector, a low aggregate productivity in the economy, and substantial disparities in the levels of income (Harriss-White 2004). It is pertinent to note that the technological prosperity witnessed by India is confined to certain “islands of excellence” (“India Bids” 2008). Pharmaceutical patents in India are an excellent example of this pattern. Drastic levels of poverty and the resulting problems associated with drug pricing and affordability warrant a reduction in the scope of patent grants. However, India’s industrial and innovation imperatives demand that incentives be granted in the form of patents to large domestic corporations such as Ranbaxy and Dr. Reddy’s.

The same applies to some of the other developing countries such as Brazil and China. Brazil has a strong aircraft manufacturing sector (Mani and Romijn 2004), and China, already strong in several areas of manufacturing, is gaining proficiency in high-technology areas such as

biotechnology. Yet many of the people populating these countries live in poverty.

We need to therefore move away from an antiquated developed-versus-developing classification and differentiate developing countries according to their technological/innovative proficiencies. Such differentiation would help calibrate IP norms according to the specific developmental needs of the country in question.

The evolution of the BRICS group might represent the first stage in this process of differentiation among developing economies.³ However, this group appears to signal more of a “political” classification today and may not accurately reflect the club of countries that could qualify as “technologically proficient.”

Scholars have worked out indicators to measure technological and innovative capacity of countries.⁴ We use some of these indicators to arrive at our list of “innovative” developing countries (IDC)⁵ or “technologically proficient” developing countries (TPDC)⁶—countries that may require IP norms different from those of less technologically dynamic countries. But before we discuss these indicators and the list created using them, some caveats are in order.

First, a word about the term “innovation,” since different scholars mean different things when they use it. It has to therefore take its meaning from the context in which it is used. Since we deal primarily with calibrating IP systems to evolve appropriate patent norms, we define the term innovation narrowly to include only “technical” innovations and not other innovations such as institutional, organizational, or social (Edquist 1997).

We prefer the use of the term “‘technologically proficient’ developing country” to “‘innovative’ developing country.” A country like India, though “technologically proficient” in software, is yet to witness any significant level of “innovation” in this sector (D’Costa 2006). And to this extent, it may be more accurate to label it as a “technologically proficient” developing country.⁷

We are aware that Nelson and Rosenberg (1993, 4–5) interpret the term “innovation” broadly to encompass “the processes by which firms master and get into practice product designs and manufacturing processes that are new to them, whether or not they are new to the universe, or even to the nation.” Going by this wide definition of the term “innovation,” almost any technologically proficient country would qualify as “innovative.” We therefore prefer a narrower and more realistic definition of “innovation” as the processes by which firms master and get into practice product designs and manufacturing processes that are new to the universe.

Second, one may legitimately ask why only technological proficiency is used as a benchmark to distinguish developing countries. After all, other benchmarks exist: differences in per capita incomes, gross domestic product (GDP) growth rates, levels of education, and so on. Why are none of these indicia used to drive a wedge through this supposedly monolithic group? The answer is obvious when we consider the fact that we are dealing with IP, a subject closely intertwined with technology and innovation, at least and especially insofar as patents are concerned. Using a technological proficiency indicator to demonstrate heterogeneity is therefore not just useful but necessary if harmonizing policies are to be effective. Although the concepts of development and “catching up” are multi-factorial, we deal with only one such factor, albeit a key one: technological capability and the potential for innovation (Schumpeter 1934; Nelson and Winter 1982; Cimoli and Dosi 1995).

Third, one may ask why we need to classify countries into groups at all, whether broadly as developing countries or more narrowly as TPDCs. The answer lies in the fact that in a world with increasingly porous borders, the problems of innovation and access to technological goods are more global than local, and some level of harmonization is required. Even if some may disagree with this view and hold that the world is better off without any kind of harmonization, binding international instruments such as the TRIPS Agreement do not offer us the luxury of doing away with harmonization altogether. Moreover, the developed-versus-developing classification already exists. Rather than fully eviscerating this classification within international IP debates, it may be more practical to work within this framework and achieve a more nuanced classification, particularly since this paper deals with the Development Agenda, an agenda being pushed by countries that are traditionally considered to be “developing” countries. Given the politics of IP, wishing away the developed versus developing country classification may not be a practical suggestion.

Finally, it should be noted that this chapter does not seek to delineate a precise list of IDCs or TPDCs but, rather, to demonstrate only that there is technological heterogeneity. The countries that are significantly more proficient in terms of technology than the others may require separate normative treatment (in IP). The issue, then, is how to best respect the harmonization mandate under WIPO while, at the same time, creating a regime that furthers WIPO’s mandate of promoting “creative intellectual activity and ... facilitates the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development.”⁸

In order to address these issues more effectively, we need to see the TPDCs as a separate group that warrants separate consideration and perhaps distinct treatment.

The Commission on Development and Intellectual Property (2002, 191) rightly notes:

It is essential to consider the diversity of developing countries in respect of their social and economic circumstances and technological capabilities ... China and India, along with several other smaller developing countries, have world class capacity in a number of scientific and technological areas including, for instance, space, nuclear energy, computing, biotechnology, pharmaceuticals, software development and aviation. By contrast, 25% of poor people live in sub-Saharan Africa (excluding South Africa), mainly in countries with relatively weak technical capacity. It is estimated that in 1994 China, India and Latin America together accounted for nearly 9% of worldwide research expenditure, but sub-Saharan Africa accounted for only 0.5% and developing countries other than India and China only about 4%.

Thus developing countries are far from homogeneous, a fact which is self-evident but often forgotten ... Policies required in countries with a relatively advanced technological capability where most poor people happen to live, for instance India or China, may well differ from those in other countries with a weak capability, such as many countries in sub-Saharan Africa.

So who exactly are the TPDCs? And, more importantly, what are the implications of this distinction for the progress of the Development Agenda?

WHO ARE THE TPDCS?

Prior to a classification of the countries that are entitled to the “technologically proficient developing country” label, one must have an idea of what the term “developing country” entails in the first place. We look to the WTO to assist us in this enquiry.

Members of the WTO are grouped into the categories of developed countries, developing countries, and least developed countries (LDCs). The WTO does not use any objective criteria to categorize countries as developing. Rather, members may self-select as developing countries. The self-selection of countries may not represent their true status, as such selection could be a politically strategic choice. The WTO grants transitional windows to developing countries that wish to take more time to comply with WTO obligations. To date, all WTO member states with the

exception of the United States, the European Union, Canada, Japan, and New Zealand have at one time or another classified themselves as developing countries for the purposes of the WTO. As for LDCs, a fairly objective classification is made by the United Nations based on per capita income (UN Conference on Trade and Development 2002).

Two international trade law scholars have arrived at a more objective classification in a recent paper (Horn and Mavroidis 1999). They select developing countries as those countries that are not members of the Organization for Economic Co-operation and Development (OECD) and that are not in the group of LDCs (UN classification). No doubt, this list is arbitrary to some extent, as classifying all OECD members as developed countries may not be entirely accurate. Nevertheless, for the sake of convenience, we rely on the Horn and Mavroidis list, with two exceptions. We classify two OECD members, Mexico and Turkey, as developing countries, as both are widely acknowledged as “developing countries” in the literature. Further, it would appear paradoxical to qualify these countries as “developed” when they rank lower than many other “developing” countries in our “technological proficiency” index, drawn up for the purpose of this paper (Annex B). We also include countries that are not yet WTO members but have initiated WTO accession negotiations. We do this for the reason that countries desiring accession are likely to attempt to implement standards of the TRIPs Agreement in their domestic legislation in a bid to demonstrate that they deserve membership. Therefore, they are likely to be interested in the Development Agenda and norm-setting activities at the international level.

Our list of developing countries (Annex A) closely resembles the WTO list, but it is based on relatively more objective indicia than self-selection.

To identify technologically proficient developing countries from the list of “developing countries” above, we measure their technological/innovative capability by relying on two indicators:

1. the share of medium- or high-technology products in total manufacturing value added, following the UNIDO classification, and
2. R&D expenditure as a percentage of GDP.

In Annex B, we chart a graph showing the relative positioning of countries according to these two indicators.⁹ Countries that are above the average under either of the two indicia fall in quadrant 2 and include Russia, Taiwan, China, India, Brazil, South Africa, Ukraine, Malaysia, Belarus, Argentina, Mexico, Turkey, Chile, and Indonesia. We label these countries

as the TPDCs. Of these countries, all but Malaysia and Indonesia qualify above the average under both indicia. In order that one might compare the performance of developing countries to that of developed countries, we include the average performance of the United States and other advanced economies in this graph.¹⁰

Table 1 is drawn on the basis of the graph presented in Annex B.

In a separate list—Annex C—we also deal with the number of patents granted from 2002 to 2006. Barring a few exceptions, countries that qualify as TPDCs in Annex B rank high in terms of the number of patents granted. The exceptions are not surprising, as higher technological proficiency does not always convert to increased patent numbers. For this reason, we eschew the use of patents or patent counts as a primary mode of measuring technological proficiency.

We therefore have two categories of countries that are supposedly the beneficiaries of the WIPO Development Agenda: TPDCs and other developing countries. For the purpose of this chapter, we exclude the thirty-two UN-classified LDCs from our list of developing countries, as there is a consensus that these countries have very low technological capabilities. We

Table 1: A (tentative) taxonomy of technologically proficient developing countries

		INNOVATIVE EFFORT	
		Low (< average of developing countries)	High (> average of developing countries)
TECHNOLOGICAL SPECIALIZATIONS	High (> average of developing countries)	Potentially innovative developing countries Malaysia, Indonesia, Philippines, Thailand, Armenia, Egypt Pakistan, Macedonia, Venezuela	Technologically proficient developing countries Russia, Taiwan, China, India, Brazil, South Africa, Ukraine, Belarus, Argentina, Mexico, Turkey, Chile
	Low (< average of developing countries)	All the other developing countries	Potentially innovative developing countries Morocco, Tunisia

Source: Table created by authors based on figures from the UNIDO, MSTI, and UNESCO databases.

Note: While “innovative effort” is measured by R&D expenditure as a percentage of GDP, “technological capabilities” are measured by the share of medium- or high-tech products in total manufacturing value added. In addition to the group of countries identified as TPDC, one might also identify countries that come close to this list as being “potentially innovative.” It bears noting that technological and production capacities are not “fixed” for all time to come and it is only a matter of time before countries with rising innovative efforts come to be classified as TPDC’s.

therefore assume that these countries would not, in any case, have qualified as technologically proficient. Further, the WTO and the TRIPs Agreement recognize them as a separate group and provide more windows for the implementation of international IP norms.

The IDC or TPDC category that this paper uses is not a perfect one—and it may change with time. It is hoped that this list will at least provide a good start toward a more nuanced classification within the WTO/WIPO.

IMPLICATIONS OF DISTINGUISHING AMONG DEVELOPING COUNTRIES

The distinction among developing countries revealed earlier is critical, particularly in terms of norm setting for IP. Labelling countries as one monolithic group of developing economies and setting uniform norms may be misguided. Particularly when the norm being advocated in the context of the development agenda in some quarters equates to the “lowest” level of protection permissible under TRIPs.

As the economist Jagdish Bhagwati (2002, 127 n. 6) notes, “Some middle-level countries such as India do produce some intellectual property (IP), especially in software and movies, so they may well see an interest in the TRIPs regime, which addresses the IP question at the WTO.” As mentioned earlier, pharmaceutical patents in India offer an excellent illustration in this regard. Drastic levels of poverty and the resulting problems associated with drug pricing and affordability warrant a reduction in the scope of patent grants. Yet India’s industrial and innovation imperatives warrant the granting of incentives in the form of patents to domestic corporations such as Ranbaxy, Dr. Reddy’s, and Cipla. India therefore needs to work toward a standard that balances these various conflicting concerns appropriately (Basheer and Reddy 2008). This concern may not apply to other developing countries that do not have a robust pharmaceutical manufacturing base—such countries may wish to see as much of a reduction in the scope of patentability as possible.

Consider also the vexed issue of protecting regulatory data under Article 39.3 of the TRIPs Agreement, which requires that such data be protected from “unfair commercial use.” Developing countries have acquired enough sophistication with respect to issues under the TRIPs Agreement to appreciate the dubiousness of the US/EU position that Article 39.3 requires data exclusivity. In other words, the minimal standard under Article 39.3 is not data exclusivity. Of course, there is some debate as to what is the exact minimal threshold. Some argue that legal sanctions against the fraudulent or dishonest obtaining of data ought to satisfy the

criterion under Article 39.3 (Correa 2002). Others argue that the minimal threshold envisaged under Article 39.3 is a compensatory liability model (Basheer 2006).

Does this necessarily mean that all developing countries must incorporate the lowest minimal threshold under Article 39.3, whatever the standard? While this may hold for a large number of developing countries, some of the TPDCs may prove to be an exception to this rule. Consider the case of India. An Indian committee recently recommended that, for the time being, there be no data exclusivity for pharmaceutical drugs (India 2007a). However, based on the recommendation of the Department of Ayurveda, Yoga and Naturopathy, Unani, Sidhha, and Homeopathy (AYUSH), it advised that such exclusivity be granted for data generated from traditional medicines. AYUSH is of the view that data exclusivity for a term of five years is a good way to create incentives for more research and development into traditional medicines, since the prospects of patenting such medicines is relatively weak. Based on AYUSH's recommendation, the committee noted: "A large number of scientists, entrepreneurs, SMEs, corporates are working on the development and standardization of traditional medicines. Providing data protection to these products would encourage the much needed data generation for their scientific validation" (*ibid.*, 43).

The interesting question is whether this position will hold good for other developing countries with traditional medicinal systems, such as Ethiopia? Assuming that such a standard is implemented, will there be an industry capable of doing enough research and development and conducting enough trials on such herbal/traditional medicines to generate validation data? One is not certain of the answer, and such a conclusion has to be independently assessed for each country. Therefore, the argument that developing countries always ought to implement the lowest level of protection mandated under the TRIPs Agreement is not a sound one. To this extent, one ought to appreciate that what is compliant with the TRIPs Agreement and what is good from a national policy perspective are two different issues and one ought not to conflate them. Thus, although India was not mandated by the TRIPs Agreement to grant data exclusivity to traditional medicines, it saw the need to do so from a national policy perspective.

Similarly, in the case of China, Peter Yu (2008, 353) states:

There has also been emerging industrial development in the areas of computer programs, movies, semiconductors, and biotechnology. Such developments have led me to suggest elsewhere that the many conflicts and competing interests within China are likely to drive the country's leaders

to develop a “schizophrenic” nationwide intellectual property policy. While the country wants stronger protection for its fast-growing industries, it prefers weaker protection in fields related to pharmaceuticals, chemicals, fertilizers, seeds, and foodstuffs, due to its huge population, continued economic dependence on agriculture, the leaders’ worries about public health issues, and their concerns about the people’s overall well-being.

The above examples illustrate the danger of assuming that all developing countries wish to implement minimal standards under the TRIPs Agreement in their domestic legislations. The above point does not necessarily demonstrate that the TPDCs necessarily require higher IP standards. Indeed, such a decision has to depend on the technology in question, competitive strengths, and innovation imperatives. Thus, in the case of software, there is little evidence that increased IP protection spurs innovation. In fact there is some evidence that suggests otherwise (Bessen and Meurer 2008). Therefore, in a country such as India, which is widely acknowledged to be a software leader, increased IP protection may not necessarily be the best way to create incentives for innovation. A recent article suggests that owing to the service-based nature of the software industry in India, the best way forward is to encourage open source software and not to move up the conventional value chain by attempting to create proprietary software products (India Knowledge@Wharton 2008).

Similarly, in the area of pharmaceuticals, a technology sector that often serves as the poster child for the proposition that IP is necessary to drive innovation forward, alternative innovation paradigms, such as open source, prizes, advance purchase contracts, and even a global research-and-development treaty are being proposed. Interestingly, in India, the Council for Scientific and Industrial Research, India’s premier research institution, is spearheading a project that uses an open-source/collaborative innovation framework to bring out an effective anti-tuberculosis drug.

Of course, these alternatives are not exclusive to the developed world or the TPDCs. However, the extent of technological capabilities may be important determinants in whether one or more of these alternative paradigms will work well. For those countries with no technology base at all, it may be the case that rather than focusing too much on innovation incentives—be they traditional IP rights or alternative paradigms such as prizes—one is better off building up technological capabilities through education and infrastructure. In other words, for such countries, a disproportionate deployment of resources towards IP norms may not be optimal.

It bears reiteration that this chapter is not meant to set out the exact nature of the norms to be adopted and implemented. Rather, this is

something that ought to be independently investigated. However, the above examples demonstrate the pitfalls of creating uniform norms, without giving adequate consideration to the technological status of the developing country in question.

CONCLUSION

The developed-versus-developing country schism reverberates in several channels of domestic and international IP making and is hardwired into the very fabric of the WTO and TRIPS. It is therefore imperative that the Development Agenda proponents make every effort to debunk this antiquated mode of thinking and embrace a more sophisticated approach to classification.

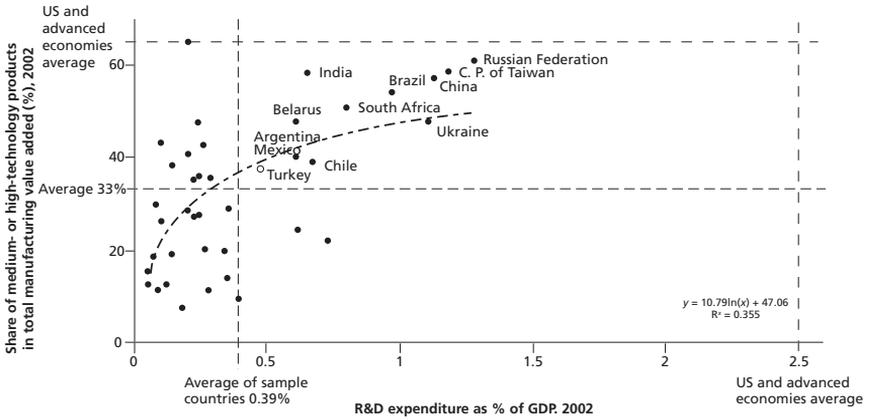
In order to make the WIPO Development Agenda more effective in its implementation, one ought to recognize the fact that there is considerable heterogeneity in technological capability among developing countries. Some are more technologically proficient than others, and this distinction may warrant separate norms in areas of technology that they are strong in. Otherwise the Development Agenda runs the risk of falling into the trap of endorsing a one-size-fits-all scheme—a trap that has characterized the upward harmonization of IP norms for many years and one that the Development Agenda seeks to challenge and change.

This chapter is not aimed at spelling out the precise nature of IP norms that developing countries ought to adopt and implement. Rather, it means to suggest that this determination will vary from case to case and depends on factors such as the “technological capability” of the country in question and the specific technology sector under consideration. This chapter therefore cautions one against the tendency to swing from a one-“super-size”-fits-all model to a one-“micro-mini”-fits-all model. The technology/innovative capability indices deployed and the TPDC list that has been arrived are not precise and may need to be refined further. In other words, the list could serve as a starting point toward a more nuanced classification at the WTO and WIPO. Failing to acknowledge the technological differences between countries, and the different needs of TPDCs in particular, may result in a weak Development Agenda implementation. The inherent technological disparities between these countries is likely to lead to tension and impact the progress of the agenda. Explicitly recognizing these differences and leveraging them to further the cause of the agenda may be far more strategic in the long run.

ANNEX A: CLASSIFYING “DEVELOPING” COUNTRIES

Least Developed Countries	Developed Countries	Developing Countries	Developing Countries (cont.)	Developing Countries (cont.)	Accession Negotiations	Data Available	Data Available (cont.)
Angola	United States	Albania	Georgia	Saint Kitts and Nevis	Afghanistan	Algeria	Macedonia
Bangladesh	European Community	Antigua and Barbuda	Ghana	Saint Lucia	Algeria	Antigua and Barbuda	(Federal Republic of Yugoslavia)
Benin			Grenada	Saint Vincent and the Grenadines	Andorra	Argentina	Malaysia
Burkina Faso	Australia	Argentina	Guatemala		Azerbaijan	Armenia	Mauritius
Burundi	Canada	Armenia	Guyana		Bahamas	Bahrain	Mexico
Cambodia	Croatia	Bahrain	Honduras		Belarus	Barbados	Morocco
Central African Rep	Hong Kong (China)	Barbados	India		Bhutan	Belarus	Nicaragua
Chad	Iceland	Belize	Indonesia		Bosnia Herzegovina	Bolivia	Nigeria
Dem. Rep. Congo	Israel	Bolivia	Jamaica		Cape Verde	Botswana	Oman
Djibouti	Japan	Botswana	Jordan		China	Brazil	Pakistan
Gambia	Korea	Brazil	Kenya		Chinese Taipei	Cameroon	Panama
Guinea	Liechtenstein	Brunei	Kuwait		Tanzania	Chile	Paraguay
Guinea-Bissau		Darussalam	Kyrgyz Republic		Thailand	China	Peru
Haiti	New Zealand	Cameroon	Macao (China)		Trinidad and Tobago	Colombia	Philippines
Lesotho	Norway	Chile	Malaysia		Tunisia	Costa Rica	Qatar
Madagascar	Singapore	China	Mauritius		Turkey	Cote d'Ivoire	Russian Federation
Malawi	Republic	Colombia	Mexico		United Arab Emirates	Ecuador	Saudi Arabia
Maldives	Switzerland	Congo	Moldova		Uruguay	Egypt	South Africa
Mali		Costa Rica	Mongolia		Venezuela	El Salvador	Sri Lanka
Mauritania		Côte d'Ivoire	Morocco		Zimbabwe	Fiji	Suriname
Mozambique		Cuba	Nicaragua			Gabon	Swaziland
Myanmar		Dominica	Niger			Georgia	Syrian Arab Republic
Nepal		Dominican Republic	Oman			Ghana	Taiwan
Niger		Ecuador	Pakistan			Grenada	China
Rwanda		Egypt	Panama			Guatemala	Tanzania
Senegal		El Salvador	Papua New Guinea			Honduras	Thailand
Sierra Leone		Fiji	Paraguay			India	Trinidad and Tobago
Solomon Islands		Federal Republic of Yugoslavia	Peru			Indonesia	Tunisia
Togo		(Macedonia)	Philippines			Jamaica	Turkey
Uganda		Gabon	Qatar			Jordan	Ukraine
Zambia						Kazakistan	Uruguay
						Kenya	Venezuela
						Ukraine	Zimbabwe
						Uzbekistan	
						Vanuatu	
						Yemen	

ANNEX B: TECHNOLOGICAL HETEROGENEITY AMONG DEVELOPING COUNTRIES



ANNEX C: NUMBER OF PATENTS GRANTED BY USPTO TO DEVELOPING COUNTRIES (2002–6)

	Developing Countries	Number of Patents (2002–2006)		Developing Countries	Number of Patents (2002–2006)
More than 1000	Taiwan, China	28145	Less than 10	Nigeria	9
	China	2053		Uruguay	9
	India	1819		Pakistan	8
Between 500 and 1000	Russian Federation	892		Kazakistan	8
	Brazil	530		Sri Lanka	7
	South Africa	521		Armenia	7
Between 100 and 500	Mexico	411		Morocco	6
	Malaysia	386		Syrian Arab Republic	6
	Argentina	225		Barbados	6
	Thailand	134		Fiji	6
	Philippines	110		Tunisia	5
	Ukraine	104		Guatemala	5
Between 50 and 100	Venezuela	88		Zimbabwe	5
	Saudi Arabia	81		Jamaica	5
	Turkey	78		Panama	5
	Chile	60		Trinidad and Tobago	5
Between 10 and 50	Colombia	38		El Salvador	4
	Indonesia	33		Jordan	4
	Kuwait	29		Honduras	3
	Egypt	26		Algeria	2
	Kenya	24		Quatar	2
	Peru	17		Macedonia, FYR	1
	Costa Rica	17		Ivory Coast	1
	Belarus	16		Paraguay	1
	Georgia	16		Tanzania	1
	Ecuador	11			
	Lebanon	11			

Source: Table created using data from USPTO database.

NOTES

The opinions expressed in this chapter are the authors' and do not necessarily reflect those of the organization.

- 1 Development Agenda for WIPO, <http://www.wipo.int/export/sites/www/ip-development/en/agenda/recommendations.pdf>.
- 2 For an overview of some of the literature that hints at this view, see Roya Ghafele, "Perceptions of Intellectual Property: A Review," IPI, London, August 2008, <http://www.ip-institute.org.uk/pdfs/Perceptions%20of%20IP.pdf>. A World Bank report notes: "IPRs are generally more beneficial to industrial countries than to developing countries. Developing countries are net importers of technology, while, in general, industrial countries are the producers of technology. Industrial countries therefore reap the static benefits of higher prices resulting from the market power provided by IPRs, at the expense of developing countries. It has been estimated that the United States stands to gain \$5.7 billion in net transfers from TRIPS, while Germany, Sweden and Switzerland are also expected to receive substantial net inwards transfers. In contrast, developing countries are expected to experience net outward transfers, amounting to \$430 million for India, \$434 million for Korea, \$481 million for Mexico, and \$1.7 billion for Brazil" (World Development Report 2002: Building Institutions for Markets, Washington, DC: World Bank, page 147). A civil society report recommends that "developing countries should narrow to an absolute minimum the type and scope of pharmaceutical patents." See Arthur Mpeirwe, In Defence of National Interest: A report on Uganda's reform process for the Industrial Property Legislation (HEPS-Uganda), August 2003, <http://www.heps.org/documents/IN%20DEFENCE%20OF%20NATIONAL%20INTEREST%20REPORT.pdf>.
- 3 A 2003 study by Goldman Sachs found that over the next fifty years Brazil, Russia, India, and China—countries they labelled the "BRICs" economies—are likely to overtake many existing developed countries. See Dominic Wilson and Roopa Purushottam, "Dreaming with the BRICS: The Path to 2050," Global Economics Paper No. 99, <http://www2.goldmansachs.com/ideas/brics/book/99-dreaming.pdf>.
- 4 For a recent and comprehensive review of existing indicators and methods for measuring technological capabilities at the country level, see D. Archibugi and A. Coco, "Measuring Technological Capabilities at the Country Level: A Survey and a Menu for Choice," *Research Policy* 34 (2005): 175–94.
- 5 See C.M. Morel et al., "Health Innovation Networks to Help Developing Countries Address Neglected Diseases," *Science* 309, no. 5733 (July 2005): 401–404. These authors define the term "innovative developing countries" as developing countries that have demonstrated a significant promise in carrying out activities in health innovation.
- 6 The term "'technologically proficient' developing country" appears to have been first used by John Barton. See John Barton, "Catch-up Strategies for Technologically Proficient Developing Nations," Simposio Nacional de Pesquisa de Administracao em Ciencia e Tecnologia, Rio de Janeiro (1991). Some use the term "innovative developing country."
- 7 See also Dosi, who states that "The concept of 'innovation' refers to the search for, development, adaptation, imitation and adoption of technologies that are new to a specific context." G. Dosi, "The Nature of the Innovative Process," in L. Soete, ed., *Technical Change and Economic Theory* (London: Pinter Publishers, 1988), 222, <http://www.scidev.net/dossiers/index.cfm?fuseaction=policybrief&policy=61§ion=362&dossier=13>.
- 8 Agreement between the United Nations and the World Intellectual Property Organization, 27 September 1974, in *Treaties and International Agreements Registered or Filed or Reported with the Secretariat of the United Nations*, 956, no. 729, Article 1.

- 9 Our chart is based on data from UNIDO, UNESCO, and MSTI. The vertical axis measures the share of medium- or high-technology products in total manufacturing value added (year 2002). Medium- or high-technology intensive manufacturing sectors are: 342, 351, 352, 356, 37, 38 (excluding 381), in accordance with the UNIDO classification. See UNIDO Industrial Development Report, 2005. The horizontal axis measures the R&D expenditure as a percentage of GDP (year 2002).
- 10 It is important to note here that since we do not have data for all the countries in our list (Annexure A), we consider only those developing countries (66) for which we have data. We have noted these countries separately in the last column of Annexure A.

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Localizing WIPO's Legislative Assistance: Lessons from China's Experience with the TRIPs Agreement

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INTRODUCTION

One of the major themes of the Development Agenda is to urge WIPO, a specialized agency of the United Nations, to pay more attention to the local conditions and priorities of developing countries in its future activities.¹ This theme permeates through many specific proposals of the agenda. Among them, Recommendation No. 13 concerning WIPO's technical assistance activities is particularly relevant. It reads:

WIPO's legislative assistance shall be, *inter alia*, development-oriented and demand-driven, taking into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of Member States and activities should include time frames for completion. (WIPO 2007a)

This recommendation sends an unequivocal message to international and domestic policy makers that legislative assistance must be more sensitive to the local circumstances in developing countries. It emphasizes the need to "localize" intellectual property (IP) policy making. If implemented properly, it is possible to bridge the gap between global rules and local conditions.

This chapter examines why and how to integrate a localized approach into the implementation of Recommendation No. 13 and the rest of the Development Agenda. Drawing lessons from China's experience implementing the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement), it argues that WIPO's legislative assistance programs must go beyond legislative drafting to account for real-world practical phenomena, including local economic, cultural, and political conditions. Correspondingly, three strategies are suggested: paying more

attention to local economic conditions to avoid providing inappropriate or ineffective legislative assistance to developing countries, being more patient in helping developing countries identify local cultural factors that might facilitate or impede IP reform, and allying more closely with local stakeholders to understand attitudes toward normative changes. These strategies will ensure that legislation and regulations crafted with WIPO's assistance are more relevant and persuasive to the people in local communities.

WHY LOCALIZATION MATTERS

The term "localization" is not new. It has been widely used in software development, business model design, and other areas. Localization as a business strategy has also been broadly used by multinational companies to address cultural, socio-economic, and political diversity. In the context of globalization, some commentators have used the term "glocalization" (Swyngedouw 2001, 137–66; Jessop 1999). The various versions of Windows Vista and McDonald's country-specific menus provide two notable examples. In legal analyses, the concept is often associated with legal transplantation. In the field of IP specifically, localization is a concept that has only recently begun to be discussed. Until fairly recently, IP discussions focused more on the importance of globalizing harmonious norms.

Daniel Gervais (2002, 933–49) delineates IP's internationalization/globalization process in four phases: the early bilateral phase (pre-1883), the phase of the *Bureaux internationaux réunis pour la protection de la propriété intellectuelle* (1883–1971), the phase of the TRIPs Agreement (1971–94), and the paradigmatic phase (1994–today). The process largely takes three forms: multilateral treaties, bilateral agreements, and unilateral measures (Birnhack 2006, 506). The result is increasing homogeneity in different countries' IP legislation, despite wide variation in their stages of development, cultural diversity, and political contexts.

Proponents of globalization argue that a harmonized approach toward IP represents the path to long-term development, with only short-term, if any, costs. This claim, however, fails to stand up to both historical and empirical scrutiny. Historically, most developed countries have taken advantage of weak protection for IP on their own paths to development (Choate 2005, 17–18; Chang 2002, 57 and 83–85). Only when their local interests favoured protection did they opt to increase the levels of protection. Cambridge University economist Ha-Joon Chang (2002, 139–40) famously described this tactic of upgrading international standards of

protection as “kick[ing] away the ladder” with which developed countries have climbed to the top.

Moreover, empirical evidence shows that strong protection of IP rights alone does not necessarily promote growth as promised by the advocates of these rights. Rather, it is only one among a set of important factors, acting in parallel with other policies such as market liberalization and deregulation, technology development policies, and an effective competition regime (Maskus 1998, 152; Gervais 2007). And the high costs associated with strong IP protection in developing countries, including high administrative costs, rent transfers to developed countries, increased prices of patented drugs and agricultural inputs, and potential misappropriation of genetic materials and indigenous knowledge, should not be underestimated (World Bank 2001).

Problems associated with legal transplantation are not unique to IP, but they are a general phenomenon associated with the process of universalizing Western legal norms (Glenn 2007, 269). Law has social, cultural, and economic roots, as Graham Mayeda (2006, 559) maintains, and “sometimes the institutions that well-meaning advocates of development seek to create are the impediment, due to the incompatibility of the norms underlying these institutions with the social, cultural, and political context of a given developing country.” Furthermore, even when harmonization ostensibly occurs in theory, the complexity and diversity of local conditions throughout the world means that real harmonization rarely happens in practice.

Addressing this kind of incompatibility is crucial to translating relevant international rules into actual behaviour. Michael Birnhack (2008) describes this gap between the globalized IP regime and the unique local conditions of each country as the “glocal IP gap.” To bridge the gap between global norms and local conditions, Birnhack (2006, 504) suggests that “glocalization” can be used as a deliberate strategy to empower local communities and ease the shock of globalization.

This concept is important for the implementation of Recommendation No. 13 regarding WIPO’s delivery of legislative assistance, one of the major goals of which is to help developing countries to not only draft workable IP laws that are appropriate for local circumstances but also to fulfil obligations under international treaties. If legislative assistance is to be “development-oriented and demand-driven,” taking local conditions of developing countries into account, then developing countries need genuine assistance, not merely model laws and uniform legislative templates. Help must be provided not in harmonization but in adaptation.

LESSONS FROM CHINA'S EXPERIENCE IMPLEMENTING THE TRIPS AGREEMENT

Although the interaction between global rules and local conditions is a bidirectional process, the question whether global or local circumstances predominate varies from country to country. Generally, as China's experience illustrates, local conditions play a more important role in shaping the enforcement of IP rights in developing countries than in the majority of developed countries. While the TRIPs Agreement obligates developing countries to adopt the minimum standards of IP protection, and even puts enforcement rules and dispute resolution mechanisms into place to ensure compliance, it is questionable whether these arrangements will produce the expected results on the ground. Without necessary changes in social and political fields, legal change alone "does not necessarily facilitate economic growth" (Mayeda 2006, 562).

China began the process of adopting Western models of IP as early as the end of the nineteenth century. Nevertheless, these norms are still far from established in local society. Only very recently, while China was experiencing tremendous changes in its economic, cultural, and political conditions, has the concept of IP been accepted and internalized in any meaningful way. These changes suggest that any legal reforms should be localized, sensitized, and responsive to local cultural, economic, and political circumstances. In other words, effective IP rights protection requires "tailoring intellectual property to the needs of the developing countries" (Stiglitz 2007, 119).

From Imitation to Innovation

States at different development stages usually have different development priorities and policy preferences. In contrast to the general claim that strong IP promotes innovation, empirical evidence shows that technological and innovative capabilities in some developing countries are more associated with weak rather than strong IP protection at some stage of their economic development (Commission on Intellectual Property Rights 2002, 22). This conclusion is clearly supported by the IP history of post-revolution China, which tracks an ongoing process of technological advancement and economic transition.

Since the end of the 1970s, China has witnessed three fundamental transitions of its economy: (1) from a rigid centrally planned economy to an increasingly open and market-based economy; (2) from an internally oriented economy to an externally oriented economy; and (3) from an imitative economy to an innovative economy. If the first change facilitated

the spread of the idea of “knowledge as commodities,” then the second change significantly increased the importance of IP (Yu 2007, 198). Both changes contributed significantly to the third transition.

China’s considerable imitative capacity played a crucial role in its economic transition. The late leader Deng Xiaopin put tremendous emphasis on *guochanhua*, or reverse engineering, in order to foster China’s technological advancement and, he hoped, to surpass the developed world (Nemets and Torda 2002). Following Deng’s directive, China launched a large-scale reverse engineering project. Many high-grade consumer goods, such as colour televisions, tape recorders, refrigerators, and washing machines were targets of *guochanhua* (*ibid.*). This imitative strategy not only promoted the establishment of many modern industries in a short period of time and at low costs in China but also narrowed the technological gap with the developed world.

Little protection for IP was provided in China during this period, but other problems arose. In particular, profit margins on imitative products were continuously squeezed by intense competition. Export markets for Chinese products, especially in the European Union and North America, became vulnerable to threats of litigation over IP infringements. These pressures forced Chinese political and business elites to realize the importance of technological innovation, coupled with at least some IP protection, in order to compete globally. In part, such external forces led to China’s transition from an imitative economy to an innovative economy.

As a response, during the last decade, China has promulgated a series of policies to promote innovation and invention. Significant resources have been poured into research and development and education (“New Lab Partner” 2005). These efforts have generated some concrete and promising results, which range from rising numbers of science and engineering graduates trained domestically (China’s Global Path 2006) to more patent and trademark applications (WIPO 2007b; China 2007a, 24–25). These indicators may illustrate China’s continuing progress from a nation of imitation to a nation of innovation. Correspondingly, China is becoming more willing to adopt global IP norms such as those embodied in the TRIPs Agreement. The major IP reforms that have occurred recently are evidence of this fact.

Nevertheless, according to some criteria such as the number of resident patent applications per million inhabitants, China’s innovative capacity is still lagging far behind not only developed countries but also many developing countries (WIPO 2007a). The importance of imitation still pre-

vails in Chinese economy, and escalating IP protection is not (yet) a top priority for the Chinese government. This is one reason why China allied with the Group of 77 and other developing countries in the recent negotiation of WIPO's Development Agenda.

China's experience shows that any legislative assistance should take local economic conditions seriously. It should start with a comprehensive understanding of local economic conditions rather than simply pursuing a uniform law model. This task, in practice, will not be easy. Although WIPO claims that its legislative assistance is member driven and takes into account specific national considerations and local economic development levels (WIPO n.d.), there are still increasing concerns that, as Peter Drahos (Drahos n.d., 29) notes, "when developing countries turn to WIPO for legislative assistance that assistance might steer them down a TRIPS plus path." WIPO often deviates from the recipient country's best interests and tends to base its advice on a TRIPS-plus model to avoid becoming involved in potential multilateral disputes (*ibid.*, 23). Similar concerns were voiced by some participants at a conference organized by Médecins Sans Frontières and Oxfam International in Geneva in March 2002 (Pengelly 2005).

Such problems are avoidable. Instead of pursuing a one-size-fits-all solution, WIPO should focus more on addressing different local economic needs associated with different development stages. Although this claim is a general one, its merit should not be discounted. By working within the flexibilities provided by the TRIPs Agreement, WIPO's legislative assistance should allow and facilitate developing countries, no matter what stages of their development, to choose the IP model best suited to their national circumstances and priorities. Its model laws should be based on a careful examination of local economic conditions, especially the technological and innovative capacities of local societies.

Cultural Matters

Although economic factors are a significant determinant of the effectiveness of legal transplantation, local culture plays a perhaps even more important role in shaping the norms of a particular society. Actually, law is "the product of specific cultures with different and distinct histories and traditions" (Simons 1999, 61). When we note that legal changes may bring rapid cultural changes, the opposite also stands true (World Bank n.d.). Although the evolution of an international IP regime can be justified in terms of trade, the underlying cultural conflicts should not be ignored.

Johanna Sutherland (1998, 291) points out that the economic discourse by which the General Agreement on Tariffs and Trade operates represents liberal cultural values in favour of open markets and private property rights.² This Western ideology is unequivocally reflected in the preamble of the TRIPs Agreement, which states that IP rights are recognized as private rights. This “proPERTIZATION” approach to intellectual creations institutionalizes “a conception of IP based on protection and exclusion rather than competition and diffusion” (Sell 2002, 193).

This ideology is not only missing from the Chinese history of technological evolution but also conflicts with the traditional Chinese culture of knowledge sharing. As Christopher May (2007, 15) notes, the ancient Chinese “developed many of the technological innovations which prompted thought about property in knowledge in Europe without developing the notion of intellectual property themselves.” China’s lack of an indigenous notion of IP in its imperial history is believed to be attributable mainly to its political culture (Alford 1995, 19). In such a society, there is no explicit notion of rights, let alone IP rights (Glenn 2007, 337). Sharing rather than dividing (individualizing) is important (Qian 2001, 66), and knowledge is therefore believed to be the common heritage of all people (Alford 1995, 29).

Taiwan’s and Singapore’s acceptance of IP may suggest that traditional Chinese values do not entirely preclude the successful adoption of Western norms. However, as William Alford (1995, 108) notes, Taiwan’s support of IP laws is fundamentally rooted in the extraordinary economic, political, technological, and diplomatic changes that have occurred there. Now, rapid changes are occurring in China as well.

Since the middle of the nineteenth century, traditional Chinese values represented by Confucianism have been subjected to harsh criticism, especially following the adoption of the “open up and reform” policy at the end of 1970s. The emergence of a market economy has fundamentally changed the lifestyle and values of ordinary Chinese people. Moreover, the rhetorical effects of the claim of Chinese leaders and governments that stronger IP protection will promote economic development should not be underestimated (Yu 2007, 188–93). Consequently, Chinese people are becoming ever more conscious of individual rights, including rights to their intellectual creations. This cultural change makes the domestic TRIPs-compliant laws more relevant and accessible than ever to Chinese society.

On the other hand, culture is often lagging behind legal changes and brings about some problems. The diversity and differences between dif-

ferent societies cannot be easily diluted or blurred by simply introducing globalized rules. The traditional perceptions and beliefs held by the people of a given state not only shape their understanding and acceptance of modern IP norms but also influence their attitudes toward counterfeiting, piracy, and other forms of IP infringement. This fact, to some extent, provides a workable explanation of why, from a cultural perspective, when TRIPs-complaint laws have been adopted in China there is still widespread skepticism about, and a lack of respect for, IP rights.

China's experience indicates that local cultural conditions have an important role to play in shaping local IP regimes. In order to achieve the best result, WIPO needs to be more patient in searching for the local cultural changes underlying IP reforms in developing countries. Although WIPO's Development Agenda does not address cultural diversity directly, some of the proposals imply a commitment to respect cultural diversity and the need to accommodate different IP traditions.³ As a whole, these proposals reject the narrow view that IP is just about commerce or trade. If implemented, these proposals will surely enhance the persuasiveness and legitimacy of IP reforms in local societies. However, this will not happen until the Development Agenda, including the legislative assistance proposal, is localized to adapt to local cultural conditions.

To achieve this goal, I suggest that WIPO's legislative assistance should focus on helping the recipient country to identify those local cultural factors that might potentially facilitate or impede IP reform. Once relevant cultural norms are identified, WIPO should incorporate these considerations systematically into the advice that it provides. Moreover, WIPO requires patience to ensure that local cultural changes are properly nourished and that support for IP reform develops at an appropriate pace. Considering that the ultimate goal of WIPO's legislative assistance is to establish more balanced and development-oriented IP regimes in developing countries, it will be more successful if such assistance builds upon, rather than struggles against, local cultural traditions.

Playing the Game of Local Politics

Another important consideration, in addition to economic and cultural issues, is the political processes through which legal changes are effected. Laws are deeply contextual in nature and cannot be detached from the social and political environment in which they operate (Upham 2002, 7). While cultural factors indirectly influence the localization of WIPO's legislative assistance, political factors play a more straightforward role.

At the international level, Western governments and multinational companies have played the dominant role for decades in shaping the global IP regime. The voice of developing countries at the treaty-making stage has been effectively silenced for the most part. The TRIPs Agreement is regarded as “the most potent multilateral expression” of such type of coercion (Drahos 2002, 788). The evolution of China’s IP rights regime is not an exception.

Prior to China’s accession to the World Trade Organization (WTO), the United States repeatedly threatened China with trade sanctions, including revoking China’s most-favoured-nation status and blocking China’s accession to the WTO, all in the name of protecting US IP interests (Yu 2000, 131). After China’s accession into the WTO, the United States resorted to the multilateral dispute settlement to force China to adopt domestic policies in accordance with US demands.

Pressure at the international level, however, is failing to have a significant effect on people’s practices at the local, community level. Stakeholders at this level can be categorized into four groups: governments, non-governmental organizations (NGOs), local IP owners, and the general public. Since Chinese NGOs have limited influence on government policy and consumer associations are poorly organized, important roles are filled by local governments and local IP owners (Ma 2002, 125). Local governments might not be able to significantly influence the global governance of IP, but they do have a dramatic effect on IP protection locally through enforcement activities. And government reactions to efforts to increase IP protection in China have been mixed. Despite ostensible changes in formal IP laws and policies, reticence about adopting greater IP protections has been expressed not only by the Chinese central government officials but also by local officials (Yu 2007, 208–9; Mertha 2005, 12). Regional and sectoral disparities in China have further contributed to significant variations in attitudes toward IP. While the emergence of innovative industries in some regions has led to greater IP protection, piracy and counterfeiting has spread to other places (Yu 2007, 206).

Entrepreneurs and their small- or medium-sized enterprises are also key influences on local attitudes toward IP. As more local businesses stand to benefit from stronger IP protection, a new class of social elites will begin to exercise their political influence on the policy-making processes of government. And compared with their Western counterparts, Chinese local elites are in a better position to lobby both Chinese central and local governments to further strengthen IP protection. As such, locally

driven efforts to change IP policies are likely to be far more effective than foreign pressure (Sanders 2007, 262).

If the Western countries and multinationals are the major forces of shaping international IP norms, then the success of enforcement to a great extent depends on the support of local players. China's experience shows that obtaining support from local stakeholders, or, at least, reducing local resistance, is an integral part of any legal reform, whether by way of the TRIPs Agreement or the recommendations of the Development Agenda. Local stakeholders are not only the ultimate bearers of the costs of IP rights but are also the direct driving force of legal reform. Thus, it is essential to consider local allies' perspectives on IP reform.

Fortunately, the negotiation process of WIPO's Development Agenda has, at least to some extent, avoided the long-existing democratic deficit in international governance of IP. The recommendations under the agenda do address many of the concerns of local innovators and indigenous knowledge holders in developing countries. This provides a greater chance for WIPO to win support from local stakeholders. Getting local stakeholders involved in IP law reform may not only help address some of the democratic criticisms levelled against WIPO but also enhance the persuasiveness of IP rules resulting from technical assistance. Therefore, WIPO must ally with local political players, including local governments and local businesses, to deliver appropriately localized legislative assistance.

CONCLUSION

Viewing the Development Agenda through a legal lens, as well as economic, cultural, and political lenses, is integral to its successful implementation. WIPO must pay more attention to local economic, cultural, and political conditions in the countries it is assisting if its programs are to effectively promote the principles underlying the agenda. Although the rules of IP are significantly shaped by international institutions and thus achieve some degree of universality, only those norms factoring local conditions or, using Clifford Geertz's (1983, 218) words, "local knowledge" have the potential to have real impact on everyday practices. Recommendation No. 13 concerning WIPO's legislative assistance and other parts of the Development Agenda is therefore not just about translating and transplanting foreign laws into developing countries. Rather, this aspect of the agenda is about integrating local cultural, social-economic, and political conditions into the implementation of internationalized rules.

NOTES

- 1 Development Agenda for WIPO, <http://www.wipo.int/export/sites/www/ip-development/en/agenda/recommendations.pdf>.
- 2 General Agreement on Tariffs and Trade, 30 October 1947, 55 U.N.T.S. 194.
- 3 For example, Recommendation No. 3 states that require technical assistance should promote development-oriented IP culture and generate greater public awareness. In Cluster B, the agenda pays much attention to the preservation of the public domain and the protection of genetic resources, traditional knowledge, and folklore. Recommendation No. 27 directs WIPO to assist member states in identifying practical IP-related strategies to use ICT (information and communication technology) for economic, social, and cultural development (WIPO 2007a). Further, the agenda also requests that WIPO “undertake, upon request of Member States, new studies to assess the economic, social and cultural impact of the use of intellectual property systems in these States” (WIPO 2007a).

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The Public–Private Dichotomy of Intellectual Property: Recommendations for the WIPO Development Agenda

V.C. VIVEKANANDAN

INTRODUCTION

State-funded institutions are major players in innovation and the creation of knowledge in the developing world. There is a major thrust in recent times for these institutions to capitalize on the emerging intellectual property (IP) rights regime to create rights for their creations and innovations. They are urged to reap the benefits of their innovation through licensing in order to become self-sustaining. This approach is particularly relevant in the context of shrinking resources for state-funded institutions. Those in favour of this approach to IP rights for state-funded innovation make a number of arguments:

If these innovations and creations are not claimed as rights, and instead placed in public domain, it will only help other players to use it freely to commercialize this knowledge. As such, publicly funded innovation suffers a net loss on the resources invested in creating knowledge. The creation of IP rights for publicly funded institutions will assist in further research that will assist in creating essential technologies, which otherwise is imported at a huge cost or may not otherwise be available owing to restrictions on technology transfer enforced by other countries. (Vivekanandan 2007)

Those opposed to IP rights for innovation created though publicly funded institutions counter that “Privatization of intellectual output public institutions, while potentially creating small returns for the institution in the short run, may have the effect of shrinking the knowledge access in public domain and thereby will impact the long term innovation base” (ibid., 36).

A middle-ground position is the adoption of a mixed policy of strategically keeping certain outputs in the public sphere while creating private

rights with respect to certain aspects of publicly funded knowledge output. This chapter argues that this middle-ground approach will balance the space for public domain knowledge while allowing for commercial benefits to accrue to the innovators in the area of publicly funded research. Fundamentally, this approach requires a strategic mix of policies that balance public and private spaces.

The balancing of public domain resources with the protection of IP rights requires the creation of new models. These models will be dependent on the levels of innovation in a particular society, on the human resources in research and development, on the fields of technology and their impact on society, and on the implementation of appropriate legislative frameworks fostering a mixed approach. This chapter briefly examines the following issues:

- What is the effect of IP legal regimes on the direction of public and private innovation in developing countries?
- What is the effect of IP legal regimes on the public access of knowledge resources? Will it decrease access to knowledge in the long term as a trade-off against short-term gains for publicly funded institutions?
- As an example, should there be mandatory space for free access to knowledge with reasonable compensation as an alternate model to data exclusivity?
- What role might the WIPO Development Agenda play in generating legal and policy alternatives for developing countries?¹

PUBLIC–PRIVATE DICHOTOMY OF IP PROCESSES

WIPO's Development Agenda aims to transform the nature of the international IP regime. This transformation would take the regime from one that was premised on incentives to the creator of innovation or knowledge as a private right to one that is premised on a broader goal of addressing development issues and benefiting a broad array of stakeholders. This proposed transformation must be analyzed from the perspective that IP is a tool rather than an end in itself. This, in turn, requires a discussion of issues such as how to achieve inclusive economic growth and how benefits from knowledge and innovation should be distributed by public and private sector actors.

The long-held belief that patents are the best method of promoting and reaping the benefits of innovation has been sharply criticized recently. Lionel Bentley and Brad Sherman (2001, 315) opine that “[t]he role that the patent system played in inducing invention and the implementation

of new industrial practices has been widely but inconclusively debated.” This debate has even occurred in societies with a long history of functioning IP regimes, where concerns over the anti-commons have been raised. The concept of anti-commons refers to the more complex obstacles that arise when a user needs access to multiple patented inputs to create a single useful product. Each upstream patent allows its owner to set up another toll booth on the road to product development, adding to the cost and slowing the pace of downstream biomedical innovation (Heller and Eisenberg 1998, 699).

Incentives to the inventor/investor and the curbing of free riders have been the legitimizing principles of IP regimes in the developed world. However, developing countries stand on a different footing, and it is necessary to determine whether these legitimizing principles are applicable to developing countries. Major research and development activities in developing countries take place predominantly within the framework of publicly funded research. In India, for example, national investment in research and development for 2002–3 reached approximately rupees 18000.16 crores (US \$450 million), rupees 19726.99 crores in 2003–4, and rupees 21639.58 crores in 2004–5 (India 2005). In 2002–3, research and development expenditure by sector broke down as follows: central government 62 percent, state governments 8.5 percent, higher education institutions 4.2 percent, public sector industries 5.0 percent, and private sector industries 20.3 percent (*ibid.*). Thus, in 2002–3, over 84 percent of India’s research and development investment came through the public sector.

IP PROTECTION OF PUBLIC RESEARCH

The use of patents to protect publicly funded research is common in India and abroad. However, when analyzed, the commercialization of these patents has resulted in no significant incentive for innovation. A study released by India’s Department of Science and Technology (DST) for the years 2001–6 shows that, of a total of 612 patents granted to the Council of Scientific and Industrial Research (CSIR), only 15 percent of those patents were eventually commercialized (India 2006).² The DST saw no commercialization result from the twenty-two patents that it was granted during the same period (*ibid.*).

In financial terms, the DST and the CSIR’s patenting of knowledge has not generated significant resources to fund additional research and development. In fact, from 2001 to 2006, revenues from the licensing of

the DST and CSIR's patents generated only 29 percent of the cost of filing, prosecuting, and maintaining patents. These statistics give rise to a number of conclusions:

- In spite of the increase in the number of patents, the incentive or revenue accruing from the CSIR and DST's patenting activity has been dismal.
- Investment in innovation has actually led to a net loss in terms of obtaining and maintaining IP rights for publicly funded innovation.
- The public sector in India has been ineffective in commercializing its knowledge, owing possibly to a lack of experience or to the lack of market potential for publicly funded research and development. The major issue is the failure of the public sector to effectively commercialize these patents due either to a lack of expertise or to the fact that the patents lack market potential.
- Patented inventions may be blocking downstream research.

PUBLIC DOMAIN AND THE DEVELOPMENT AGENDA

The Development Agenda places an emphasis on the preservation of the public domain, taking account of countries' differing levels of development. Preserving the public domain is partially dependent on the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement).³ Greater clarity on how the TRIPs Agreement is to be interpreted would facilitate the preservation of the public domain. Examples on the need for clarity on the TRIPs Agreement vis-à-vis the public domain are discussed in the next sections.

Open Source Drug Discovery Project

Open source experiments in the software industry have been successful over the last two decades. A survey in 2004 found that approximately 87 percent of companies had used open source software (Optaros 2005). This approach should be replicated within the pharmaceutical industry. The Indian public sector research council is looking to experiment with an open source drug discovery model. The government has begun discussions with Sun Microsystems to set up Web-management tools for an open source drug discovery project, which would work in a similar way to a popular online encyclopedia, which comprises articles contributed and edited by the brightest minds worldwide. The first project is targeted at developing medicines for tuberculosis, and it may later be extended to other diseases such as malaria and AIDS.

Under the proposed project, researchers attached to institutions such as the Royal Society of the United Kingdom, the Imperial College of London, Médecins Sans Frontières, and various Indian universities will have an opportunity to work on a drug discovery process even at the individual level. Furthermore, contributions will fetch reward and recognition. Corporations such as the Kinetic Group and other entities such as the Wellcome Trust would sponsor the awards. The project is likely to be implemented either by the CSIR itself or by the Institute of Genomics and Integrative Biology (Banerjee and Prasad 2007).

India's proposed experiment is not the first example of this type of collaboration. The Tropical Disease Initiative (TDI), an alternative innovation group, has made similar proposals with respect to research targeted at tropical diseases, such as African sleeping sickness, dengue fever, and leishmaniasis. The TDI's proposed cooperative licensing scheme includes:

- a public-domain licence that permits anyone to use the information for any purpose;
- licences such as the Creative Commons Attribution License (<http://creativecommons.org/licenses/by/2.0>) that permit anyone to use the information for any purpose, provided proper attribution is given;
- licences such as the General Public License (<http://www.opensource.org/licenses/gpl-license.php>) that prohibit commercial use; and
- licences that permit commercial companies to obtain and exploit patents outside the developing world. These would allow Virtual Pharma to stretch its own research and development funds by letting corporate partners sell patented products to eco-tourists, governments, and other consumers living in the industrialized world (Maurer, Rai, and Sali 2004, 180).

Both the TDI and Indian open source initiatives merit further consideration by developing nations and WIPO. In addition, financial support for such initiatives will be necessary if they are to be replicated by developing countries.

Data Exclusivity Compensation Fund Account

One of the major issues affecting the development perspective with respect to innovation is data exclusivity demanded by innovators from the developed world. Article 39.3 of the TRIPs Agreement states:

Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the

origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public or unless steps are taken to ensure that the data are protected against unfair commercial use.

Policy makers in the developing world are under pressure from lobby groups acting on behalf of innovators to provide for a data exclusivity clause based on an interpretation of “disclosure” and “unfair commercial use” when drug regulators use certain data in evaluating applications by generic drug makers.

This provision requires clarification so that domestic drug regulators are excluded from the ambit of Article 39.3 where information is used in evaluating generics. Questions of compensation to the innovator can be addressed by a mandatory fee payable by generic companies. This fee could be assessed on the basis of a percentage of sales over a prescribed period, which is paid to drug regulators and then distributed as of the date used by the regulator. As part of this approach, any moratorium periods on the use of data should be eliminated so as to speed up the approval of generic drugs. Such an approach would balance the need to compensate the innovators and meet societal needs.

Technology Transfer Escrow Account

A crucial issue is that of technology transfer. Under Article 66.2 of the TRIPs Agreement, developed countries are under an obligation to

[p]rovide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.

Implementation of this provision has been almost non-existent. One potential method of implementing this commitment is to create a technology transfer escrow account in the same way that software development is done. Through this model, there would be a commitment from developed nations to provide incentives, held in escrow, which are in turn provided to entities that release the technology to recipient nations implementing particular IP regimes. This will ensure that the obligations of the nations that promised *quid pro quo* for implementation of the TRIPs Agreement are met. Significantly, such an approach would also serve to concretely implement Recommendation No. 23 of the Development Agenda, which urges states “to consider how to better promote pro-com-

petitive IP licensing practices, particularly with a view to fostering creativity, innovation and the transfer and dissemination of technology to interested countries, in particular developing countries and LDCs.”

Traditional Knowledge Monetary Fund

Issues relating to traditional knowledge have wide ramifications and scope. In particular, countries have struggled with how to ensure that the benefits of traditional knowledge flow to the creators or “owners” of the knowledge. Attempts by developing nations to confront this issue have not borne fruit. India has enacted a provision of disclosure and an attendant approval mechanism with respect to traditional knowledge as part of its patent law. However some developed nations such as the United States and Japan have objected to the inclusion of this issue under the framework of the TRIPs Agreement, claiming that voluntary contractual methods are sufficient to protect traditional knowledge. Developed countries appear to support the basic idea that traditional knowledge should not be unduly exploited and that there should be some method for compensation or benefit sharing for those who are initially responsible for the development of the invention.

One potential mechanism is to dispose of the disclosure system and instead create a traditional knowledge fund. As the Government of India’s Department of Commerce has noted:

If the country of origin and/or traditional knowledge has no benefit sharing infrastructure in place for the use of biological resources and/or traditional knowledge, any compensation to the custodians of such resources and/or traditional knowledge would not be possible even if a patent relates to these materials. So, first a mechanism to transfer benefits must be established.⁴

In order to create this infrastructure, a traditional knowledge monetary fund organized under the auspices of WIPO should be considered. This fund essentially would work out the modalities of (1) identifying the beneficiaries through disclosures in applications under the Patent Cooperation Treaty;⁵ (2) establishing mechanisms to interpret foreign laws relating to prior informed consent and sources of disclosure; and (3) encouraging contributions from developed nations that otherwise feel that disclosure and prior informed consent are not viable through the patent regime. This fund will meet the needs of the developing nations and also respond to those nations that raise objections to disclosure provisions in the patent law.

CONCLUSION

The construct of the TRIPs Agreement as a harbinger for the growth of innovation and wealth needs critical rethinking, particularly in the context of publicly funded research and development in developing countries. Increasingly, the notion that protection of IP and growth are correlated seems misplaced, particularly given the contextual nature of development. The current IP regime needs to be re-engineered to focus on development-related concerns rather than on problems associated with so-called free riders. Such a redirection requires a change of mindset from policy makers and IP think-tanks in developed nations. Innovations are not only for products and processes but also for models of public policy choices. The challenge is to strive for unity in diversity whether it is culture, race, or IP regimes.

NOTES

- 1 Development Agenda for WIPO, <http://www.wipo.int/export/sites/www/ip-development/en/agenda/recommendations.pdf>.
- 2 The Council of Scientific and Industrial Research is a state-funded vehicle for research and development.
- 3 Agreement on Trade-Related Aspects of Intellectual Property Rights, in *Marrakech Agreement Establishing the World Trade Organization*, 15 April 1994, 33 I.L.M. 15 (1994).
- 4 See <http://commerce.nic.in/trade/wtopdfs/wt-gc-w-564.pdf>.
- 5 Patent Cooperation Treaty, <http://www.wipo.int/pct/en/texts/articles/atoc.htm>.

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Strategies to Implement WIPO's Development Agenda: A Brazilian Perspective and Beyond

PEDRO PARANAGUÁ

INTRODUCTION

Many commentators have lately focused on the implementation of the WIPO Development Agenda at the international and/or governmental level, offering insights into the institutional reforms and policy strategies that are needed to make the agenda's goals a reality.¹

This chapter seeks to shift the analysis to the role and work of non-governmental organizations (NGO) in implementing the agenda. Put very simply, there are forces at work in the international intellectual property (IP) regime that make the work of national grassroots organizations and NGOs more important than ever if IP is to properly facilitate development. This chapter begins by discussing why a focus only on governmental and organizational implementation of the Development Agenda is misplaced. While the agenda represents an important spark for reform, actions by the major developed countries threaten to undermine the attempt to properly balance IP protections and development (Paranaguá 2005). For example, the European Union, the United States, Japan, and others are working to conclude an Anti-Counterfeiting Trade Agreement (New 2008). Such an agreement seems to be a counter-reaction to the progress made thus far on WIPO's Development Agenda and an addition to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement), which may be imposed on developing countries through bilateral or other free trade agreements (Drahos and Braithwaite 2003).² This chapter then moves to the discussion of a case study from Brazil. For four years, the Centre for Technology and Society at Fundação Getulio Vargas—Rio has been working in Brazil to facilitate research and develop policies that foster development through IP. Some of the centre's projects will be canvassed. Finally, this chapter concludes

with some brief recommendations for developing grassroots IP movements that may help make the Development Agenda an eventual reality at WIPO and, just as importantly, beyond.

FOUR REASONS TO FOCUS ON NATIONAL GRASSROOTS STRATEGIES FOR IMPLEMENTING THE DEVELOPMENT AGENDA

If one wishes to genuinely implement WIPO's Development Agenda and/or to move forward on a more balanced approach to protecting IP rights and fostering access to knowledge for all, one must take into account at least four issues that are influencing IP policy making: (1) the election of the new WIPO director-general; (2) TRIPs-plus treaties; (3) bilateral free-trade agreements (FTAs); and (4) unilateral measures taken by the United States under their "special 301" reports and/or via their Generalized System of Preferences. These issues are briefly canvassed in turn.

Election of a New WIPO Director-General

It is important to call attention to the debate over the alleged mismanagement and corruption related to WIPO's former director-general, Kamil Idris. WIPO's Development Agenda calls for far-reaching changes not only to the international IP regime but also to the organization's mandate and governance. Implementation of the Development Agenda will be possible only if the organization adheres to the United Nations' goals and principles, including its guidelines on the management of financial and humanitarian resources.

Moving beyond the crisis precipitated by Idris's resignation requires two things. First, any investigation into alleged mismanagement or corruption at the organizational level must be expeditious and fair. Second, the selection of a new director-general for WIPO is essential to implementing the Development Agenda. The nomination of Francis Gurry to succeed Idris was not without controversy. Honduras has alleged that there were procedural irregularities in the nomination of Gurry. Some WIPO staff accused Gurry of corruption and sexual harassment, and the Swiss police were investigating the case (Ninio 2008). These discussions might have been an attempt to undermine WIPO, ruining the progress made thus far on WIPO's Development Agenda. Given that the new director-general may have a mandate until 2020, it is important to ensure that the new director-general has the space necessary to reform the organization and implement the agenda.

TRIPs-plus Treaties

TRIPs-plus agreements, laws, or treaties are instruments that contain IP protections and rights beyond those required by the World Trade Organization's (WTO) TRIPs Agreement. For instance, if the TRIPs Agreement mandates the protection of copyright for the life of the author plus fifty years after her/his death, and a FTA provides for the protection of copyright for the life of the author plus seventy years after her/his death, then the new FTA has a TRIPs-plus provision, which extends the protection of copyrighted works for twenty years beyond the minimum standard mandated by the TRIPs Agreement.

The idea that greater IP protections are better is not necessarily correct. A number of studies have shown that increased IP protection may hinder, rather than foster, innovation and creativity (Musungu and Duffield 2003; South Centre and the Center for International Environmental Law 2005; United Kingdom 2002; United States 1958). Moreover, most developing and least developed countries have not had sufficient time and technical capacity to understand, implement, and, most importantly, benefit from the TRIPs Agreement. Worse, most of these poor countries lack the capacity to take advantage of the little flexibility that is provided by the TRIPs Agreement.

Bilateral FTAs

In the hopes of obtaining broader market access, a number of developed and developing countries are in the process of negotiating bilateral FTAs (Office of the US Trade Representative n.d.; IPRonline.org n.d.). Many of these proposed agreements contain provisions on IP, and most of these provisions are TRIPs-plus. Indeed, FTAs have been the vehicle of choice by developed countries for obtaining TRIPs-plus protections from the developing world. In effect, market access for agriculture or manufactured goods for the developing world comes at the price of enhanced IP protections. The exchange is patently unequal.

Unilateral Measures by the United States

A number of provisions of US domestic law provide the United States trade representative (USTR) with the ability to pressure countries to apply US-like standards of IP protection. For example, under section 301 of the Trade Act, the USTR may, based on complaints received from US IP rights holders, place countries on a "priority watch list" or "watch list" as a signal that the United States is displeased with another country's IP

protections. Information upon which a section 301 designation is made is often inaccurate.³ Yet, without the other country having an opportunity to refute these claims, the United States can signal to the world its displeasure with national IP practices. The USTR's annual "special 301 report" is a tool to pressure governments to ensure US IP rights are protected to the United States' satisfaction.

Where the section 301 designation becomes particularly pernicious is under the Generalized System of Preferences. This system grants tax incentives to some developing countries chosen by the United States on a unilateral and non-reciprocal basis in order to aid some agricultural or industrial sectors of these countries that want to export their goods to the United States. However, the Generalized System of Preferences is linked to IP protection and enforcement. A developing country on the section 301 watch list risks losing any benefits it may enjoy under this system. Thus, the United States has powerful tools to seek TRIPS-plus protection for its IP rights. This forces developing countries to adopt IP standards that are not mandated under the WTO.

When combined with the amount of time it will likely take WIPO to implement the Development Agenda, the four areas of concern identified in this article give much reason for pause. Governmental solutions to implementing the agenda are neither the only way nor potentially the best way to ensure a proper balance between IP rights and development. What are needed to advance the agenda are partnerships between development-friendly NGOs, inter-governmental organizations (IGOs), consumers groups, academia, and government, from both the North and South, that will move both independently and in parallel to WIPO's Development Agenda.⁴ The Brazilian experience demonstrates the potential effectiveness of such partnerships.

THE BRAZILIAN EXPERIENCE

One example of the type of grassroots national movement necessary to achieve the Development Agenda's goals is the Centre for Technology and Society (CTS), which is part of the Rio de Janeiro School of Law at Fundação Getulio Vargas (FGV). The FGV is an educational institution established in 1944, offering post-graduate and doctoral degrees. Originally publicly funded, the FGV is now a private academic institution. Its headquarters are located in Rio de Janeiro, with branches in São Paulo, Brazil's financial and economic heart, and in Brasília, the capital. It also

has partner educational institutions in all of Brazil's other twenty-four states. The FGV comprises several schools: schools of business and public administration (in Rio and São Paulo), schools of economics (both in Rio and São Paulo), schools of social science, as well as schools of law (both in Rio and in São Paulo). Furthermore, the FGV houses the renowned Brazilian Institute of Economics (IBRE), which calculates Brazil's gross domestic product. The IBRE is responsible for collecting economic data for calculating the most used price indexes in Brazil—the nationally famous IGP-M or general price index-market. State governors, presidents of the republic, and members of Congress, tribunals, and the Central Bank, as well as many high-level business people have studied and/or taught at the FGV.

Within the FGV, the schools of law in Rio de Janeiro and in São Paulo are relatively young, having been created in 2002. The FGV's law schools seek to promote reform in legal thinking in Brazil. The goal of the reform is to promote sustainable development and democracy. Although the law schools in Rio de Janeiro and São Paulo follow the same principles and are part of the same educational institution, they work under the leadership of different deans. The FGV School of Law in Rio de Janeiro has chosen two areas of focus: (1) reform of the judiciary system; and (2) reform of the traditional IP institutions.

CTS

The CTS in the School of Law at the FGV in Rio, which was founded in 2003, currently is Brazil's leading academic institution dealing with the interplay of law, technology, and society. The CTS manages extensive research and educational programs, employing an inter-disciplinary approach. Its collaborators include anthropologists, journalists, computer scientists, economists, and media executives, as well as law professors and researchers. The centre currently has eleven full-time staff members and works with a number of external contributors.

The CTS seeks to develop lines of research with concrete outcomes in terms of national policy making. To this end, the CTS members have developed a number of activities. They have split their time between researching, teaching, and advocacy activities. Apart from the director, the vice-director, and two researchers, who are hired by the FGV as professors or area coordinators, most of the activities and the research staff of the centre is funded by means of external project grants. The CTS coordinates graduate and post-graduate programs at the FGV's School of Law in Rio

de Janeiro, including all of the IP courses. The CTS provides advanced training to federal and state court judges, under the invitation of the Brazilian Association of Judges and offers an annual course to high-ranking military officers. The centre coordinates twenty distance-learning continuing education law courses, which have enrolled more than 3,500 students from all over Brazil and abroad in the past four years.

Using the Berkman Center for Internet and Society at Harvard as a model, the CTS has undertaken a number of initiatives. The first initiative of the centre was to promote, for the first time in Latin America, Harvard's Internet Law Seminar (I-Law), which brought to Brazil important IP legal scholars including Jonathan Zittrain, Lawrence Lessig, Yochai Benkler, Charles Nesson, John Perry Barlow, among others. The repercussions of I-Law/Brazil continue to gain attention in the Brazilian legal-technical community. The participation of singer, composer, and former minister of culture Gilberto Gil at the I-Law Congress continues to affect the work of the Ministry of Culture in Brazil. The magazine *Wired* published a five-page article about Gil after the event (Dibbel 2004). The article starts by telling the story of the meeting that Gil had with the professors who came to Brazil for the I-Law Congress.

The foregoing activities demonstrate that the CTS was created with a practical mission in mind: to produce concrete results in terms of social change. In other words, the goal and principle of action of the CTS is to develop and influence public policy and private practices. The strategy adopted is that absolutely no project undertaken by the centre should have an exclusively academic character. All projects must produce some sort of practical impact in Brazil or regionally/internationally. The CTS understands that reforming IP norms and laws requires more than academic discussion. What follows is a list of the main projects that the CTS has developed or that it continues to develop. Some of them are funded, while others are undertaken without the aid of any financial resources.

Creative Commons (CC) Brazil Project

The words Creative Commons have become a media phenomenon in Brazil. It is a type of license that not only maintains the copyright protection of a work but also gives some permission for use to third parties. Instead of "all rights reserved," it uses the model of "some rights reserved." The author chooses what may be done with her/his work, allowing for the copying, distribution, and execution of the work. Thus, it usually makes copyrighted works more widely known, fostering access to knowledge,

while maintaining copyright protection. The CC project was extremely well received and has been enthusiastically embraced by a huge community of artists, starting with former minister of culture, Gilberto Gil. And artists are not the only users. Alongside them stand many members of the civil society, including a number of public interest NGOs, academics, and so on. One of the most renowned IP scholars in Brazil licenses his entire website under a CC license (Barbosa n.d.).⁵ Even more interestingly, the government itself has adopted several initiatives using the CC model. The website of the Ministry of Culture is entirely CC licensed. Two other important examples include a portal named “publicdomain.gov,” created by the Ministry of Education, which was inspired by, and uses, the CC licenses.

The largest supporter of arts in Brazil, the oil company Petrobras, included in its yearly call for proposals a clause stating that works licensed under the CC would achieve a better result in the selection process. This call for proposals represents grants whose total amount is approximately US \$20 million. The Financiadora de Estudos e Projetos, a state-owned granting agency, recently announced that their newly launched book, detailing the best innovation programs in Brazil, is licensed under one of the CC licenses.

These CC successes were the result of the CTS’s work with these partners as well as through articles on the Internet, in magazines and newspapers, and through seminars, interviews, and lectures around the country. The CTS has never received any funds from CC International. The CTS represents the CC because it believes in broadening public access (the Brazilian Portuguese version of the website, hosted and managed by the CTS is located at <http://www.creativecommons.org.br>).

iCommons

Since January 2007, the CTS director Ronaldo Lemos has served as the chairperson of iCommons international, an institution supporting numerous open access practices around the world. This can be seen as a form of recognition to the work that the CTS is performing as an organization. In 2006, the annual iSummit was hosted by the CTS in Rio de Janeiro, with the participation of the then Brazilian minister of culture Gilberto Gil and the CC’s designer Lawrence Lessig (iCommons international can be accessed at <http://www.icommons.org>).

Free Software Legal Support Group

Thanks to the financial support of the Financiadora de Estudos e Projetos, the CTS created a group to provide legal support for free and open

source software research. As a strategy for spreading the free software legal concepts, the CTS has created a national contest for research projects dealing with practical problems connected with free software businesses. The winners were supervised in 2006 and received financial support from the FGV School of Law in Rio de Janeiro to prepare papers dealing with these practical issues. The contest was extremely successful in attracting impressive candidates from all over the country. It has also been “ported” to Brazil’s nineteen open source license models, such as the Mozilla and the BSD licenses. These licenses had no Portuguese language version, and the CTS accredited these Brazilian versions.

Cultura Livre (Free Culture) Program

This program is funded by the Ford Foundation. It aims at building a “Southern” dialogue and perspectives on culture, media, and IP. One of its main goals is to monitor, *in loco*, WIPO’s Development Agenda and to put into practice alternative IP licensing models. It is a joint project between NGOs in two developing countries: the CTS in Brazil and the University of the Witwatersrand’s Learning Information Networking and Knowledge Centre in South Africa. The project has managed to put musicians from Salvador da Bahia, Brazil, in touch with South African artists in order to promote exchanges of content (Cultura Livre can be accessed at <http://www.culturalivre.org.br> [in Portuguese]).

WIPO Monitoring

In early 2005, several public interest NGOs tried to participate in discussions on the newly tabled WIPO Development Agenda. However, several of the NGOs were not permanently accredited before WIPO to take part officially in the discussions, and they were told by WIPO they would have to wait until the next General Assembly, at the end of that year, to receive permanent accreditation in order to be allowed in the plenary room. No ad hoc accreditation was given to any of the interested NGOs—as it usually would have been given. As a result, several public interest NGOs would be barred from taking part in the very important discussions of the WIPO Development Agenda.

Accordingly, a WIPO Manifesto on Transparency, Participation, Balance and Access was launched, which within forty days gathered over 1,200 signatures from more than sixty countries, from persons from top academic institutions worldwide. As a result, all NGOs that had had their accreditation denied were then accepted on an ad hoc basis for the Development Agenda meetings.

This was a historical moment, and it proved to be crucial for the wide participation of public interest NGOs within WIPO. The FGV/CTS became the first, and until now the sole, academic institution from the global South to have permanent accreditation before WIPO. Since early 2005, FGV/CTS has been participating two to three times a year in WIPO meetings in Geneva.

The present author has been appointed to represent the FGV/CTS at WIPO. It is also worth mentioning that the CTS is the only academic institution from the global South with permanent accreditation at WIPO. Not only does the CTS take part in the meetings with WIPO member states, but it also has the right to speak on the meetings when allowed. This participation in Geneva has been of tremendous value for many CTS activities, and it has made it possible for members to exchange ideas with other international institutions, personally meet their representatives, get to know country delegates, and better engage in relevant discussions. The CTS also translates into Portuguese all of the discussions held at WIPO meetings. Getting accredited before WIPO is much easier than it might seem at first glance. The interested organization is required to send some documents listed on the WIPO website and then wait for the annual General Assembly to have its accreditation allowed by the member states. Should you have any difficulty in doing this, please feel free to contact this author. The monitoring of WIPO is a joint program with the FGV/CTS's A2K Brazil Programme and the Cultura Livre Program.

Draft Bills and Regulatory Framework Studies

The Brazilian federal government has commissioned the CTS to elaborate on several comprehensive studies as well as to prepare draft bills to be introduced in the Brazilian Congress. The first example is the regulatory framework study for supporting free software adoption in the country, covering possible implementation in public administration and the private sector. The second example is the draft bill commissioned by the Brazilian Internet Steering Committee to regulate spam in Brazil. A third example is a study that the CTS conducted on the use of technological protection measures in Brazilian digital television. These digital locks limit or prevent the copying of digital content, whether or not the content is copyrighted or not, which lessens access to knowledge and prevents harm to consumers. This study has been used by the Civil House of the Presidency of the Republic in order to prohibit the use of technological protection measures in Brazilian digital television.

Internet Access for Everyone research

A group of major multinational companies, overseen by the World Economic Forum, has requested a study by the FGV on information and communication technologies, which ranges from tax incentives to industrial policies, including IP rights for Internet service providers, voice over Internet protocols, and telecommunications regulation in Brazil. The aim of the study is to prepare the implementation of a full-scale digital inclusion program in the country.

Open Business Latin America

This program is funded by the International Development Research Centre and aims at doing research on the Amazon and northeastern regions of Brazil in connection with open business practices emerging from technology and culture, such as the “tecno-brega” (techno-cheesy) and funk music scenes in the periphery of Brazil. The CTS findings demonstrate that creativity is taking place in these so-called “peripheries” in a completely innovative way,” and these findings seem to have parallels in China and Egypt. By replicating this research in partner countries, one may observe that these new cultural business models are independent from the traditional ideas connected to IP in developed countries. In fact, these are specifically Southern business models, in which sharing and freely disseminating information is the main driving force for the economic sustainability of these emerging cultural industries. The traditional music industry operates on a business plan that is inconsistent with the cultural and musical diversity found in Brazil. The industry usually launches only a few major international albums and not many of these are Brazilian artists, while the open business scenario in north and northern Brazil launches hundreds more albums from a much more diverse array of artists, making the system much more democratic. It is worth mentioning that the first phase of the Open Business Programme also includes research projects from Colombia, Mexico, Argentina, and Nigeria (Open Business can be accessed at <http://www.openbusiness.cc>).

Access to Knowledge (A2K) Brasil Programme

The A2K Brasil Programme is funded by the Open Society Institute, and it focuses on building a network with civil society, public-interest NGOs, and the Brazilian government in order to promote access to knowledge and to amend the Brazilian copyright law in order to make it more balanced. The program has built very important strategic alliances with the largest consumer group in Brazil, Instituto Brasileiro de Defesa do Consumidor (IDEC) and also with the Brazilian Ministry of Culture. It has also

built connections with the student movement in Brazil (National Students Union), and other student associations. As a result of the partnership with the Ministry of Culture, a national joint seminar on copyright and the public interest took place in December 2006 in Brasilia. Moreover, the A2K Brasil Programme provides support to a growing group of students that is being sued by the Brazilian Reprographic Rights Association for making photocopies of educational materials.

As a result of the partnership with IDEC, the latter institute has conducted research on the price of educational materials. The Brazilian Ministry of Culture has also commissioned a CTS study on copyright and access to knowledge, which was presented to more than seventy ministry of culture officials who gathered in Rio de Janeiro in November 2006. The CTS website has become a national reference for access to knowledge issues in the country and is visited by members of civil society as a whole and by government officials. It currently has more than 50,000 visits per month. The website is updated regularly and discusses several issues, ranging from technological protection measures, digital locks, exceptions and limitations to copyrights, access to educational materials, and cultural diversity. Under the A2K Brasil Programme, the CTS has made dozens of public appearances at conferences and lectures.

It is worth noting that the controversy generated by the CTS's confrontation with the music industry in Brazil, with respect to the International Federation for the Phonographic Industry's announcement that it would start suing individual users in Brazil that upload numerous illegal copyrighted music files, has allowed the CTS to raise a number of possible amendments to Brazilian copyright law. A public petition that the CTS issued has obtained more than 15,000 signatures supporting the amendment of the law. Naturally, changing the copyright law is an extremely difficult task that would involve negotiations with diverse and contradictory interests, including powerful vested interests such as broadcasters, the music industry, and the printing industry (the A2K Brasil Programme can be accessed at <http://www.a2kbrasil.org.br> [in Portuguese, with an English version]).

The projects listed in the preceding sections illustrate the strategy that the CTS proposes. It is necessary to demonstrate in practice that open models can work better than the traditional IP-based models, especially in the context of sustainable development. Additionally, it is already clear that for historical reasons Brazil needs to leapfrog directly from the nineteenth century into the twenty-first century in terms of IP rights. In other words, it is mandatory for our cultural and economic development that we

skip the “cultural industry” phase, which has been predominant in the twentieth century, directly to a “cultural society,” which includes everyone in terms of access, production, and the dissemination of knowledge.

CTS Partnerships and Collaboration

The CTS has built several national and international partnerships. At the national level, the CTS has been successful in developing partnerships, owing in part to the FGV’s reputation as a successful academic institution. Such a reputation, however, was not a precondition for success, as will be discussed later in this article. On the international stage, specifically in the IP field, the FGV was not known at all. The work on partnerships began with the personal work of the CTS’s director, Ronaldo Lemos, and continues with the current CTS members. Having undertaken studies abroad, the CTS members have had the chance to meet top academics, government officials, and activists from the main public interest NGOs working on access to knowledge and IP reform. These partnerships have been truly invaluable.

The CTS has formed official and unofficial partnerships, worked collaboratively with the following academic institutions, public interest NGOs, and government entities:

- Brazilian Ministry of Culture;
- Brazilian IDEC;
- Brazilian Patent and Trademark Office (INPI);
- Yale University’s Information Society Project;
- South Centre;
- Derechos Digitales (Chile);
- IP Justice (United States);
- Socio Environmental Institute (Brazil); and
- West Virginia University (United States).

In addition, the CST has had extensive communication with the following Brazilian institutions: the Free Software Project (Brazil); the National Institute of Information Technology, which is linked to the presidency of the republic; Coletivo Interveozes; the International Network for the Third Sector; the AIDS Interdisciplinary Brazilian Association; Doctors without Borders in Brazil; the Brazilian Network for Peoples Integration; the Brazilian Ministry of Foreign Affairs; as well as with the following foreign institutions: the US-based Electronic Frontier Foundation; the Geneva-based IQsensato and the International Centre for Trade and Sustainable Development; the US-based Knowledge Ecology International; the Centre for

International Environmental Law; the Malaysian Third World Network; and the India-based Alternative Law Forum, among others.

The CTS is the only academic organization in the southern hemisphere with permanent accreditation to WIPO. Additionally, the CTS also actively participates in the UN-supported Internet Governance Forum. The CTS is a founding member of Communia, the European thematic network on the public domain in the digital age, a project that covers all countries in the European Union. The project, funded by the European Union, also includes organizations based in other strategic countries.

Advising on policy matters is another expertise that the CTS has worked to cultivate. The centre has partnered with several branches of the Brazilian government—including the National Institute of Information Technology, the Brazilian Internet Steering Committee, the Ministry of Culture, and the Ministry of Education—on projects ranging from drafting legislation to project implementation.

Since the CTS was founded, it has been active in shaping the A2K movement in Brazil and abroad. This experience places the CTS in a particularly strong position to share best practices. Accordingly, the CTS has been chosen to be part of the launching of the A2K Global Academy together with other members from China, Egypt, India, South Africa, and the United States. The A2K Global Academy will make it possible to explore new lines of research that will be valuable in the context of all the other members of the A2K Global Academy. One research project to be undertaken will be a comprehensive study on the potential liability of Internet service providers. Recently, the European Parliament voted against shutting off Internet access to users involved in file sharing and establishing a clearer framework in connection with the limits, duties, and boundaries of liability for Internet service providers. In Brazil and in most of the countries of the A2K Global Academy, this issue is still unresolved. This research project will focus on analyzing comparative models and on developing a new draft bill that will regulate the liability of Internet service providers. This new proposed legislation will have the positive effect of establishing not only predictability for investment in information technology services in Brazil but also safe harbours for service providers.

Other CTS Activities

Together with its partners, the CTS has been able to actively influence the policy-making process with respect to IP rights at the national and international levels. The CTS's work also includes other more traditional "aca-

demic” activities including publishing academic books; doing applied research; teaching graduate and post-graduate level courses; delivering training to patent and trademark examiners; writing easy-to-understand articles for magazines, newspapers, and Internet blogs; giving interviews to radio and TV channels; training judges and military officials; and delivering lectures to a variety of stakeholders, including the Supreme Court of Brazil. The CTS understands that informing all walks of Brazilian society is necessary to ensuring a fulsome debate on IP issues.

CTS FUNDING

Most of the CTS’s funding comes from external sources. Reliance on such a funding strategy has not proven detrimental to the centre’s work. The CTS has received funding from the Financiadora de Estudos e Projetos, the International Development Research Centre, the Ford Foundation, and the Open Society Institute.

RECOMMENDATIONS

So what can be learned from the CTS’s experience to date? What follows are some recommendations aimed at those grassroots movements aimed at getting more involved in the area of IP rights, particularly a balanced approach to IP and development. A legal background is not strictly required. Indeed, an inter-disciplinary approach has served the CTS extremely well since its foundation. These recommendations are not exhaustive or mandatory—developing NGOs or other grassroots movements require sensitivity to local conditions. Thus, the recommendations are helpful suggestions to guide potentially interested players.

- *English is essential.* No one can deny that English is currently an international language. Being fluent or at least being able to communicate in English will facilitate engaging on the international stage. Documents and materials in English dominate many issue areas, including IP. In addition, having direct contact with persons from other countries and being able to understand and participate in international debates is crucial.
- *Study abroad.* Ironic as it may seem at first glance, some developed countries have excellent academic institutions developing ideas connected to IP rights that are very development friendly. This will depend at any given moment on the scholars at a particular institution. Attention should be paid to adopting foreign knowledge to national needs.

What is certain is that studying abroad opens one to a wider array of perspectives and views and can help in forming relationships that could be useful in the future.

Connected to this recommendation is a potential problem known as brain drain. Studying abroad might always open the possibility for developing country candidates to undertake further activities abroad. As a consequence, none of the knowledge acquired abroad would be transferred to and applied in the candidate's country of origin. This would imply a tremendous loss to developing countries. Although it might seem interesting at first glance to undertake further activities abroad after one's studies are completed, one must not lose sight of the social and eventually moral importance of returning to one's homeland in order to implement the knowledge acquired abroad. Of course in many cases home institutions are not that attractive in terms of infrastructure, career development, and salary. That being the case for many, one should nevertheless understand that studying abroad could be a way to open opportunities and build networks that a candidate could use later to aid his or her activities in the homeland.

Moreover, the role of funders is essential here. It is of no use to send candidates abroad and not to have a repatriation program that provides financial incentive to each individual and/or to institutions in her or his homeland to bring the candidates back and keep them. In the case of CTS, we currently receive most of our funds from foreign institutions such as the Ford Foundation, Open Society Institute, and International Development Research Center. Without this support we would not be able to retain some of our staff. The present author then calls upon funders to build programs focused on repatriation, otherwise most of the efforts would not turn into benefits to the candidates' countries of origin.

- *Communication.* Active communication is essential to building a successful grassroots organization. The Internet offers exciting possibilities in terms of reaching out to a broad audience. The Internet is also a low cost option for communication. Communication also involves becoming active in writing for magazines and newspapers. It is important to spread one's message as widely as possible. Give interviews, lectures, and speeches to all types of audiences but do not forget to communicate with your audience—be didactic and use their language. Write easy to understand articles and books, be it in print or electronic format. Use some type of open collaborative license, such as the

CC, so that others may pass your ideas forward or even rewrite and improve it. Spread your message and multiply your ideas.

- *Participate in access to knowledge discussions.* Engage in access to knowledge discussions either passively, if one is a newcomer, or actively if one has more experience or views the issue with a critical eye. There are several access to knowledge discussion lists open to the public, such as the a2k@lists.essential.org (mainly in English). There are some other lists on specific topics such as health, free software, and technology.
- *Apply for funding.* There are quite a few international institutions that currently grant funds on IP-related areas such as health, trade, technology, environment, and software. Among the better known granting institutions are the Ford Foundation, the Open Society Institute, the MacArthur Foundation, the International Development Research Centre, and the Social Science Research Council. All of these organizations grant funds specifically on IP and sustainable development projects. These institutions are great partners and an essential resource. Moreover, many countries have national agencies and/or companies that also grant funds for these types of activities.
- *Apply for scholarships.* There are also a great number of scholarships available for research programs, including courses abroad at the post-graduate and doctoral levels. This is a viable way of funding one's living expenses and tuition fees abroad. Some may think that scholarships are out of reach or impossible to obtain, but this is not the case. Receiving a scholarship is an important step to expanding one's learning and meeting key people.
- *Collaborate.* Collaboration is a strategic element for developing a deeper engagement on any subject and can facilitate efforts at promoting awareness. Building formal or informal coalitions with sister institutions, be it academia, public interest NGOs, IGOs, government, or consumers is a key movement for optimizing one's action. This could begin on a personal level and develop at an institutional level.
- *Be multidisciplinary.* Having persons from diverse fields of expertise usually enhances understanding issues and also helps one spread a message to a broader segment of society. Economists, sociologists, anthropologists, political scientists, musicians, artists, chemists, physicians, journalists, technologists, biologists, and lawyers, among others, are essential for discussions involving IP rights. Despite IP rights being a very specific field, they have various ramifications that converge with

several areas of knowledge. Several perspectives should be brought to the discussion.

- *Engage in research.* Research is essential to effectively advocating and advancing policy ideas. It allows one to build credibility in a particular field.
- *Be pro-active.* Do not wait for a collaborative project, a scholarship, or funding to arrive at your door. Take the first step. Show interest. Show one's potential and work.

This chapter has attempted to show that action on the Development Agenda is not something left only to WIPO or its member states. The core theme underlying the agenda is promoting a balanced approach to IP and development. Meeting this goal does not lie strictly in the hands of policy makers. Informed citizens, working collaborative, can have just as important a role in the discussion as delegates in Geneva.

The recommendations outlined earlier have served the CTS well. Understandably, several other variables may considerably influence success at the local level. However, these basic suggestions have broad applicability. What is most important, however, is bringing forward an IP-related sustainable development approach at the national and/or regional level, in cooperation with other development-friendly NGOs, IGOs, consumer groups, academia, and governments, both from the North and South. This is perhaps the best way to move forward without having to depend entirely on the implementation of WIPO's Development Agenda.

NOTES

- 1 Development Agenda for WIPO, <http://www.wipo.int/export/sites/www/ip-development/en/agenda/recommendations.pdf>.
- 2 Agreement on Trade-Related Aspects of Intellectual Property Rights, in *Marrakech Agreement Establishing the World Trade Organization*, 15 April 1994, 33 I.L.M. 15 (1994).
- 3 In the 2007 and 2008 reports issued by the International Intellectual Property Alliance (IIPA), Brazil was wrongly accused of allowing the reproduction of small excerpts of books within the University of Sao Paulo, including allegations that the copies were made for profit. This is not true as the University of Sao Paulo allows for copies that are not for profit only (International Intellectual Property Alliance 2008; A2K Brasil Programme Blog 2006).
- 4 Of course, isolated actions totally disconnected from the foreign policy of each country will have strong limitations due the international obligations already agreed to by each country. Yet, this is another reason for the building of these partnerships in an attempt to prevent developing countries and least developed countries from signing TRIPs-plus treaties.
- 5 <http://denisbarbosa.addr.com>.

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Implementing WIPO's Development Agenda: Treaty Provisions on Minimum Exceptions and Limitations for Education

ANDREW RENS

INTRODUCTION

As its name suggests, the Development Agenda adopted by WIPO is designed to focus WIPO's efforts and resources on achieving a better balance between intellectual property (IP) rights and development.¹ Education has been identified by the United Nations as essential to development. And while many domestic IP regimes create exceptions and limitations on IP used in the educational sector, these exceptions vary from state to state. This variation presents serious challenges to the use of educational materials across borders.

This chapter argues in favour of the creation of minimum treaty standards with respect to the use of IP in education. Such provisions would facilitate the cross-border sharing of educational resources, thus facilitating a key aspect of development. Existing rules with respect to exceptions and limitations are insufficient. What has emerged is a patchwork of varying exceptions that invariably creates more obstacles than it removes. A harmonizing approach of establishing minimum exceptions for education is required to adequately foster education vis-à-vis the Development Agenda.

EDUCATION IN THE DEVELOPMENT AGENDA

Issues and themes related to education were at the heart of proposals leading to the adoption of the Development Agenda. The proposal submitted to WIPO by Argentina and Brazil (the Friends of Development) in August 2004 raised a number of concerns, including obstructions to the free flow of information and "the ongoing controversy surrounding

the use of technological protection measures in the digital environment” (WIPO 2004, 3). Of particular relevance to the education sector, the proposal submitted by the Friends of Development proposes “an international regime that would promote access by the developing countries to the results of publicly funded research in the developed countries” (*ibid.*); imposing obligations as well as awarding rights to rights holders (*ibid.*, 4); that “the social costs of IP protection are kept at a minimum” (*ibid.*, 4); and that “a proper balance is struck between the producers and users of technological knowledge, in a manner that fully services the public interest” (*ibid.*, 5).

Building on these proposals, the recommendations for a Agenda adopted in 2007 contain a number of education-related mandates. These include:

- preservation and access to the public domain (WIPO 2007, Annex, No. 16);
- norm setting that takes account of development flexibilities, the Millennium Declaration,² and includes exceptions and limitations (*ibid.*, Annex, Nos. 17 and 22); and
- a balance of rights and obligations. (*ibid.*, Annex, No. 45)

Different countries are at different stages of development and require different IP schemes, with different mixes of exclusivity and access to appropriate incentives. This insight is critical to understanding the Development Agenda. Yet how does a simple plan to set minimum exceptions and limitations for all WIPO members fit within this understanding?

The Development Agenda explicitly relies on the Millennium Declaration to set policy direction. The declaration states in paragraph 6: “Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most.” The declaration and related Millennium Development Goals point to the centrality of education to development in setting the Goal of universal primary education. Furthermore, the declaration affirms a commitment to ensuring that “the benefits of new technologies, especially information and communication technologies” are available to all.³

Other UN documents have recognized the centrality of education to development (United Nations 1992, 442). According to the Johannesburg Plan of Implementation, which was adopted by the World Summit on Sustainable Development, “[e]ducation is critical for promoting sustainable development” (United Nations 2002, 61).⁴ Leaders at the summit agreed

that it was essential to consider the resource constraints on educators and to mitigate the serious financial constraints faced by many institutions of higher learning (*ibid.*). The Millennium Declaration and its implementing processes can and must inform the implementation of WIPO's Development Agenda. As a UN agency, WIPO is bound to observe the principles of the Millennium Declaration. If education is essential to development, then the international IP regime must be guided by concerns respecting education.

MINIMUM EXCEPTIONS AND LIMITATIONS

IP law serves a public interest objective. By rewarding creative activity by granting limited exclusive rights, IP law attempts to enable society to benefit from creative activity. Possible financial rewards create an incentive to create new works, or inventions, which may become available to members of a society through the successful commercialization of the work. While the exclusive rights granted to creators and inventors may result in some access to the work through market mechanisms, the exclusive rights preclude other access to the work. When works are not successfully commercialized and when commercialization does not enable certain important uses, the public interest objectives of IP are imperilled.

In order for IP rights to serve the public interest, countries have resorted to exceptions and limitations to exclusive rights in national IP legislation. Limitations are often spoken of as if they are interchangeable with exceptions, and the distinction is a technical one. Limitations are legal provisions that limit the extent of a right of exclusivity, setting a boundary to the right. Exceptions are carve-outs, which also reduce the scope of a right of exclusivity but do so by granting users a right to do something that would otherwise fall within the copyright owner's right to exclude others from that use.

Historically, international treaties have required minimum sets of exclusive rights that vest in rights holders, while leaving exceptions and limitations to individual countries to regulate.⁵ More recent international conventions have dealt with exceptions and limitations by restricting their scope.⁶ For example, the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) (World Trade Organization 2003, 321) refers extensively to limitations and exceptions.⁷ Although these references permit exceptions and limitations, many of the provisions restrict national sovereignty with respect to limitations and exceptions by delineating a notional maximum extent of such provisions.

Exceptions and limitations already exist in the laws of most developed countries and many developing countries. Most of these exceptions comply with the “three-step test” set out in Article 13 of the TRIPs Agreement (*ibid.*, 326). This test permits exceptions that constitute special cases, do not conflict with a normal exploitation of the work, and do not unreasonably prejudice the legitimate interests of the rights holder.

The implementation of the Development Agenda by WIPO provides an important opportunity for member states to collectively discuss exceptions and limitations. The minimum exceptions and limitations that should receive priority in these discussions are those that best advance the Development Agenda. These include exceptions and limitations with respect to education, libraries, translation, inter-operability, and access by sensory disabled persons.

This chapter is focused on the need for minimum exceptions and limitations with respect to education, especially the need to harmonize specific exceptions to resolve clashing jurisdictional schemes with a negative effect on education. However, the focus on education is only one example of a broader challenge: the need to harmonize exceptions and limitations that are conducive to development. Exceptions and limitations that remove barriers so as to ensure that all developing countries benefit from increasing knowledge flows is an essential mandate of the Development Agenda.

The issue of minimum exceptions for education is discussed primarily in the context of copyright, focusing on the approaches found in fair dealing, fair use, and similar provisions. The number and range of such provisions already in existence, as well as the pressing problem of removing barriers to global information flows, point both to an opportunity and necessity to urgently address exceptions for education. The urgency of the work on copyright exceptions for education should not obscure the importance of exploring limitations and other issues related to copyright or the minimum exceptions and limitations to other IP schemes, such as patent and design, for education.

EXCEPTIONS FOR EDUCATION

It is both appropriate and necessary that there should be copyright exceptions for education. The first modern copyright statute in the world, the Statute of Anne, was not only entitled an “Act for the Advancement of Learning” but also contained provisions to ensure that works were available for education. The public interest in using copyright works is particularly

compelling with respect to education, which is not only a public good in itself but also a necessary pre-requisite for other public goods, such as the development of skills necessary for both the economy and state and an informed and empowered citizenry (United Nations 2002, 61). Exceptions and limitations for education also play an important role within copyright schemes, since education is almost always necessary for the development of future creators and users of works and inventions.

A number of countries have minimum copyright exceptions for education. In jurisdictions that derive their copyright legislation from the United Kingdom, these exceptions often take the form of fair dealing provisions, which provide for the use of copyrighted works without seeking permission. By contrast, jurisdictions influenced by US law tend to employ fair use provisions that are far more flexible but are sometimes criticized for their generality. US fair use provisions have been criticized for being insufficiently detailed to inform the public of their rights and obligations. One way of reconciling these approaches is through the statement of a general principle, similar to a fair use provision, followed by the enumeration of specific examples that are not intended to be exhaustive of the general principle. The general principle can serve as a basis, at least in common law countries, for the development of more detailed jurisprudence with respect to enumerated examples and unanticipated situations.

Existing treaty norms do provide some basis for conceptualizing minimum exceptions to copyright for education. However, they do not adequately address the issue. For example, Article 10(2) of the Berne Convention for the Protection of Literary and Artistic Works, explicitly permits exceptions with respect to “teaching”:

It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

This provision refers to the use of copyrighted work only as illustration and not other educational uses such as criticism, parody, re-engineering, and the purposes of assessment. Furthermore, the provision is limited to literary and artistic works for the purposes of teaching. Education extends beyond formal teaching situations, to self-study, postgraduate research, and peer group learning.

Minimum exceptions for education must also take into account recent technological advances, such as the increasing growth and centrality of the Internet. The Internet has provided new opportunities for a wide range of educational actors and profit-motivated corporations to engage in education across borders. Some of these actors may have engaged in cross-border education before the rise of the Internet. The Internet, however, allows interactions to take place without the mediation of other agencies, such as branches or partner institutions in recipient countries. More importantly, it is the difference in the scale of cross-border education between the periods before and after the Internet that amounts to a fundamentally different operating environment for education.

Educational materials are made available through the Internet either freely or as part of a formal course of instruction, with or without a fee. Although there are costs to providers for making material available over the Internet, they are often negligible. The costs of making material available over the Internet are distributed across the Internet and are thus borne by the providers and users alike. When someone makes material available through the Internet for his or her own particular purposes, such as a university professor making course materials available to her students, the materials are automatically available to anyone else connected to the Internet without any additional distribution cost. Once material is available on the Internet, there is no marginal cost for making it available to an additional user.

The necessity for exceptions to copyright in the educational context is best illustrated by an example. A professor creates an online course that includes a section on the historical significance of the release of Nelson Mandela from prison. If the professor writes her own material, she may then make it available for education. However, if she needs to make use of a photograph showing Mandela's release, she must look to another source as she was not present to photograph the occasion of Mandela's release. Thus, there is a tension between a limited and potentially copyrighted work and an educational imperative.

Education requires that learning materials that include copyrighted works be available as examples, illustrations, and as the objects of study, criticism, parody, and re-mixing. Requiring permission for all of these uses is problematic since it may be prohibitively expensive for educators to obtain such permissions. Even if copyright holders were willing to grant permissions upon request, the sometimes-onerous obligation to locate the owner and then seek and obtain permission may deter educators from using

essential copyrighted works. A fair dealing provision would provide an exception for educational use without requiring permission.

In the pre-digital world, many such uses either did not fall within the exclusive rights granted to rights holder or were allowed under detailed exceptions. However, in a digital environment, every action, such as displaying something on a computer screen, browsing on an Internet website, or incorporating an item into lesson notes, requires the making of a copy. Such uses may even require changes to the copyrighted materials that may constitute the making of a derivative work. Both reproduction and the making of a derivative work are exclusive rights, usually reserved for the rights holder. It is necessary to formulate exceptions that allow the use of copyrighted works for educational purposes in digital formats. Such exceptions should, as far as possible, allow at least the same exceptions that are allowed in the non-digital world.

OPEN EDUCATIONAL RESOURCES

When material is subject to copyright, it may be made available either under an “all rights reserved” rubric or as an open licence. The application of claims of all rights reserved in the context of the Internet raises difficult conceptual problems, these problems can be resolved by open licences (Lessig 2004, 139–47). The Cape Town Open Education Declaration signifies an important movement to make educational resources available under open licences.⁸ The potential of this movement to address the challenges faced by developing countries is far greater than the approaches used thus far. The open education movement aims to reduce barriers to sharing educational resources as far as possible. Open education resources are intended by their creators, subsequent rights holders, and distributors to be freely distributed. In other words, they represent resources that are purposely devoted to development through educational resources that are openly available across borders. Thus, any barriers to open educational resources arising from copyright law that cannot be resolved by open licensing are especially pernicious and require urgent resolution.

In the example of the online course where the professor creates material, he or she may place the course online under an open licence. Students and others may use the material under that open licence. The professor can incorporate material into the course that is created by others if it is obtained under an open licence. Others who wish to re-use the material for educational purposes will be able to do so within the broad terms of the open licence and without having to enquire whether they may also

do so under an exception, although they do retain the ability to use the material within the narrower confines of whatever exceptions are available. However, returning again to the earlier example, because open licences have only recently found widespread acceptance, there is no photograph of the release of Nelson Mandela available under an open licence. It is necessary even with open educational resources to make use of copyright material for exceptional uses, such as by way of illustration. Learning materials available under an open licence and learning materials under an “all rights reserved” label both require exceptions for education.

CONFLICT OF LAWS

Since an open licence sets the conditions of re-use and does not require further permission, it is possible for someone in another country to use open educational material under the terms of that licence. The re-user need not enquire whether their re-use is permitted by an exception as long as the re-use is permitted by the broad confines of the open licence. In the example of the online course, a Mozambican teacher might choose to use the South African professor’s online course. No problems will arise with respect to the open licensed material. However, in regard to the photograph of Nelson Mandela, the Mozambican teacher will encounter a problem. Is there an exception for photographs for educational purposes in Mozambique? Does it apply to a digital environment? While the professor can license material that she has created, the question of exceptional use of the material requires a separate determination of the law in every jurisdiction. Even if a particular use were to be allowed in a digital environment by a legislative provision in one country, this use may not be allowed in other countries that lack an exception in their laws.

Exceptional uses of copyrighted works in open educational resources create a barrier to use of that open licensed work in other jurisdictions. In order to make use of the open licensed work, a person would have to enquire whether the exceptional use is acceptable not only in the originating jurisdiction but also in his own jurisdiction, requiring an inquiry into conflicting jurisdictional rules by every user. This situation dramatically raises the transaction costs of using learning materials, including open licensed materials. The creator or distributor of work who wishes to make her work available under an open licence in multiple jurisdictions would be confronted with a vast array of legal regimes if she simply wished to make use of a copyright work for criticism. The situation would be further complicated if a user wished to use a copyrighted work that was

obtained via the Internet, which may potentially be regarded as being situated in another jurisdiction.

The example of the online course would be further complicated if a US corporation wished to redistribute the professor's work globally using the Internet. Once the corporation obtained the rights to exploit the work, whether under the open licence or a traditional copyright assignment, it would still be faced with a mammoth task. The corporation would have to determine what educational or equivalent exceptions apply with respect to the photograph used by the teacher in all of the jurisdictions where the resources would be available. Even a well-resourced corporation would find this a prohibitively costly and time-consuming exercise. Alternatively, the corporation could attempt to obtain a commercial licence to re-use the photograph. However, even this is not simple, especially since there is a great deal of difference between sourcing a stock image for illustrative purposes and obtaining global rights to re-use a famous photograph. If this issue arises with respect to multiple educational resources, it becomes uneconomical for the corporation to distribute educational material on a global scale.

Similar issues arise for services that enable one to search for scholarly and educational materials. Is this function, which is useful to teachers and learners across the world, permitted by the copyright law in each jurisdiction? The provider of such a service is currently required to determine whether its functions comply with the law of more than one hundred jurisdictions. Market-based responses to the global need for educational materials are as imperilled as public responses.

TREATY PROVISIONS

The example of the online course materials illustrates a larger problem. Although exceptions for educational use have a long history in copyright law, the conflict between differing exceptions is particularly glaring given that the Internet has reduced other barriers to sharing educational resources. This problem can be resolved through the harmonization of national laws, by means of WIPO-sponsored international provisions for minimum exceptions and limitations for education. Such provisions would outline only minimum exceptions and limitations, allowing countries to build upon the base rules, subject, of course, to the constraints of other international treaties. Both the creators and users of learning materials who wish to make available or use learning materials across borders

would have to contemplate one harmonious standard when sharing learning materials across borders. The result would be greater certainty for rights holders and users.

CONCLUSION: EDUCATIONAL EXCEPTIONS IN THE DEVELOPMENT AGENDA

Why should treaty provisions for exceptions and limitations for education not form part of implementing the Development Agenda? WIPO has traditionally engaged in norm setting through treaties that prescribe minimums. These treaties have usually had minimum exclusive rights granted to rights holders. The Development Agenda seeks to bring about a balance of rights and obligations for rights holders. Minimum exceptions and limitations for education would constitute a balance to the extensive treaty provisions already in place that grant rights to rights holders as required by the Development Agenda (WIPO 2007, Annex, No. 22). Exceptions and limitations for education fit within the Development Agenda's priority on norm setting, which is supposed to take into account exceptions and limitations.

Treaty provisions are WIPO's most powerful way of addressing issues. By setting minimum exceptions for education, WIPO can assist in significantly reducing the demands on the resources of educational institutions in developing countries, which would be in line with the Development Agenda and the Millennium Declaration's priorities. Educational institutions will be able to better fulfil their tasks through the greater use of educational materials.

There are other means of engaging in norm setting such as ministerial declarations or model laws. Either of these may also be able to mitigate the problems associated with the conflict of laws under the current exception and limitation regime. Why should treaty provisions that are required to address a conflict of laws problem not find favour? The rationale is the same as it is for setting minimum standards for exclusive rights—that IP actors are given greater certainty as to what rules apply across multiple jurisdictions. If, however, the rationale for harmonization is rejected in this instance, it gives credence to the critics' view of WIPO who claim that harmonization is no more than the skewing of international trade rules in favour of developed countries.

Exceptions and limitations already exist in the laws of most developed countries and many developing countries. They are an accepted part of IP

regimes and already comply with existing international treaties. The business models of creative industries already take into account that certain uses are permitted under exceptions and limitations. The incentives for creative industries will thus not be substantially affected by minimum exceptions and limitations for education since these are already factored in. What will be reduced will be the inefficiency created by differing exceptions and limitations. The result of the conflict of laws is that creative industries are unable to calculate what the effect of exceptions and limitations are on their businesses beyond their home countries. Instead of serving as a disincentive, the introduction of certainty via minimum standards will assist creative industries in operating in a global environment.

The negotiation of minimum exceptions and limitations for education is not intended to suggest that the Development Agenda should operate primarily by setting uniform standards for all countries. Different regimes are appropriate for different circumstances, which is why the proposal is that the standards for exceptions in the field of education should be minimum standards. In order to allow beneficial knowledge to flow from one country to another, especially in the context of existing minimum standards for rights holders, it is necessary that there should be appropriate minimum exceptions and limitations.

NOTES

- 1 Development Agenda for WIPO, <http://www.wipo.int/export/sites/www/ip-development/en/agenda/recommendations.pdf>.
- 2 Millennium Declaration, 8 September 2000, UN Doc. A/RES/55/2 (2000).
- 3 *Ibid.*, paras. 19 and 20.
- 4 Johannesburg Plan of Implementation, in *Report of the World Summit on Sustainable Development*, Johannesburg, South Africa, 26 August-4 September 2002, UN Doc. A/CONF.199/20 (2002).
- 5 The Berne Convention for the Protection of Literary and Artistic Works, Paris Act, 1979, Article 9(2). One exception is found in Article 10. Article 10(1) provides a mandatory exception for quotations, and Article 10(2) permits fair use of copyrighted material for illustrative or teaching purposes.
- 6 Berne Convention, Article 9(2).
- 7 Agreement on Trade-Related Aspects of Intellectual Property Rights, in *Marrakech Agreement Establishing the World Trade Organization*, 15 April 1994, 33 I.L.M. 15 (1994).
- 8 Cape Town Open Education Declaration, 2007, Open Society Institute <http://www.capetowndeclaration.org/read-the-declaration>.

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Afterword

THE WORLD INTELLECTUAL PROPERTY ORGANIZATION DEVELOPMENT AGENDA

This book is a very valuable addition to the lamentably small independent literature on the World Intellectual Property Organization. Throughout its pages the contributors have reflected on both the promise and the difficulty of enacting the Development Agenda at WIPO. The organization has become a battleground for competing visions of the role of intellectual property in development, made more confusing by the shared language that is often deployed on different sides of the debates (but with different implied meanings). Here I will not revisit my own work on WIPO (see May 2007) but rather will reflect on the future possibilities for WIPO and the Development Agenda.

The debates over the Development Agenda have not led to a significant level of what critics have often referred to as forum shopping or a further expansion of forum proliferation. This possibly indicates that there are only so many times a forum can be changed before the diplomacy of such shifts becomes difficult in the short term. But perhaps more importantly the secretariat of WIPO itself has made a significant effort to positively respond to the Development Agenda while seeking to keep the less enthusiastic rich and developed country group as part of the process rather than merely siding with one side or the other. For some commentators this has been seen as yet more evidence that WIPO is unable to effectively engage with those members whose views on intellectual property are more critical than celebratory. However, this balanced approach might also be seen as a pragmatic move to ensure that WIPO remains at the centre of the global governance of intellectual property. Indeed, this

is a clear move toward one of the key demands of the Development Agenda—that WIPO act as a membership organization. When its members cannot agree, an organization has a clear responsibility to attempt to mediate such differences. WIPO has recently begun to do this rather than merely adopt the IPR-maximalist position favoured by a particular subgroup of its membership. Certainly this has been cautious and incomplete, but the trajectory is at least potentially in the direction set out by the agenda.

The contributors to this book, and the wider critical engagement with the agenda that they represent, are right to conclude that while there have been and continue to be problems with the manner in which WIPO operates vis-à-vis development, these issues have now been clearly recognized (if as yet not resolved) by WIPO itself. In this acceptance of reformism as the most fruitful way forward in dealing with the shortcomings of global governance, WIPO's critics themselves have entered the mainstream. In a similar way that the history of critical engagement with the World Trade Organization has moved from calls for abolition at the end of the previous century to the now almost universal desire to see a continuing program of reform succeed, so too the future of WIPO seems likely to hold the promise of a more complex understanding of the role of intellectual property in development. Now backed less by faith (as in the past) but responding to the diversity of evidence on the role of IPRs in development, WIPO's public pronouncements (and specifically those by its new director-general) are beginning to recognize that the full protection of IPRs is appropriate only once countries have reached a certain stage of development. This realization has driven the Development Agenda and has now entered the policy mainstream from a position on the margins during the negotiation of the WTO's Trade Related aspects of Intellectual Property Rights (TRIPs) agreement. That said, there is much in the agenda that is yet to be fully incorporated into the wider (re)engineering of WIPO: for instance as yet little has been accomplished on establishing a more robust diplomacy of the global public domain, nor has the central issue of flexibility moved out of the Development Agenda document and into the practices of WIPO itself. For optimists, this may indicate merely that the process has achieved some early and easy gains before moving onto more difficult issues, for the pessimists the relatively uncontentious aspects of the agenda may in the end be the only parts enacted: only time will tell which assessment is correct. In the meantime, however, this welcome but still developing shift in international IPR-related diplomacy now confronts a set of difficult circumstances.

ENTERING THE GLOBAL SLOWDOWN

At the time of writing (December 2008), the global economy has entered what will undoubtedly be a difficult period of slowdown, recession, and on some forecasts a full global depression. Although there are many issues that the downturn raises in the global political economy, as regards the implementation and further development of the agenda, there are three questions worth bearing in mind as the next couple of years unfold.

1. **Are (some) rich countries about to find themselves in the same position as (some) poorer countries?**

In the debates about IPRs during and after the Uruguay Round, the typical summary of the position that divided protagonists was between those countries whose corporations have benefited from their (protected) ownership of various intellectual properties and those countries whose users (commercial and private) experienced IPRs as extra costs on access to information, or the use of various aspects of knowledge for development and other purposes. However, as the balance of technical leadership starts to move, perhaps accelerated by the impact of the recession on research and innovation in the most-developed countries (the US, Europe, and Japan), it is not clear that those states that previously argued for robust protection of IPRs will necessarily find themselves so advantaged by the current settlement. If the TRIPs agreement and the work of WIPO has largely in the past privileged the interests and benefits of the technological leaders in the global economy, what happens when this leadership starts to shift?

If the global downturn does consolidate and accelerate the shift in technological leadership in the global system, we are likely to see national negotiating teams from the most developed countries at WIPO being less all-encompassing in their support for the global intellectual property system. If major corporations start to find that they are disadvantaged by the system (as already some are finding with IPRs significantly raising their input prices; see Jaffe and Lerner 2004), this will be communicated to those diplomats who are working on these issues. This may not immediately transform the IPR system, but it is likely to make the more flexible approach that is favoured by the supporters of the Development Agenda become more not less amenable to widespread diplomatic support. This may prompt renewed interest in rehabilitating compulsory licensing as well as a less supportive stance on the harmonized expansion of patent scope. Conversely, for previous skeptical countries' governments, who are now starting to see themselves

with economic sectors that are able to profit from the exploitation of IPRs (perhaps most notably some content industries, but also in software services), the boot (as they say) may be on the other foot. Having seen other countries do well from the IPR system, some governments may regard keeping the system robust as a way of taking their turn to support industrial/sectoral profits. Thus, it is not self-evident that the supporters of the Development Agenda will necessarily continue to support all of its elements, and indeed this mosaic of (partial) support is already complicating discussions at WIPO.

2. Will companies more jealously guard their intellectual properties or assets?

There is already a clear move in copyright for those corporations holding rights over content to more vigorously seek to enforce the protection of these rights. This is partly a response to the tightening economic environment in late 2008, but it is also due to the significant work conducted by both WIPO and national intellectual property offices in identifying IPRs as a significant site of potential financial losses, an issue especially relevant in a downturn. Moreover, as firms start to make people redundant, the possibility of ex-employees taking sensitive or right-protected information and knowledge to the employment market has reinforced the practices of some major IPR-controlling corporations, causing them to make more strident efforts to halt employee-related transfer of intellectual property between firms (via contract and IPR-related law).

Furthermore, as moves to ratchet up coverage of geographical indicators suggests, not all developing countries see the preferred outcome of the agenda as being a wholesale relaxation of protection for IPRs outside the rich and more developed countries. Indeed, as WIPO's previous capacity-building activities have spent some time inculcating developing country entrepreneurs into the IPR-maximalist position, we should not be surprised that as avenues of earning potential start to look unreliable, developing countries are starting to adopt measures that support enhanced control over valuable assets. Indeed, in a downturn, companies are likely to seek ways of sweating existing (intellectual) assets and of generating profit from resources they already hold.

3. Can the "open" alternative survive in less prosperous times?

One of the trajectories that alternatives to IPRs have involved is the move to more "open" platforms and modes of knowledge dissemination.

The Development Agenda does not make much of “openness” in explicit terms, but the call for flexibility of treatment of knowledge and information for development clearly implies an interest in open alternatives to the commoditization of knowledge. Here the latest generation of Internet-empowered mobile phones is clearly moving away from proprietary software (with three competing open platforms competing against Apple and Microsoft), and one argument may be that in the realm of high and advanced technology intellectual property is becoming less important.

However, looking at the manner in which open communities are often tacitly supported by the proprietary sector (through time allowances for open-related work, for instance), it may be that the relatively relaxed attitude that some high-tech companies have adopted about the characterizing of innovations as open (despite being developed on company time), which allows these companies to reap wider benefits from quasi-membership of the open community, will not survive the tightening of purse strings as the slowdown begins to bite. Moreover, when employers fail and “open” workers no longer have financial cushions provided by traditional (proprietary) employers, we may see the supply of, and interest in, open development begin to shrink.

THE GLOBAL GOVERNANCE OF IPRS IN THE NEXT DECADE

In one sense, the Development Agenda may be the last best chance for WIPO to maintain its relevance to the global governance of IPRs. As I have briefly discussed above, the global political economic context is undoubtedly already changing and as such the past positions and practices of WIPO may well play out differently in the new millennium. WIPO in the past has been too clearly associated with a particular (as some would have it, faith-based) appreciation of the role of IPRs in development. Now that this has been comprehensively and widely challenged, the agenda is a mechanism by which WIPO can once again (repeating its post-TRIPs diplomatic success) seek to remain at the centre of the global governance of intellectual property. However, if in the thinner times that we are about to experience the interest in IPRs as a business asset is transformed across the membership of WIPO, then WIPO’s previous positions on IPRs may begin to seem less problematic to at least some of the supporters of the agenda. This suggests that the diplomatic agenda to which WIPO will work is not a simple as it was in the past: the agenda has opened

up a number of issues in the organization, but the global downturn has already changed the shape of the likely responses.

– Christopher May, Lancaster University

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